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THE RIGHTS OF STUDENTS WITH LEARNING DISABILITIES AND THE RESPONSIBILITIES OF INSTITUTIONS OF HIGHER EDUCATION UNDER THE AMERICANS WITH DISABILITIES ACT

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INTRODUCTION

New York University revoked the admission of Justin Fruth, a seventeen-year-old learning disabled student from Indiana, because he refused to attend a mandatory orientation program for learning disabled students admitted to the university.[1] The orientation program was scheduled during the summer break, thereby forcing the disabled students to interrupt their summer schedules and arrive on campus several weeks before their fellow students.[2] Furthermore, the university required the learning disabled students to pay a $750 fee to cover the costs of the orientation program, in addition to the tuition and other fees charged to non-learning disabled students.[3] New York University maintains that the program was designed to benefit persons with learning disabilities by allowing extra time for such students to familiarize themselves with the campus environment and to facilitate their registration

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[*] BLS Class of 1995. The author wishes to thank BLS Professor Minna Kotkin for her comments during the preparation of this article.

[1] Michael Winerip, *Enrolled as Disabled but Ousted for Refusing Help*, N.Y. TIMES, Aug. 18, 1993, at A17.

[2] *Id.*

[3] *Id.*

process.[4] Justin Fruth commenced an action against New York University claiming that the mandatory orientation program violates the Americans with Disabilities Act of 1990 ("ADA").[5]

Many actions filed against universities involve claims that academic programs are not accessible to disabled students. Cases such as *Fruth v. N.Y. Univ.* may require the courts to determine whether universities can mandate participation by disabled students in supplementary programs designed to facilitate their educational experience.

Legislative action to prevent discrimination against persons with disabilities, and the inclusion of learning disabilities within such legislation, presents complicated issues for post-secondary educational institutions. Such issues include whether a university should be required to admit a learning disabled person whom it determines may not be capable of successfully participating in its academic program and the considerations of the university in making such a determination. In addition, if the university decides that a learning disabled student may have the potential to successfully pursue a degree with supplemental programs or assistance, there is a question as to whether the university can require that the student participate in the supplemental programs and who should be responsible for any additional costs. Also at issue is the extent to which exams should be modified to accommodate disabled students, and whether universities may refuse to modify their exams, claiming academic freedom.

This Note will examine the inclusion of learning disabilities in the Americans with Disabilities Act and the problems encountered by institutions of higher education in attempting to achieve compliance with the ADA. These problems are often a result of an institution's efforts to assist persons with disabilities. The Note will also include an analysis of the definition of the term "qualified individual with a disability" and a review of the Americans with Disabilities Act to determine whether programs such as a mandatory orientation program for learning disabled students are prohibit-

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[4] *Id.*

[5] Fruth v. N.Y. Univ., Civ. No. 93-5572 (S.D.N.Y. August 10, 1993).

ed. Specifically, the Note will analyze whether, in accordance with the ADA, universities may mandate programs for students with disabilities in the absence of similar requirements for non-disabled students as a condition of admission and continued enrollment. In conclusion, it will be argued that special programs and assistance offered by universities to learning disabled students must be optional if universities are to remain in compliance with the Americans with Disabilities Act.

Persons Covered by the ADA

On July 26, 1990, President George Bush signed into law the Americans with Disabilities Act, thereby extending protection against discriminatory practices to millions of disabled persons.[6] Prior to the signing of the ADA, persons with disabilities received limited protection against discrimination from the Rehabilitation Act of 1973.[7] The protections granted by the Rehabilitation Act were only applicable in those instances in which a disabled person was discriminated against by a federal contractor or federal agency.[8] The Americans with Disabilities Act of 1990 expanded upon the protections contained within the earlier legislation by seeking to prevent discriminatory practices against persons with disabilities in virtually every element of society, including private schools, universities, restaurants, transportation services, telecommunication services, and by private employers and landlords.[9]

The Americans with Disabilities Act affects the operation of every business in the United States considered under the statute

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[6] Pub. L. No. 101-336, 104 Stat. 327 (codified as 42 U.S.C. §§ 12101-12213 (1990)).

[7] Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988).

[8] *See* Mark D. Laponsky, *Defining "Disability"*, 39 FED. B. NEWS & J. 44 (1992).

[9] Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1990).

to be a "public accommodation."[10] This term includes, among many other places, inns and hotels;[11] restaurants and bars;[12] laundromats, banks, and gas stations;[13] private universities, colleges, and other places of education;[14] grocery stores, shopping centers, stadiums and movie theaters; and other places of public gathering.[15] The statute prohibits discrimination against disabled persons in any of the above-referenced places by declaring 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."[16]

The term "disability" is defined under the ADA as follows: "(A) a physical or emotional 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."[17] This definition includes not only persons with an actual disability, but also persons with a prior record of a disability, though such a person may not actually suffer from any of the effects of the prior disability, and persons mistakenly

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[10] 42 U.S.C. § 12181 (1992).

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] 42 U.S.C. § 12181 (1992).

[15] *Id.*

[16] 42 U.S.C. § 12182(a) (1992).

[17] 42 U.S.C. § 12102(2) (1992).

perceived by an institution or employer as having such a disability.[18] A physical or mental impairment is defined as:

> (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine; or
> (2) Any mental or physiological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.[19]

The term "major life activities" includes walking, talking, breathing, learning, working, performing manual tasks, hearing and caring for oneself.[20]

The language defining a disability under the ADA is identical to that contained in the Rehabilitation Act of 1973 defining "individual with a handicap."[21] Given the similarities between the Rehabilitation Act of 1973 and the ADA, the Interpretive Guidelines for the ADA drafted by the Department of Justice and the Equal Employment Opportunity Commission reflect many of the interpretations reached by the courts in the extensive litiga-

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[18] *See* 29 C.F.R. § 1630.2(k) (1993); *see also* Cook v. R.I. Dep't of Mental Health, Retardation, and Hosps., 1993 WL 470697, at *2 (1st Cir. Nov. 22, 1993) (Although the court found that the plaintiff's morbid obesity constituted a disability, it further noted that such a determination was not necessary to rule in favor of the plaintiff. If the employer mistakenly perceived the plaintiff to be disabled, and denied her employment based upon his misperception, whether an actual disability existed is immaterial. Persons perceived as being disabled are protected by the legislation.).

[19] 29 C.F.R. § 1630.2(h)(1)(2) (1993).

[20] 29 C.F.R. § 1630.2(i) (1993).

[21] Rehabilitation Act of 1973, 29 U.S.C. § 706(8)(A) (1993).

tion brought under the Rehabilitation Act of 1973.[22] Similarly, the courts, in identifying those persons covered under the ADA, and in analyzing whether such persons have suffered from discriminatory practices, frequently rely upon the tests and standards reached during the extensive litigation under the Rehabilitation Act of 1973. Courts have interpreted Section 504 of the Rehabilitation Act quite broadly in deciding who is eligible for protection under a federal disability statute. Under Section 504, disabled status has been granted to an alcoholic student,[23] a learning disabled student,[24] a person with a heart condition,[25] a kleptomaniac,[26] persons with diabetes,[27] a morbidly obese person,[28] a compulsive gambler,[29] and a drug addict.[30] Courts have denied granting handicap status

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[22] See H.R. Rep. No. 485, Part 2, 101st Cong., 2d Sess. at 53-55 (1990).

[23] Anderson v. University of Wis., 841 F.2d 737 (7th Cir. 1988).

[24] Wynne v. Tufts Univ. Sch. of Medicine, 932 F.2d 19 (1st Cir. 1991).

[25] Commonwealth v. Brown, 558 A.2d 121 (1989), *vacated on other grounds*, 620 A.2d 1139 (Pa. 1993).

[26] Fields v. Lyng, 705 F. Supp. 1134 (D. Md. 1988), *aff'd*, 888 F.2d 1385 (4th Cir. 1989). *See also infra* notes 35-37 and accompanying text (in drafting the ADA, Congress expressly excluded kleptomania as a disability).

[27] Serrapica v. City of New York, 708 F. Supp. 64 (S.D.N.Y.), *aff'd*, 888 F.2d 126 (2d. Cir. 1989).

[28] Cook v. R.I. Dep't of Mental Health, Retardation, and Hosps., 1993 WL 470697, at *2 (1st Cir. Nov. 22, 1993) (a morbidly obese person is considered by the medical profession to be one who weighs more than twice his or her optimal weight or 100 pounds more than his or her optimal weight).

[29] Rezza v. Dep't of Justice, 698 F. Supp. 586 (E.D. Pa. 1988).

[30] Nisperos v. Buck, 720 F. Supp. 1424 (N.D. Cal. 1989), *aff'd*, 936 F.2d 579 (9th Cir. 1991).

to a person with a fear of heights,[31] an individual suffering from occasional bout of stress or mental exhaustion,[32] a person with varicose veins,[33] and a person with severe sensitivity to insect bites.[34]

It is widely assumed that courts will continue to broadly interpret the ADA, offering protection to a variety of disabled persons. The legislature, however, apparently disagreeing with several of the extensions granted by the courts, has expressly stated that certain categories of persons shall be excluded from protection under the ADA. For example, Section 511 of the ADA states that homosexuality and bisexuality shall not be considered disabilities even though courts have never considered these sexual orientations to be disabilities.[35] This section further provides that certain conditions such as transvestitism, exhibitionism, pedophilia, compulsive gambling, kleptomania, and disorders resulting from the current use of drugs shall not be included in the definition of "disability" as this term is used in the ADA.[36] The enactment of the ADA presented Congress with the opportunity to review the current state of disability law and to amend the current legislation in order to disallow certain broad interpretations reached by the courts under the Rehabilitation Act of 1973. While specific categories of persons were expressly excluded by the legislature under the ADA, many of the types of disabilities recognized by the

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[31] Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986).

[32] Pressman v. University of N.C. at Charlotte, 337 S.E.2d 644 (1985) (decided under a North Carolina state statute protecting disabled individuals).

[33] Oesterling v. Walters, 760 F.2d 859 (8th Cir. 1985).

[34] James v. Runyon, 1992 WL 382311 (E.D. Pa.), *aff'd*, 6 F. 3d 779 (3rd Cir. 1993).

[35] 42 U.S.C. § 12211(a) (1992).

[36] 42 U.S.C. § 12211(b) (1992).

courts under the Rehabilitation Act of 1973 remain protected. Among those continuing to receive protection under the ADA are learning disabled persons.[37] Courts have held certain mental disabilities to be clearly within the purview of legislation such as the ADA and the Rehabilitation Act of 1973. These disabilities include schizophrenia,[38] severe psychiatric difficulties,[39] mental retardation,[40] and specific learning disabilities.[41] Congress has defined the term "specific learning disabilities" in the Education of Individuals with Disabilities Act, finding that this term should be used to describe conditions such as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.[42]

Other conditions, which may arguably be considered mental disabilities, have not received such status under the Rehabilitation Act of 1973 or the Americans with Disabilities Act of 1990. Such conditions include poor judgment, irresponsible behavior, and a

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[37] 29 C.F.R. § 1630.2(h)(2) (1993).

[38] *See* Boalthouse v. Continental Wingate Co., 656 F. Supp. 620 (W.D. Mich. 1987) (Plaintiffs alleged they were denied subsidized housing because of their disabilities, cerebral palsy and schizophrenia. The court held that both were handicapped within the definition of the Rehabilitation Act of 1973.).

[39] *See* Doe v. Marshall, 459 F.Supp. 1190 (S.D. Tex. 1978) (holding that student suffering from severe psychiatric difficulties was handicapped).

[40] *See* Halderman v. Pennhurst State School and Hosp., 446 F. Supp. 1295, 1298 (E.D. Pa. 1977) (distinguishing mental retardation from mental illness, the court stated that the former was "primarily an educational problem and not a disease which can be cured through drugs or treated."), *aff'd*, 612 F.2d 81 (3d Cir. 1982), *rev'd on other grounds*, 151 U.S. 1 (1981).

[41] *See* Stutts v. Freeman, 694 F.2d 666 (11th Cir. 1983).

[42] Education of Individuals with Disabilities Act, 20 U.S.C. § 1401(15) (1988).

lack of impulse control.[43] Courts have also rejected occasional stress, depression and mental exhaustion as disabilities under statutes aimed at protecting disabled persons from discrimination.[44]

In litigation arising in connection with claims of mental impairments, courts have closely adhered to the statutory language by refusing to grant plaintiffs the protection of disability laws without evidence that their disability substantially interferes with "a major life activity." For example, an employee suffering from mental stress caused by a poor working relationship with her supervisor would probably not be successful in arguing that her stress was a disability under the ADA. The disability must interfere with a major life activity, and although in this example it does interfere with her ability to perform a specific job, in order for it to substantially limit a major life activity it must interfere with her ability to work in general. In effect, the stress must interfere with her ability to perform any job. Instead of being regarded as having a "substantial limitation" of a "major life activity," a person suffering from stress due to a poor working relationship with a supervisor would more likely be considered as "unsuited for one position in one plant - nothing more."[45] If the stress were to substantially interfere with a person's ability to work in other positions as well, however, it would constitute a disability under the terms of the ADA.[46]

In addition, courts will not consider an impairment a

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[43] *See* Daley v. Koch, 892 F.2d 212 (11th Cir. 1986); *see also* Winston v. Maine Technical Schl., 631 A.2d 70 (Me. 1993) (A teacher, dismissed from his job after kissing a student, claimed that he suffered from poor sexual impulse control and that the school's action in dismissing him violated the ADA. The court rejected this argument.).

[44] *See* Pressman v. University of N. C., 337 S.E.2d 611 (1985) (finding that the university's decision to terminate an employee who claimed she suffered from occasional stress, depression, and mental exhaustion did not violate a North Carolina statute protecting disabled persons).

[45] *See* Forrisi v. Bowen, 791 F.2d 931, 935 (4th Cir. 1986).

[46] *Id.*

limitation on a major life activity if it is of a temporary duration.[47] The employee in the above hypothetical, therefore, would probably not be successful in an action under the ADA. A court would construe her disability as one of a temporary duration, lasting only as long as she worked with the supervisor, and not interfering with her ability to work in general, but rather with her ability to perform a particular job. A similar analysis of a claim for protection under a federal disability statute could be performed in an educational context as well. A university student who suffers from stress or anxiety in a class with a particular professor, or from a difficult exam period, would probably not be entitled to the protections offered under the ADA. Similar to private employers, colleges and universities would be entitled to distinguish between temporary disabilities and permanent disabilities in deciding whether to accommodate students under the ADA or the Rehabilitation Act of 1973. Based upon prior judicial interpretations relating to employment, a university would not be required under the existing legislation to grant accommodations to students complaining of stress in a particular class, or temporary fatigue, depression, or mental exhaustion during exam periods.[48] Of course, this means only that the ADA does not require academic institutions to grant accommodation to temporary disabilities. Universities and colleges may, however, decide to offer students with such problems relief through internal medical leave policies or other administrative means.

Qualified Individual with a Disability

The Rehabilitation Act of 1973 provides that "[n]o otherwise qualified individual with handicaps . . . shall, solely by reason of his or her handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any

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[47] *See* Evans v. City of Dallas, 861 F.2d 846, 852 (5th Cir. 1988) (finding that a temporary knee injury was not a handicap under the Rehabilitation Act of 1973).

[48] *Id. See also Forrisi*, 791 F.2d at 935.

program or activity receiving Federal financial assistance."[49] The term "otherwise qualified handicapped person" was used in the Rehabilitation Act to prevent discrimination against persons able to meet the requirements for a position in every respect, except for limitations arising from their handicap.[50] A literal interpretation of this term would prevent institutions from taking into account any type of limitation resulting from an individual's disability, irrespective of the extent to which the disability would interfere with job or academic performance. The regulations put forth by the Department of Health, Education and Welfare to interpret Section 504 of the Rehabilitation Act, however, utilized the term "qualified handicapped person" and omitted the word "otherwise."[51] This change in terminology was necessary to avoid literal interpretations permitting, for example, a person possessing all of the qualifications for driving a truck, except sight, to be found "otherwise qualified" for a job as a driver.[52]

The legislature sought to prevent the problems of interpretation which arose as a result of the wording of the Rehabilitation Act of 1973 and, therefore, changed the terminology of the ADA to prevent discrimination against a "qualified individual with a disability."[53] This term is defined in the ADA as:

> an individual with a disability who, with or without reasonable modifications to rules, policies or practices, the removal of architectural, communication or transportation barriers, or the provision of auxiliary

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[49] Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (1988).

[50] *Id.*

[51] 45 C.F.R. § 84.3(k)(3) (1978).

[52] *See* Southeastern Community College v. Davis, 442 U.S. 397, 407 n.7 (1979).

[53] 42 U.S.C. § 12101 (1992).

> 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.[54]

This definition includes many of the interpretations reached by the courts in litigation involving the Rehabilitation Act of 1973. Accordingly, a review of the decisions reached under the Rehabilitation Act of 1973 will provide a basis for understanding the elements of the above definition. Given the similarities between the ADA and the Rehabilitation Act of 1973, the same type of analysis will be used by the courts in cases seeking clarification of the term "qualified individual with a disability" under the ADA.[55]

During the admissions process, a university must first determine whether a student claiming a disability is considered a "qualified individual with a disability." The United States Supreme Court has provided a definition, in the context of university admissions, to the term "otherwise qualified" as contained in Section 504 of the Rehabilitation Act of 1973.[56] In *Southeastern Community College v. Davis*,[57] a deaf nursing school student brought an action under the Rehabilitation Act after the college refused to admit her into a clinical training program. The district court entered judgment for the university deciding that the plaintiff's handicap would prevent her from safely completing the training program and practicing in the nursing profession.[58] The Court of Appeals for the Fourth Circuit reversed, finding that Southeastern had to

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[54] 42 U.S.C. § 12131(2) (1992).

[55] *See* Coleman v. Bd. of Regents of the Univ. of Neb., 824 F. Supp. 1360, 1367 (D. Neb. 1993). *See also infra* text accompanying notes 115-24.

[56] *See Davis*, 442 U.S. 397.

[57] *Davis*, 442 U.S. 397.

[58] *Id.*

disregard any limitation resulting from a handicap and evaluate her credentials without considering that the only manner in which she could follow the instruction would be by lip-reading.[59]

The Supreme Court, however, rejected this reasoning and held that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap."[60] Thus, a university was not required to accommodate a handicapped individual if such an accommodation would result in "substantial modifications" to the existing program.[61] The Court stated in *Davis* that "[i]f these regulations [referring to the Dept. of HEW guidelines][62] were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would do more than clarify the meaning of Sec. 504."[63] The Court further found that "[i]t is undisputed that the respondent could not participate in Southeastern's nursing program unless the standards were substantially lowered. . . . [S]ection 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person."[64] After the *Davis* decision, courts only required that universities demonstrate a rational basis for denying admission to a disabled student.

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[59] *Id.*

[60] *Id.* at 406. *See also* 45 C.F.R. § 84.3(k)(1) (1985) (stating that in the employment context the term "otherwise qualified" refers to one who can perform the "essential functions" of the job in question).

[61] *Id.* at 410. (In putting forth this reasoning the Court accepted Southeastern's argument that a substantial portion of the instruction would take place in a surgical room in which instructors would be required to wear surgical masks).

[62] 45 C.F.R § 84.44 (1978).

[63] Southeastern Community College v. Davis, 442 U.S. 397, 410 (1979).

[64] *Id.* at 413.

Universities were not required, however, to explore the issue of whether a reasonable accommodation would permit a disabled student to successfully participate in the academic program.[65]

The Supreme Court revisited the issue of "reasonable accommodation" nearly six years later in *Alexander v. Choate*.[66] Reviewing its previous holding in *Davis*, the Court noted that:

> Davis . . . struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones.[67]

The Court's decision in *Alexander* altered the previous holding in *Davis* and required institutions to now demonstrate that a reasonable accommodation, which would allow the "otherwise qualified person" to participate, was not available.[68] This change forced the courts to recognize the paradox implicit in the Supreme Court's analysis of the phrase "otherwise qualified." *Davis* held that "an otherwise qualified person is one who is able to meet all of a programs requirements in spite of his handicap."[69] *Alexander* required that a program make "reasonable accommodations," if such an accommodation would allow participation by an "otherwise qualified handicapped person." An "otherwise qualified handi-

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[65] *Id.*

[66] Alexander v. Choate, 469 U.S. 287 (1985).

[67] *Id.* at 300.

[68] *Id.*

[69] Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979).

capped person" thus became one capable of participating in a program if a "reasonable accommodation" was available for implementation by the institution.

Accordingly, universities and colleges, in deciding whether to admit "a qualified individual with a disability," must first make a factual determination as to whether the individual "meets the academic and technical standards requisite to admission or participation in the . . . education program or activity."[70] If the response to this inquiry is negative, the institutions must next determine whether a "reasonable accommodation" exists which will allow the individual to successfully participate in the academic program.[71]

Courts have granted deference to the safety concerns of academic institutions in the admission of disabled students to health-related programs such as medical and nursing schools.[72] In fact, in *Davis,* the district court was especially concerned by the fact that the clinical portion of the training program took place in an operating room and the instructors lips would be covered by a surgical mask. The court noted that the plaintiff, a deaf nursing student, would have difficulty communicating under such circumstances, causing safety concerns for both the plaintiff and prospective patients.[73] In *Doe v. New York University,*[74] the Court of Appeals for the Second Circuit disagreed with the lower court's

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[70] 45 C.F.R. § 84.3(k)(3) (1985).

[71] *See Alexander,* 469 U.S. at 300; *see also* Stutts v. Freeman, 694 F.2d 666 (11th Cir. 1983) (finding that the Tennessee Valley Authority failed to explore "reasonable accommodations" prior to denying entrance to a learning disabled employee into an apprentice program for a position as a heavy equipment operator).

[72] *See* Doe v. N.Y. Univ., 666 F.2d 761, 777 (2d Cir. 1981) (stating that "[i]t would be unreasonable to infer that Congress intended to force institutions to admit or readmit persons who pose a significant risk to themselves or others").

[73] *Davis,* 442 U.S. 397.

[74] *Doe,* 666 F.2d. 761.

standard that Doe, a medical school applicant prone to self-destructive behavior in stressful situations, should be "deemed qualified if it appeared 'more likely than not' that she could complete her medical training and serve as a physician without recurrence of her self-destructive and anti-social conduct."[75] Instead, the court of appeals found that "she would not be qualified for readmission if there is a significant risk of such recurrence."[76]

Once a disabled student is admitted to a college or university, he or she must meet the academic standards required to maintain enrollment at the institution.[77] For example, a law student who was dismissed from the University of Wisconsin for his failure to meet the minimum academic requirements claimed that his alcoholism was the cause of his inadequate performance.[78] The university readmitted him on two occasions, but he again failed to meet the minimum academic requirements. After he was dismissed by the university, the student brought an action claiming that the school discriminated against him in violation the Rehabilitation Act of 1973.[79] The court recognized the student's alcoholism as a handicap under the Rehabilitation Act, but found that he

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[75] *Doe*, 666 F.2d. at 777.

[76] *Id.*

[77] *See* Anderson v. Univ. of Wis., 841 F.2d 737 (7th Cir. 1988); *see also* McGregor v. La. State Univ. Bd. of Supervisors, Civ. No. 91-4328 (E.D. La. 1992) (The law school granted a physically and neurologically disabled student accommodations including additional time for exams and access to faculty members for additional assistance. In spite of these accommodations, the student was unable to meet the academic requirements of the program. Upon his dismissal for low test scores, the student brought an action under the Rehabilitation Act claiming that the university had discriminated against him. The court ruled that his low test scores, even with the accommodations, indicated that he was not "otherwise qualified" for the program, and his dismissal, therefore, did not violate the Rehabilitation Act.), *aff'd*, 3 F.3d 850 (5th Cir. 1993), *petition for cert. filed*, (Dec. 23, 1993) (No. 93-7279).

[78] *Anderson*, 841 F.2d 737.

[79] *Id.*

was not "otherwise qualified" as required by the statute.[80] The university's decision to dismiss him, therefore, was determined not to be a violation of the Rehabilitation Act.[81]

Reasonable Accommodation

In 1992, nearly 20,000 students took a specialized version of the SAT examination for learning disabled students.[82] The special tests allow a student 12 hours over two days to complete the test instead of the usual single session lasting for two and a half hours.[83] The number of students enrolling for these specialized tests has been growing by 10 to 15 percent per year for the past decade.[84] As colleges and universities receive an increasing number of applications from students recognized as learning disabled, requests for reasonable accommodations will also increase and become more unique. The difficult task for the academic institutions is to determine which of these requests constitute reasonable accommodations, and which requests are unduly burdensome, infringe upon the academic freedom of the university, or substantially alter the academic program.[85] Traditionally, courts have granted substantial deference to schools in deciding cases involving the alteration of academic programs. In *Sweezy v.*

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[80] *Id.* at 740.

[81] *Id.*

[82] *See* Winerip, *supra* note 1, at A17.

[83] *Id.*

[84] *Id.*

[85] *See* Southeastern Community College v. Davis, 442 U.S. 397 (1979).

New Hampshire,[86] the concurring opinion of this Supreme Court decision identified the four essential freedoms of a university as: determining for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be permitted to study.[87] Although federal legislation has increased involvement of the courts in such academic determinations, they continue to express concern when called upon to re-evaluate a university's decision with respect to "an applicant's qualifications and whether he or she would meet reasonable standards for academic and professional achievement established by a university or a non-legal profession."[88]

As mentioned earlier, the courts began requiring institutions to look into the possibility of a "reasonable accommodation" in 1985 after the *Alexander* case.[89] The courts refrained, however, from requiring institutions to implement the "reasonable accommodation" if such action would impose "undue financial and administrative burdens"[90] or "[w]here reasonable accommodation does not overcome the effects of a person's handicap, or where reasonable accommodation causes undue hardship to the employer, failure to promote the handicapped person will not be considered discrimination."[91]

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[86] 354 U.S. 234 (1957).

[87] *See* Fruth v. New York Univ., No. 93 Civ. 5572 (S.D.N.Y. 1993) (citing Sweezy v. New Hampshire, 354 U.S. 234 (1957)).

[88] *See* Doe v. New York Univ., 666 F.2d 771, 775-76 (2d. Cir. 1981) citing University of Mo. v. Horowitz, 435 U.S. 78, 92 (1978) ("[c]ourts are particularly ill-equipped to evaluate academic performance").

[89] *See* Alexander v. Choate, 469 U.S. 287 (1985).

[90] *See* School Bd. of Nassau Co. v. Arline, 480 U.S. 273, 287-88 n. 17 (1987) (quoting *Davis*, 442 U.S. at 412).

[91] *Id.* at 287-88 n.17 (1987) (citing *Davis*, 442 U.S. at 410-13; *Alexander*, 469 U.S. at 299-301 n.19).

The obligations of an academic institution, in exploring whether a reasonable accommodation is available to permit a learning disabled student to attend its academic program, were succinctly set forth by the Court of Appeals for the First Circuit in *Wynne v. Tufts University School of Medicine*.[92] A student, Steven Wynne, was dismissed from the School of Medicine after he failed several courses during consecutive attempts to complete the first year program.[93] Wynne was diagnosed as suffering from a learning disability, dyslexia, and claimed that the university discriminated against him by failing to modify its exams to accommodate his difficulties.[94] Wynne maintained that the university failed to provide him with an alternative to the multiple-choice exams offered to first-year medical students, even though it was established that his dyslexia interfered with his performance on such tests.[95]

In *Wynne*, the court of appeals articulated the standard for determining whether a university had met its obligations in exploring a "reasonable accommodation" by finding that:

> [i]f 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 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

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[92] 932 F.2d 19 (1st Cir. 1991).

[93] *Id.* at 20.

[94] *Id.*

[95] *Id.* at 22.

accommodation.[96]

In this context, the university submitted an affidavit from the Dean of the School of Medicine which stated that the purpose of the multiple choice tests was to "measure a student's ability not only to memorize complicated material, but to understand and assimilate it . . . [and] [i]n the judgment of the professional medical educators who are responsible for determining testing procedures at Tufts, written multiple choice examinations are important as a matter of substance, not merely form."[97] The Court of Appeals for the First Circuit, in setting aside the summary judgment granted to the university by the district court, discounted the affidavit. The court pointed out that the affidavit failed to expound upon the unique qualities of multiple choice examinations over other types of exams, or consider alternatives for accommodating a handicapped student.[98] This type of review places a heavy burden on the university to demonstrate that it has exhausted all possible means of accommodating a disabled student before denying or revoking the admission of such a student. Under *Wynne*, if a university rejects a proposed "reasonable accommodation," it must be prepared to articulate the grounds for the rejection in substantial detail.

In determining whether a university or college may offer a reasonable accommodation to a student, the academic institutions often examine the availability of auxiliary aids such as tutors, note-takers, and interpreters. The regulations concerning the provision of auxiliary aids as a "reasonable accommodation" under Section 504 of the Rehabilitation Act of 1973 were substantially clarified

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[96] *Id.* at 26. *But see* McGregor v. La. State Univ. Bd. of Supervisors, *aff'd*, 3 F.3d 850, 859 n.11 (5th Cir. 1993) (disagreeing with the proposition that the burden of proof rests with the university to demonstrate how a proposed accommodation would substantially alter its program), *petition for cert. filed*, (Dec. 23, 1993) (No. 93-7279).

[97] *See* Wynne v. Tufts Univ. Sch. of Medicine, 932 F.2d 19, 23 (1st Cir. 1991).

[98] *Id.* at 28.

in *United States v. Bd. of Trustees for the Univ. of Ala.*[99] In this case, the University of Alabama was investigated by the Department of Health, Education and Welfare after a deaf student filed a complaint stating that her request for an interpreter had been denied by the university.[100] Upon the commencement of this investigation, the University of Alabama at Birmingham ("UAB") set up an auxiliary aids policy which provided that the university would furnish note-takers and transcripts of the courses to deaf students, but not costly interpreters.[101] The policy of UAB further stated that if students required the services of an interpreter, they should contact the university several months before the academic quarter so that UAB could assist them with finding interpreters through the Vocational Rehabilitation Service, or if they were not eligible for this service, through student loans or other financial aid.[102] In addition, this policy excluded students taking non-degree or non-credit courses from receiving auxiliary aids from UAB.[103] The university argued that it offered the same benefit to all qualified students, and that benefit was an opportunity to be educated. It further argued that "[s]ome students are smarter than others, some work harder than others, and . . . [s]ome will incur more expenses than others.[104] UAB also claimed that under *Alexander,* it was not required to change its program "simply to meet the reality that the deaf must spend more money to receive the same results as hearing

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[99] 908 F.2d 740 (11th Cir. 1990).

[100] *Id.* at 742.

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.* at 748.

students."[105]

The Eleventh Circuit, not surprisingly, rejected this argument, finding that in some instances "the lack of an auxiliary aid would effectively deny a handicapped student equal access to his or her opportunity to learn."[106] The court affirmed the decision of the district court to enjoin UAB from "denying auxiliary aids to handicapped students based upon consideration of their financial status."[107]

In deciding whether to provide an auxiliary aid as a reasonable accommodation to a disabled student, the university may not consider the financial status of the student benefiting from the auxiliary aid.[108] The provision of auxiliary aids such as taped examinations, interpreters, readers for students with visual and learning disabilities, and other similar services is required unless the institution can demonstrate that providing such aids will fundamentally alter the academic program or result in an undue burden on the institution. The university or college is not required to provide "attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature."[109]

Individualized Inquiry

There is a nexus between the requirements for attendance at an institution of higher education and the admittance of learning

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[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.* at 746-49 (finding that the Department of Education had consistently asserted that the consideration of a students financial status in considering the availability of an accommodation was a violation of Section 504 of the Rehabilitation Act of 1973).

[109] 34 C.F.R. § 104.44 (1989).

disabled students. The nexus has a parallel in employment cases that require employers to perform a thorough analysis of the requirements of the job and possible accommodations before denying employment to a disabled person.[110] In *Nassau Co. School Bd. v. Arline*,[111] the Supreme Court considered a claim by a teacher dismissed from her position because she suffered from recurring tuberculosis. The teacher claimed that the school board's decision to dismiss her because of the disease violated the Rehabilitation Act of 1973.[112] The Court in *Arline* described the necessity of performing an individualized inquiry if the institution aspires to meet the requirements of Section 504 of the Rehabilitation Act. After concluding that Ms. Arline was entitled to protection under the Act,[113] the Court further noted that:

> [t]he remaining question is whether Arline is otherwise qualified for the job of elementary school teacher. To answer this question in most cases the District Court will need to conduct an individualized inquiry and make appropriate findings of fact. Such an inquiry is necessary if Section 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of [the school board] as avoiding exposing others to significant health and safety concerns.[114]

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[110] *See* School Bd. of Nassau Co. v. Arline, 480 U.S. 273 (1987).

[111] *Id.*

[112] *Id.*

[113] *Id.* at 287.

[114] *Id.*

An individualized inquiry is necessary to ensure that regulations pertaining to disabled persons are not overbroad. Frequently, institutions enact blanket policies for their treatment of disabled persons, and often such policies result in regulations unfairly impacting upon a person because of an actual or perceived disability. A recent district court decision in Nebraska demonstrates the importance of requiring institutions to perform individualized inquiries before regulating the conduct of disabled persons.[115] In *Coleman v. Zatechka*,[116] a student with cerebral palsy challenged a housing policy at the University of Nebraska which prevented all disabled students with attendant care-takers from being assigned roommates. The Director of Housing for the university noted that the policy was enacted in response to complaints of embarrassment by disabled students at having an assigned roommate present during the attendant care visits.[117] The court found that the disabled student, having been admitted to the university and having submitted a residence hall contract application was "qualified" under the ADA to participate in the roommate assignment program.[118]

The university argued that she was not "qualified" because "her disability requires her to use more space than allotted to a double room occupant and to have attendant care visits at least three times a day, thereby impinging on the physical space and solitude" of her roommate. Since non-disabled students were not required to demonstrate that they would only use one-half of the room, the

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[115] Coleman v. Zatechka, 824 F. Supp. 1360 (D. Neb. 1993).

[116] *Id.*

[117] *Id.* at 1364. (The university's policy was worded as follows: "[a]lthough the University will attempt to assign residence hall living accommodations to all students based upon the choices made in a student's residence hall contract application, the University cannot always do so. In the case of students with disabilities or special medical considerations, double rooms will not be assigned if personal attendant service, nursing care, or trained animal assistance is required unless there is a mutual room request.").

[118] *Id.* at 1367.

court considered the university's policy as imposing additional eligibility requirements on disabled students.[119] It further noted that the ADA prohibited the use of eligibility criteria that "screen out or tend to screen out . . . any class of individuals with disabilities from fully enjoying any service, program or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered."[120]

In rejecting the university's argument that the disabled student would use more space and impinge upon the privacy of the roommate, the court noted the university's failure to conduct an individualized inquiry to determine the actual amount of space used by the plaintiff. The university simply assumed that because she used a wheelchair, she would use more than half the space.[121] Such assumptions are prohibited under the ADA and institutions seeking to regulate the conduct of disabled students must glean facts and conclusions from individualized inquiries.[122] This is necessary to ensure that regulations applying to disabled persons are based upon facts and not presumptions about what such a class of persons can or cannot do.

Most importantly, in *Coleman*, the district court recognized that even though the policy of providing disabled students with a single room may have originated as an accommodation to such students, "nothing in the Rehabilitation Act or the ADA requires that [disabled students] accept such accommodations."[123] The court further noted that the regulations of both the ADA and the Rehabilitation Act require that the participation by disabled persons

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[119] *Id.*

[120] *Id.* at 1368.

[121] *Id.* at 1369.

[122] *Id.*

[123] *Id.* at 1372.

in special accommodations must be an option and not mandatory.[124]

Section 302 of the ADA includes a general prohibition against various types of activities by a public accommodation which may result in a "denial of participation," "participation of unequal benefit," or the provision of a "separate benefit" to disabled persons. In addition, public accommodations must provide disabled persons with "integrated settings," the "opportunity to participate," and "administrative methods" which do not discriminate or have a discriminating effect.[125]

Without question the "denial of participation" of disabled persons in an activity or "participation of unequal benefit" would have a discriminatory effect. Equally harmful, however, is the provision of a "separate benefit" for disabled persons. The statute provides, with respect to a separate benefit, that:

> [i]t shall be discriminatory to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class . . . with a good, service, facility, privilege, advantage or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage or accommodation, or other opportunity that is as effective as that provided to others.[126]

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[124] *Id.* ("Even when separate programs are permitted, individuals with disabilities cannot be denied the opportunity to participate in programs that are not separate or different. This is an important and overarching principle of the Americans with Disabilities Act. Separate, special or different programs that are designed to provide a benefit . . . cannot be used to restrict the participation of persons with disabilities in general integrated activities . . . . Modified participation for persons with disabilities must be a choice not a requirement."). *See also* 28 C.F.R. pt. 36, App. B, at 593 (1993).

[125] 42 U.S.C. § 12182 (1992).

[126] 42 U.S.C. § 12182(b)(1)(A)(iii) (1992).

An academic institution may believe that it has adequately met its obligations to learning disabled students by providing a separate program for such students. The above provision, however, forces the university to first establish that the separate program is *necessary* in order to provide an equal benefit (an education) to such students. In establishing that a separate program is necessary, the college or university must base its conclusion on the facts of an individualized inquiry into the needs of the students for whom the program is designed. The purpose of the inquiry is to justify the creation of a separate program, rather than the modification of an existing program. A determination that the separate program is necessary to provide an equal benefit to disabled students does not permit the university to then require all disabled students to participate.[127]

A Functional Analysis of the Effect of the ADA on University Programs

In responding to issues of disability in the educational context, a college or university must first determine whether a person claiming protection under the ADA is a qualified individual with a disability.[128] In order to be eligible for protection under the ADA, such a person must be diagnosed as having a disability which substantially interferes with a major life activity.[129] As mentioned earlier, temporary disabilities, such as a broken bone or temporary stress or depression, will not be entitled to the protections offered by the ADA.[130] The statutory language of the ADA

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[127] *See* 28 C.F.R. pt. 36, App. B, at 593 (1993).

[128] *See* Southeastern Comm. College v. Davis, 442 U.S. 397 (1979).

[129] 42 U.S.C. § 12102(2) (1992).

[130] *See* Evans v. City of Dallas, 861 F.2d 846, 852 (5th Cir. 1988) (finding that a temporary knee injury was not a handicap under the Rehabilitation Act); *see also* Forrisi v. Bowen, 791 F.2d 931, 935 (4th Cir. 1986).

explicitly recognizes learning as a major life activity.[131] The existence of a professionally diagnosed learning disability will, therefore, render a person eligible for the protection of the ADA and the Rehabilitation Act of 1973.[132] After the establishment of the fact that the student has a recognized disability under the ADA, the next inquiry is whether the disabled student meets the academic and technical standards required for admission to the program or activity.[133] According to *Wynne*, an academic institution is not required to lower or substantially alter its program to accommodate a learning disabled student.[134] It is required, however, to incorporate a reasonable accommodation if such an accommodation will allow a disabled person to participate in the academic program.[135] An accommodation which does not substantially alter the program or cause undue financial burden will be considered a reasonable accommodation.[136]

A paradox exists with respect to the admission of learning disabled individuals to universities and colleges. Academic institutions do not affirmatively seek to determine whether a student is disabled through the application process. The learning disabled students, however, may find it necessary to disclose the existence of their disability in order for the admissions committee to consider their application in spite of grade discrepancies in certain subjects, low grade point averages or standardized test scores, or to obtain

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[131] 29 C.F.R. § 1630.2(h)(2).

[132] *Id.*

[133] *See Davis*, 442 U.S. 397; *see also supra* note 70 and accompanying text.

[134] Wynne v. Tufts Univ. School of Medicine, 932 F.2d 19, 26 (1st Cir. 1991).

[135] *See Alexander*, 469 U.S. 287; *see also supra* notes 66-68 and accompanying text.

[136] *See Wynne*, 932 F.2d at 26.

reasonable accommodations from the university, such as alternative tests, program modifications, auxiliary aids, or additional time for exams.[137] The identification of learning disabled students in the application process is logical if universities are required to determine whether an individual is a "qualified individual with a disability." The factors universities use in deciding which students to accept are often reflective of an individual's ability to learn. Persons with diagnosed learning disabilities should receive special consideration and the benefit of any available "reasonable accommodation" from universities and colleges. Again, this does not require academic institutions to lower their standards to accommodate such persons.[138]

Assume, for example, that a university accepts only students with a minimum high school grade point average of 3.5 into its entering class. A learning disabled student with a 2.5 grade point average applies and identifies himself as learning disabled on his application. If such a student has received reasonable accommodations during his high school studies, he would probably not be considered a "qualified individual with a disability." As a learning disabled student, his disability would be recognized under the ADA, but he would not meet the essential eligibility requirements to be considered a "qualified individual with a disability."[139] The university would be able to argue that accepting such students would lower its academic standards. The university should be prepared, however, to demonstrate the nexus between a 3.5 grade point average in high school and successful participation in the

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[137] *See* Salvador v. Bell, 622 F. Supp. 438 (N.D. Ill. 1985), *aff'd*, 800 F.2d 97 (7th Cir. 1986) (finding that an institution did not violate the Rehabilitation Act in refusing to admit a student since it did not know that the person was learning disabled).

[138] *See Wynne*, 932 F.2d at 26.

[139] *See* 42 U.S.C. § 12131(2) (1992).

academic program.[140]

Another example is an applicant with a 3.5 grade point average who identifies herself as learning disabled and informs the university that she will need additional time for her exams and, as an auxiliary aid, a reader to read her exam questions out loud. The university may be concerned with the additional expense of providing a reader or that granting additional time for exams will alter its academic program. This applicant, however, would be considered a "qualified individual with a disability" and, unless the university is prepared to show that her requested accommodations would be unduly burdensome or substantially alter its academic program, she should be admitted.[141] In addition, the university must incur the additional costs of providing her with an auxiliary aid.[142]

In a variation of the above hypothetical, similar to the *Fruth* case described earlier,[143] assume that the university decides to admit several learning disabled students with grade point averages and standardized test scores slightly below the average for its entering class. The university conditions the admission of such students on their attendance at a summer orientation program and requires them to agree to register for a reduced course load each

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[140] E.g., that students with high school grade point averages below a 3.0 are less likely to be successful in the university's academic program and will, in effect, lower the academic standards.

[141] 42 U.S.C. § 12131(2)(1992); see also Alexander, 469 U.S. 287 (although this case involved a Medicaid program, the general principle is that all programs must be prepared to make reasonable accommodations for disabled persons).

[142] *See* United States v. Bd. of Trustees for the Univ. of Ala., 908 F.2d 740, 749 (11th Cir. 1990); *see also supra* notes 99-109 and accompanying text.

[143] Fruth v. N.Y. Univ., Civ. 93-5572 (S.D.N.Y. August 10, 1993).

semester.[144] The summer orientation lasts longer than the orientation provided to non-learning disabled students. And since it is taught by educational specialists, the university requires the learning disabled students to pay an extra fee. The reduced course load forces these students to attend summer classes, at an additional expense, in order to graduate in four years. The university started this program after several learning disabled students failed to complete their academic programs and complained that the university was not responsive to their needs.

A learning disabled student accepted to the university under this program lives in another state and is working during the summer. He is unable to attend the summer program. The university offers a similar but briefer program for non-disabled students a few days before the beginning of the academic year and he decides to attend this program rather than the earlier program for disabled students. A few days prior to his departure, he receives a letter from the university advising him that his admission has been revoked due to his failure to attend the earlier orientation.

This student could bring an action against the university under the ADA. He is a qualified individual with a disability, and the university has mandated his participation in a separate program. He would first point out that the university has created a separate program, instead of modifying the orientation for non-disabled students, without demonstrating that a separate program was necessary to provide him with an orientation equal to that received by the other students. The university may require all learning disabled students to attend the orientation. Although the separate program may be necessary for some of the disabled students, others might benefit from the orientation with non-disabled students. In defending itself against this claim, the university would be required to demonstrate that an "individualized inquiry" proved that the

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[144] It is important to distinguish between a university requiring that all students with lower academic qualifications attend a supplementary program, and a university requiring that learning disabled students attend a supplementary or separate program. In the latter, the university is making a distinction based upon a disability. Requiring all students with low standards to attend a supplementary program may have a disparate impact on disabled students. This analysis, however, is aimed at instances in which the university is implementing a program specifically for disabled students.

separate program was necessary to provide this student with an education of equal benefit to the education received by non-disabled students.[145] The mere fact that the university developed the program in response to complaints from disabled students would be insufficient. In addition, if the separate program were found to be necessary, the university might also be required to explain why the orientation for disabled students could not be held closer to the start of the academic year or concurrently with the orientation for non-learning disabled students. The fact that the program was held in the middle of the summer may have the administrative effect of limiting the participation of disabled students, and such administrative effects are prohibited by the ADA.[146] Furthermore, the university should be prevented from charging the learning disabled students for their orientation since the charges may also have the administrative effect of excluding them from participation.[147]

Finally, this student would claim that even if the university can justify the existence of the separate program, it must be optional rather than mandatory.[148] Similarly, accommodations such as a reduced course load and modified exams should also be optional. If such accommodations were made available to learning disabled students, but not required, the university would be in compliance with the ADA. If the learning disabled students were to decide not to participate in programs of accommodation and their performance fell below the academic standards set by the university to maintain enrollment, the university could dismiss these students. The decision to dismiss these students, if based upon their failure to meet the requisite academic standards, would

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[145] *See* Coleman v. Zatechka, 824 F. Supp. 1360 (D. Neb. 1993).

[146] 42 U.S.C. § 12182(b)(1)(D) (1992).

[147] *Id. See also* United States v. Bd. of Trustees for the Univ. of Ala., 908 F.2d 740, 748 (11th Cir. 1990).

[148] *See* Coleman, 824 F. Supp. at 1372; *see also supra* notes 116-24 and accompanying text.

not be a violation of the ADA.[149]

In reviewing an existing program, or in considering the implementation of a new program impacting upon disabled students, an academic institution must consider the legality of such a program in light of the Americans with Disabilities Act. A university may attempt to address the needs of disabled students through the implementation of a separate program.[150] The ADA requires a university which decides to offer a separate program to establish that such a program is necessary to provide a student with an educational benefit equal to that of his or her fellow students.[151] In other words, an inquiry must be made as to whether the existing program is amenable to a reasonable accommodation which would allow disabled students to participate with non-disabled students. This inquiry is distinct from the issue of whether the university can mandate participation by disabled students in the separate program. This distinction is very important and may be a source of confusion in attempts to comply with the ADA by academic institutions. A university or college may conclude that a separate program is necessary to provide an education of equal benefit to disabled students. Next, the university or college might consider that the classification of the separate program as necessary permits it to mandate participation by disabled students. The Americans with Disabilities Act, however, expressly states that "[n]otwithstanding the existence of separate or different programs or activities, . . . an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different."[152]

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[149] *See* Anderson v. University. of Wis., 841 F.2d 737 (7th Cir. 1988); McGregor v. La. State Univ. Bd. of Supervisors, Civ. No. 91-4328 (E.D. La. 1992); *see also supra* notes 77-81 and accompanying text.

[150] E.g., an orientation program or special classes or academic programs for disabled students.

[151] 42 U.S.C. § 12182(b)(1)(A)(iii) (1992).

[152] 42 U.S.C. § 12182(b)(1)(C) (1992). *See also* 28 C.F.R. pt. 36, App. B, at 593 (1993).

The following hypothetical may clarify this particular distinction. Assume that a university admits fifteen learning disabled students into its freshman class. All freshman students are required to attend a literature course with a demanding reading schedule and an emphasis on class participation. The university decides to provide a separate literature course for the learning disabled students with accommodations such as tutors and a lighter reading schedule.

The ADA requires the university to establish that the separate literature class is necessary to provide the learning disabled students with an education equal to that of their fellow students.[153] The university could prove necessity through the testimony of special education professionals.[154] In these circumstances, it may be true that this separate class encourages more discussion among the learning disabled students and facilitates the educational process. In addition, the cost of providing individual tutors for each class may be burdensome, whereas providing a few tutors for the entire class is possible. The university in this situation would be able to demonstrate that this separate class is necessary to provide an education of equal benefit to the learning disabled students. This inquiry, however, will only permit the university to establish a separate class. The term "necessary" does not allow the university to require that all learning disabled students enroll in the separate literature class.[155] A learning disabled student must be allowed to study literature with the non-disabled students if he or she so desires.[156]

Again, the Americans with Disabilities Act does not require the academic institution to lower its standards or substantially

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[153] *Id.*

[154] Fruth v. New York Univ., Civ. No. 93-5572 (S.D.N.Y. August 10, 1993).

[155] 42 U.S.C. § 12182(b)(1)(A)(iii) (1992).

[156] 42 U.S.C. 12182(b)(1)(C) (1992). *See also* 28 C.F.R. pt. 36 App. B, at 593 (1993).

modify the academic program, so if the disabled student does not successfully complete the mainstream literature course, the university may impose its normal sanctions on a learning disabled student, including dismissal for a failure to meet the requisite academic standards.[157] Furthermore, if the disabled student participating in the mainstream literature course requests a tutor or other accommodation, the university may note that a separate class exists which provides such accommodations. It might argue that providing individual accommodations for students choosing not to attend the separate program creates an undue financial burden.[158] If the university were to mandate that all learning disabled students attend the separate literature course, it would be in violation of the ADA.[159]

CONCLUSION

The courts must maintain diligence in ensuring that disabled persons are not discriminated against by the various institutions of our society. The task of reviewing the decisions of those institutions which have denied admission or employment to disabled persons is of great importance. Employers and academic institutions are concerned by the financial costs of accommodating disabled persons, and the law has recognized that in certain instances such costs may indeed prohibit the employment or admittance of a disabled person. In many other instances, however, the employer or university may simply be trying to avoid incurring any additional expense, including a minimal expense, and the court must be prepared to enforce the legislation prohibiting such discrimination.

Equally important is the role of the courts in reviewing programs designed to facilitate the acceptance of disabled students

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[157] *See* Anderson v. Univ. of Wis., 841 F.2d 737 (7th Cir. 1988); McGregor v. La. State Univ. Bd. of Supervisors, Civ. No. 91-4328 (E.D. La. 1992). *See also supra* notes 77-81 and accompanying text.

[158] *See* 28 C.F.R. pt. 36, App. B, at 594 (1993).

[159] *Id.*

to ensure that such programs do not have a discriminatory effect. For example, the roommate program at the University of Nebraska was originally designed to facilitate the acceptance of disabled students, but was discriminatory to a disabled person desiring the opportunity to share a room with a colleague upon arrival at the university.[160] The courts must be especially diligent in reviewing programs which mandate participation by disabled students. Both the Rehabilitation Act and the ADA seek to avoid mandated participation in programs designed to facilitate the experience of disabled persons. The Americans with Disabilities Act recognizes the discriminatory effect that mandatory programs may have on disabled students. The legislature has placed strict requirements on institutions attempting to regulate the conduct of persons based upon their actual or perceived disabilities. The courts must continue to closely scrutinize such regulations, and pay particular attention to programs which appear on their face to offer a benefit to disabled persons.

Learning disabled students have overcome many obstacles in arriving at the point where they are prepared to begin their post-secondary education. Universities and colleges must be prepared to offer these students reasonable accommodations as they pursue their educational goals. In their efforts to accommodate such students, however, institutions of higher education must pay close attention to their academic programs and be certain that accommodations are based upon the individual needs of each student and not assumptions or stereotypes about the capabilities of groups of students.

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[160] Coleman v. Zatechka, 824 F. Supp. 1360 (D. Neb. 1993).