

## DISABILITIES, LAW SCHOOLS, AND LAW STUDENTS: A PROACTIVE AND HOLISTIC APPROACH

by

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The understandable and laudable desire of law schools to comply with federal laws and regulations<sup>1</sup> forbidding discrimination against, and requiring the provision of reasonable accommodations to, qualified disabled law students has diverted attention from the range of disabilities possessed by law students and the spectrum of issues raised by disabled students in law school.<sup>2</sup> This article<sup>3</sup> is intended to serve as a starting point and a means to stimulate the needed examination and discussion.

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<sup>1</sup> The legal framework is set forth in Part II, *infra*.

<sup>2</sup> This article emphasizes the treatment of disabled individuals who have been admitted to law school. Admission-related issues and issues involving students who are applying to take the bar exam, are taking the bar exam, are seeking admission to a bar, or are seeking employment occasionally are discussed. The emphasis on admitted law students stems from my position as faculty advisor to the Academic Support Program at the Cecil C. Humphreys School of Law at The University of Memphis.

<sup>3</sup> Most of this article was written long-hand and piece-meal during a three-week winter break stay at my family's home in another state. Although there is a large university library located in the town, it was closed for much of the break; and because the university does not have a law school, there was no law library to which I had access. This had the serendipitous effect of forcing me to think about these matters without the bias--or benefit--of research materials. After returning to Memphis, citations were added, as appropriate. For better or worse, and whether they are in agreement with the opinions and perspectives which are reflected in the literature, of which I was unaware at the time I wrote the bulk of this article, the observations, explanations, and opinions offered in this article are my own.

The treatment of disabled law students is an important issue. Although most law students with a physical or mental disability apparently do not self-identify, recent studies suggest that approximately ten percent of law students possess a physical or mental disability.<sup>4</sup> Further, the number of students seeking accommodations is increasing rapidly.<sup>5</sup>

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<sup>4</sup> See Laura F. Rothstein, *Introduction to Disability Issues in Legal Education: A Symposium*, 41 J. LEGAL EDUC. 301, 305 (1991) [hereinafter Rothstein, *Introduction*]; Laura F. Rothstein, *Students, Staff and Faculty with Disabilities: Current Issues for Colleges and Universities*, 17 J.C. & U.L. 471, 471 (1991) [hereinafter Rothstein, *Current Issues*]. The actual number of law students who possess a disability within the meaning of the relevant statutes and regulations is unknown. Such a student may not self-identify because she is unaware of her right to self-identify and to receive reasonable accommodations or because she is afraid of the real or imagined negative results of self-identifying.

In an empirical study of 80 law schools during the 1994-95 academic year, of the 58,932 students attending the schools, 1187, or 2%, "request[ed] reasonable accommodations in course examinations claim[ing] to have a physical or mental disability." Donald Stone, *The Impact of the Americans with Disabilities Act on Legal Education and Academic Modifications for Disabled Law Students: An Empirical Study*, 44 U. KAN. L. REV. 567, 568-69 (1996). According to the study, law schools granted the request in approximately 98% of the cases. See *id.* at 569 n.6 (in situations in which the law school determined whether to grant a request, "[o]ut of 1145 student requests for reasonable accommodations in course examinations during the 1994-95 academic year, the law schools denied only 25 such requests.").

<sup>5</sup> See, e.g., Phyllis G. Coleman et al., *Law Students and the Disorder of Written Expression*, 26 J. L. & EDUC. 1, 9 (1997). Coleman et al. also note that while "[f]or many years, law students did not ask for accommodations and frequently even attempted to disguise their disabilities to 'pass' as part of the 'normal' population . . . [t]oday, however, just the opposite is true, and even students who do not have disabilities are demanding--and receiving--differential treatment." *Id.* at n.31.

Most law school disability-related decisions are based on a case-by-case evaluation, without litigation or administrative proceedings, and with only the guidance of elastic and elusive statutory and regulatory standards denoted by such terms and phrases as “disability,” “substantially limits,” “qualified individual,” and “reasonable accommodation.” The indeterminacy of these terms and phrases means that the most important factors in a particular disability-related decision are the nature of the disability, the relevant pedagogical, normative, administrative, and practical concerns, and the decision makers’ disability-related attitudes and perspectives. In this context, it is imperative that the diverse nature of physical and mental impairments and disabilities,<sup>6</sup> as well as their effects, be understood. In addition, it is necessary to weave the factors that influence disability-related decisions into a comprehensive philosophy and to develop a general procedural response to disabled students who need reasonable accommodations.

The direct treatment of disability-related statutes, regulations, and cases in this article is relatively minimal. The legal framework that governs disability issues in higher education, including legal education, has been examined both competently and thoroughly.<sup>7</sup> Thus, the summary of the legal framework in Part

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<sup>6</sup> As all attorneys know, the meaning of a word or phrase is contextual and may be legally relevant. The general term “impairment” is used colloquially to refer to a physical or mental illness, injury, or condition, and in common usage “impairment” frequently is used interchangeably with “disability.” The relevant federal legislation and regulations invest “disability” with a technical meaning; “disability” refers to an impairment that meets the legal definition of disability and, thus, gives rise to a set of legal rights and responsibilities. Unless indicated to the contrary, “disability” and “disabled” are used in this article to mean a physical or mental impairment that a relevant decision maker (a court, a law school administrator, a university office of disability services, etc.) believes to meet the legal definition of “disability” or “disabled,” or which a law student asserts meets the legal definition. “Impairment” is used in this article to refer to an illness, injury, condition, or the like, without regard to whether there has been a determination that the impairment constitutes a disability in the legal sense.

<sup>7</sup> See, e.g., Lisa Eichorn, *Reasonable Accommodations and Awkward Compromises: Issues Concerning Learning Disabled Students and Professional Schools in the Law School Context*, 26 J.L. & EDUC. 31 (1997); Rothstein, *Introduction*, *supra* note 4; M. Kay Runyan & Joseph F. Smith, Jr., *Identifying and Accommodating Learning Disabled Law School Students*, 41 J. LEGAL EDUC. 317 (1991); Stone, *supra* note 4; Bonnie Poitras Tucker, *Application of the Americans with Disabilities Act (ADA) and Section 504 to Colleges and Universities: An Overview and Discussion of Special Issues Relating to Students*, 23 J.C. & U.L. 1 (1996); Michelle Morgan Ketchum, Note, *Academic Decision-Making: Law Schools’ Discretion Under the Americans with Disabilities Act*, 62 UMKC L. REV. 209 (1993). See also JOHN PARRY (ED. AND PRIMARY AUTHOR),

II merely outlines the basic legal concepts which serve as the focal points for a policy-oriented and practical analysis in the remainder of the article.

The legal framework establishes a floor, not a ceiling, for law school administrators and legal educators. To fulfill their dual roles as educational institutions and professional schools, law schools, and the law school administrators and legal educators who run them, must go beyond the minimum requirements imposed by law. Decision makers should interpret expansively both “disability” and “reasonable accommodation.” A wide range of accommodations and services should be made available to, but not forced upon the disabled law student without regard to whether she requested them. In addition, similar accommodations and services should be provided to students with temporary conditions or impairments, such as pregnancy or a broken hand, which are not covered by disability laws, but which may impair a student’s ability to pursue her law school education.<sup>8</sup>

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REGULATION, LITIGATION AND DISPUTE RESOLUTION UNDER THE AMERICANS WITH DISABILITIES ACT: A PRACTITIONER’S GUIDE TO IMPLEMENTATION (2d ed. 1996) (providing a further overview); 1 HENRY H. PERRITT, JR., AMERICANS WITH DISABILITIES ACT HANDBOOK (3d ed. 1997) (providing an overview of disability law as it pertains to a variety of situations, including employment and education); LAURA F. ROTHSTEIN, DISABILITIES AND THE LAW (1992) (discussing primarily federal disability laws, but also some state laws) [hereinafter DISABILITIES AND THE LAW].

<sup>8</sup> See e.g. DISABILITIES AND THE LAW, *supra* note 7, at 36.

These positions are grounded in the pedagogical and normative convictions that law school administrators and legal educators should work actively to develop fully all students' skills and abilities and that they must do so in an environment of tolerance, inclusiveness, assistance, and understanding. A "sink-or-swim," Darwinian approach is particularly anathematic when dealing with students who have disabilities or any temporary conditions or impairments which interfere with their legal education.<sup>9</sup> That having been said, *all* students ultimately are responsible for their level of effort and the extent to which they develop their potential. It is possible (and absolutely necessary) to reconcile the unwavering requirement of high, professional-level standards and the inclusion of *qualified* disabled individuals in law school student bodies who need and make use of a wide range of accommodations.<sup>10</sup>

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<sup>9</sup> Although this article focuses on students who are disabled within the meaning of the relevant federal disability-related legal framework, at several points, I assert that the same basic accommodations should be provided to non-disabled students with temporary conditions or impairments. Much of what is discussed throughout the article, such as the nature of physical and mental impairments and the type of accommodations which could be made in response to them, has obvious relevance to non-disabled, but temporarily impaired, students.

<sup>10</sup> Lest I lose, or perhaps at the risk of losing, some readers at this point, I want to reaffirm my uncompromising and unwavering commitment to high, professional-level standards with respect to class preparation, class performance, grading, and participation in activities such as law review and moot court. Standards and essential elements of the law school program must not be compromised. We owe this not only to our students, disabled and non-disabled, so they will receive a meaningful education, but also to the members of the public, so they will receive quality legal representation by all our graduates.

The inclusion of qualified disabled individuals in law school student bodies and their use of a wide range of appropriate accommodations will neither lower standards nor compromise the educational program. First, many disabilities have nothing to do with a student's academic abilities and precious little to do with the capacity to function as a student. For example, a paraplegic student may require accommodation regarding the classrooms in which her classes are held, but her disability has no direct bearing on her academic ability or on her ability to prepare for and participate in class, write required memos and briefs, or take examinations. She is not advantaged, standards are not lowered, the law school program is not jeopardized either by her presence or the accommodation that her classes be held in a wheelchair-accessible classroom.

Second, unless she self-identifies or has a disability which was obvious during an on-campus interview or tour, the school will not know of a student's disability during the admissions process. Her admission, or rejection, will be based on the same objective factors as are applied to other, non-disabled students. Even if her LSAT is flagged as having been taken with an accommodation having been granted, the student will still be rejected if her total academic profile is insufficient.

Third, once she is admitted, the disabled student will have to meet the same minimum

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level of competency, as measured by grade point average, as any other student. Because exams are graded anonymously, the disabled student will not receive more lenient treatment during the grading process. An objection may be raised that permitting a student to have extra time to complete an examination will permit a borderline disabled student to pass her courses and stay in school. However, including the advice of a professional diagnostician and an educational specialist in the process of establishing the amount of extra time to be given should help assure the student merely is given an accommodation for her disability, not an advantage over her classmates.

As previously noted, this article examines and discusses the spectrum of issues raised by the presence of disabled students in law school student bodies. In order to accomplish this task, the article is divided into five substantive parts. Part I provides information concerning the nature and effects of the disabilities which are likely to be present in law school student bodies. This information is required in order to assess the presence of disabilities, the accommodations which are reasonable in light of a given disability's effects, and why a holistic approach to disabilities is required. Part I describes three categories of disabilities: 1) physical and medical disabilities; 2) learning disabilities, Attention Deficit Disorder, and Attention-Deficit Hyperactive Disorder; and 3) emotional and mental disabilities. Part II summarizes the federal legal framework which governs disabled students in law schools, thus setting the stage for Part III and Part IV. Part III examines the definition of "disability" under the relevant federal statutes and regulations. Part IV briefly explores the concept of accommodations under the federal legal framework, outlines the principal accommodations currently provided by law schools, and discusses the factors which should be considered when determining whether an accommodation is reasonable. Finally, Part V ties together this article by considering principles which should guide a law school's treatment of disabled students and by setting forth the outline of a model program for disabled law students.

#### I. MAJOR CLASSIFICATIONS OF PHYSICAL AND MENTAL IMPAIRMENTS WHICH OFTEN QUALIFY AS DISABILITIES.

A wide variety of physical and mental impairments may result in a disability<sup>11</sup> as defined by the relevant legal framework; these disabilities occur with varying degrees of severity and frequently occur in combination.<sup>12</sup> Inasmuch as different

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<sup>11</sup> I am not an expert, nor do I believe the intended audience of this article will comprise experts, on the range of physical and mental impairments which may result in disabilities. Therefore, I intentionally have avoided using technical, medical jargon. I assume, however, that the reader has at least a basic familiarity with most physical and mental conditions addressed, and, thus, most explanatory discussion and material about particular conditions is located in footnotes. Readers who desire additional information concerning a particular physical or mental condition may access the references which I include in my footnotes through LEXIS; NEWS; MAGS. I included those references which I considered to be the most current, accurate, comprehensive, and approachable by my intended audience.

<sup>12</sup> To facilitate the flow of this discussion, I address each impairment as if it always constitutes a disability in the legal sense. Of course, in a given case, the impairment may not be of sufficient severity or duration to be classified as a disability under the relevant legal standard.

disabilities, or combinations of disabilities, affect distinct aspects of a student's physical and academic capacities, each disabled student's situation is unique. However, a general understanding of the range of physical and mental disabilities, as well as their causes and typical consequences, will permit law school administrators and legal educators to assess more accurately whether a given student's impairment constitutes a disability and what constitutes a reasonable accommodation. Further, this information will permit legal educators to assist more effectively each disabled law student in maximizing and fulfilling her potential.

Despite their diversity, physical and mental disabilities may be divided into three broad categories based on their etiologies and their resulting functional limitations:<sup>13</sup> physical/medical, learning-related and emotional disabilities. Each category is discussed in turn.

A. *Physical/Medical Disabilities.*

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<sup>13</sup> *But see, e.g.,* Michael West et al., *Beyond Section 504: Satisfaction and Empowerment of Students with Disabilities in Higher Education; Section 504 of the Rehabilitation Act of 1973*, 59 *EXCEPTIONAL CHILDREN* 456 (1993).

Disability classifications were collapsed into four categories: (a) physical impairments, including cerebral palsy, spinal cord injury, spina bifida, arthritis, head injury, epilepsy, multiple sclerosis, and other orthopedic or chronic health impairments; (b) sensory impairments, which included vision, hearing, and language or communication impairments; (c) specific learning disabilities; and (d) psychiatric/addictive disorders, which consisted primarily of people with long-term mental illness, but also included people with chronic alcohol and drug dependency.

*Id.* at 458. I adopted a three-category classification due to the fact that "physical impairments" and "sensory impairments" often share some of the same underlying causes (such as diabetes, a physical impairment, and diabetic retinopathy, an eye or sensory impairment). Thus, while I focus on the disability's etiology, the classificatory scheme used by West et al. focuses more on the disability's impact (e.g., physical, which tend to be movement-related impairments, versus sensory, which tend to be communication-related impairments). *C.f. id.* In the end, however, we cover the same territory in all material respects.

Physical/Medical Disabilities (PMDs) are disabilities which result from a disease or condition which is primarily physical and medical in nature.<sup>14</sup> PMDs include gross and fine motor impairments due to such factors as spinal cord injury (e.g., paraplegia and quadriplegia),<sup>15</sup> cerebral palsy,<sup>16</sup> and neuromuscular diseases (e.g., muscular dystrophy and Lou Gehrig's Disease);<sup>17</sup> diabetes;<sup>18</sup> autoimmune diseases (e.g., rheumatoid arthritis, lupus, and multiple sclerosis);<sup>19</sup>

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<sup>14</sup> Stone reports that of the 1187 law students who requested reasonable accommodations on exams, 375, or 31.6%, were in the "physical disability" category; 79, or 6.7%, were in the "blind" category; 14, or 1.2%; were in the "deaf/hearing impaired" category; and 65, or 5.5%, were in the unexplained "other" category. Stone, *supra* note 4, at 570 (figure 2).

<sup>15</sup> For general discussions of spinal cord injuries, including causes, diagnostic criteria, and treatment, see Douglas Cairns & John Baker, *Adjustment to Spinal Cord Injury: A Review of Coping Styles Contributing to the Process*, J. REHABILITATION, October 1993, at 30; Vance O. Gardner & Vince Caiozzo, *Medical Management of Spinal Cord Injury*, 155 W. J. OF MED. 169 (1991); Samuel L. Stover, *Facts, Figures, and Trends on Spinal Cord Injury: Part 1 of 3*, AM. REHABILITATION, September 22, 1996, at 25.

<sup>16</sup> The most obvious effect of cerebral palsy is motor dysfunction, both gross and fine. For a brief, but thorough, discussion of cerebral palsy, including causes, diagnostic criteria, and treatment, see Gabriella E. Molnar, *Rehabilitation in Cerebral Palsy; Rehabilitation Medicine: Adding Life to Years*, 154 W. J. MED. 569 (1991).

<sup>17</sup> Neuromuscular diseases comprise a wide variety of conditions, most of which manifest themselves in the deterioration or loss of fine or gross motor control. For discussions of neuromuscular diseases, including causes, diagnostic criteria, and treatment, see Kathy A. Fackelmann, *Home Run or Foul Ball? A New Drug for Lou Gehrig's Disease Gets Mixed Reviews*, SCI. NEWS, March 26, 1994, at 202; Kathleen A. Ferguson et al., *Sleep-Disordered Breathing in Amyotrophic Lateral Sclerosis*, 110 CHEST 664 (1996); Sean Henahan, *Combination Approach May be Key to Lou Gehrig's Disease*, DRUG TOPICS, May 6, 1995, at 78; John R. Mathias et al., *Neuromuscular Diseases of the Gastrointestinal Tract*, POST GRADUATE MED., March, 1995, at 95; Stephen A. McGuire, *Diagnosing Duchenne Muscular Dystrophy*, 150 W. J. MED. 575 (1989); Jennie C. Wood-Young, *What is Muscular Dystrophy?*, CURRENT HEALTH 2, March, 1993, at 30; Ronald Worton, *Muscular Dystrophies: Diseases of the Dystrophin-Glycoprotein Complex*, 270 SCI. 755 (1995).

<sup>18</sup> For discussions of diabetes, including causes, diagnostic criteria, and treatment, see Carolyn Leontos et al., *National Diabetes Education Program: Opportunities and Challenges*, J. AM. DIABETIC ASS'N, January, 1998, at 73; Nicolas N. Abourizk, *What Type of Diabetes Do You Have?*, DIABETES NEWS, January, 1994, at 40; Craig Steinburg, *Psyching out Depression*, DIABETES FORECAST, December, 1993, at 18; Sheldon J. Bleicher, *Diabetes has Link with Many Other Diseases*, DIABETES NEWS, September, 1992, at 28; Nicolas N. Abourizk, *Diabetes has Many Types, Characteristics*, DIABETES NEWS, September, 1991, at 28.

<sup>19</sup> Putting a substantial gloss on the matter, an autoimmune disease is a disease in which the body's immune system attacks and injures some part of the individual's own

chronic fatigue syndrome;<sup>20</sup> general physical trauma (e.g., broken limbs and neck or back injuries); thyroid disorders;<sup>21</sup> epilepsy;<sup>22</sup> and HIV/AIDS.

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body. Depending on the particular autoimmune disease, almost any part or system of the body is at risk of minor to life-threatening damage. For general discussions of relatively common autoimmune diseases, including causes, diagnostic criteria, and treatment, see Bruce R. Parker, *Immunology Made Easy: What Every Trial Advocate Should Know*, 63 DEF. COUNS. J. 345 (1996); Elaine M. Hay & Michael L. Snaith, *Systemic Lupus Erythematosus and Lupus-Like Syndromes*, 310 BRIT. MED. J. 1257 (1995); Andrea Hemlock, *Masterclass: Connective Tissue Disorders*, PULSE, October 18, 1997, at 96 (interviewing Andrew Bamji); Jean Marx, *Taming Rogue Immune Reactions*, 249 SCI. 246 (1990); Laura B. Ostezan & Jeffrey P. Callen, *Cutaneous Manifestations of Selected Rheumatologic Diseases*, 53 AM. FAM. PHYSICIAN 1625 (1996).

<sup>20</sup> As its name implies, chronic fatigue syndrome results in chronic and often debilitating fatigue, as well as symptoms such as headaches and difficulty in concentrating. For general discussions of chronic fatigue syndrome, including causes, diagnostic criteria, and treatment, see Leonard Calabrese et al., *Chronic Fatigue Syndrome; Clinical Manifestations, Psychologic Factors, Pathogenesis & Immunologic Factors, Laboratory Tests, Treatment*, 45 AM. FAM. PHYSICIAN 1205 (1992); Nancy S. Fuller, M.D. et al., *Chronic Fatigue Syndrome*, POST-GRADUATE MED., January 1998, at 175 (“Fatigue is the seventh most common problem in primary care practice. Among the many causes is chronic fatigue syndrome, a debilitating illness that can affect persons of all ages.”); Gael MacLean & Simon Wessely, *Professional and Popular Views of Chronic Fatigue Syndrome*, 308 BRIT. MED. J. 776 (1994).

<sup>21</sup> Thyroid disorders cover a wide variety of conditions, some in which the thyroid is overactive (hyperthyroidism), some in which the thyroid is underactive (hypothyroidism). Therefore, the effects of thyroid disorders vary widely, but may include fatigue, depression, and an inability to concentrate. For general discussions of relatively common thyroid disorders, including causes, diagnostic criteria, and treatment, see Anthony J. Costa, *Interpreting Thyroid Tests*, 52 AM. FAM. PHYSICIAN 2325 (1995); Paul H. Pronovost, M.D. & Kristin H. Parris, M.D. *Perioperative Management of Thyroid Disease*, POST-GRADUATE MED., August 1, 1995, at 83; Roland Sakiyama, *Thyroiditis: A Clinical Review*, 48 AM. FAM. PHYSICIAN 615 (1993).

<sup>22</sup> “Epilepsy is a chronic neurologic condition characterized by abnormal electrical discharges in the brain manifested as two or more unprovoked seizures.” U.S. Department of Health and Human Services, *Prevalence of Self-Reported Epilepsy--United States, 1986-1990*, 43 MORBIDITY & MORTALITY WKLY. REP. 810, 810 (1994). For general discussions of epilepsy, including causes, diagnostic criteria, and treatment, see *id.*; Rajendra Kale, *Bringing Epilepsy Out of the Shadows*, 314 BRIT. MED. J. 2 (1997).

The effects of these PMDs may include loss of fine or gross motor coordination, loss of mobility due to orthopedic problems, fatigue, loss of the ability to concentrate for extended periods, extreme pain, increased susceptibility to common illnesses such as a cold and flu, blackouts, and seizures. As a result, students afflicted with these PMDs may experience limitations in walking, opening doors, climbing or descending stairs, using lavatory facilities, using provided seating in classrooms and libraries, sitting for an entire class period, reaching for and removing books from library shelves, typing, handwriting, looking down to read or write for a long period of time, or turning pages. The fatigue, pain, and inability to concentrate which are associated with some of these PMDs also may impair a student's intellectual functioning.

PMDs also include impairments of the ability to see (e.g., total blindness, glaucoma,<sup>23</sup> tunnel vision,<sup>24</sup> and diabetic retinopathy<sup>25</sup>), hear,<sup>26</sup> and speak (e.g.,

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<sup>23</sup> Glaucoma is a potentially progressive eye disease which can cause total or partial loss of sight. It is more likely to occur among insulin-dependent diabetics and individuals with high blood pressure or atherosclerosis. For general discussions of glaucoma, including causes, diagnostic criteria, and treatment, see Anne L. Coleman, *Glaucoma Screening: A Golden Opportunity*, 52 AM. FAM. PHYSICIAN 2167 (1995)(discussing a variety of vision-related problems); Joseph G. Feghali, *Watching Out for Glaucoma*, DIABETES FORECAST, June, 1991, at 18.

<sup>24</sup> For a discussion of tunnel vision, see Barbara M. Ribakove, *The End of the Tunnel; New Lenses for Tunnel Vision*, HEALTH, May, 1984, at 8.

Retinitis pigmentosa [is] an incurable, untreatable hereditary disease that causes the pigment of the eye to deteriorate . . . throughout the patient's life, until he or she may have lost so much peripheral vision (what you see out of the corner of the eye) that what's left is called tunnel vision: a tiny bit of light in the center of a sea of darkness.

*Id.*

<sup>25</sup> Diabetic retinopathy is a potentially progressive eye disease which can cause total or partial loss of sight. Insulin-dependent diabetics are at particularly high risk. For general discussions of diabetic retinopathy, including causes, diagnostic criteria, and treatment, see Everett Ai, *Current Management of Diabetic Retinopathy*, 157 W. J. MED. 67 (1992); David M. Brown & Eric A. Orzek, *Diabetic Retinopathy: How and When to Screen*, 36 CONSULTANT 1412 (1996).

<sup>26</sup> See Philip Zazove & Paul R. Kileny, *Devices for the Hearing Impaired; Practical Therapeutics*, 46 AM. FAM. PHYSICIAN 851 (1992) (footnotes omitted) (discussing the prevalence of hearing problems, their causes, and practical methods to assist the hearing impaired). See also Hugh Latimer et al., *Sound Design; Building Design for the Hearing-Impaired*, AM. SCH. & UNIV., May 1, 1994, at 58 (focusing on the practical aspects of designing, or making changes in, a building to accommodate the hearing impaired).

stuttering<sup>27</sup>). Each of these PMDs results in rather obvious limitations of the ability to read, research, write and edit written work, and participate in class and moot court activities.

Legal administrators and legal educators must recognize that certain characteristics associated with PMDs require that they take a flexible, holistic, and continuing approach both to determine the nature and severity of a student's disability and to provide the disabled student with reasonable accommodations. First, PMDs differ in their duration, stability, and severity. Some PMDs are permanent and stable, such as paralysis due to a severed spinal cord. Some PMDs and their symptoms vary in severity, with changes being gradual or sudden, permanent or temporary. For example, the condition of a student with a degenerative muscular disease or HIV/AIDS likely will decline, while a student with a chronic illness may experience either periodic exacerbations (e.g., a flare up of lupus, a diabetic coma, or an epileptic seizure) or periods of remission (e.g., lupus or muscular sclerosis). A PMD may be "controlled" by medication for long periods (e.g., diabetes and epilepsy) or cured (e.g., cancer).

Second, even when the primary PMD is stable and permanent, the student may experience secondary problems, such as an increased risk of urinary tract infections in wheelchair-bound individuals, which may cause additional and intermittent functional impairments or disabilities. Although the secondary problems might not significantly impair a non-disabled student's ability to function, they may have a much more profound impact on an already disabled student. Therefore, law school administrators and legal educators should evaluate secondary problems from the perspective of their impact on the disabled student, not from the perspective of their impact on the average law student.

Third, treatments for many PMDs result in additional secondary functional limitations, which vary in frequency (including the frequency of treatment), duration, and severity. For example, anti-pain medication containing codeine may produce a continuous sedative effect that reduces the student's ability to concentrate while studying, in class, or taking exams. Another example is the

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<sup>27</sup> For general discussions of stuttering and other speech pathologies, including causes, diagnostic criteria, and treatment, see Bruce Bower, *Brain Scans Show Inner Side of Stuttering; Positron Emission Tomography Links Mix of Excessive and Insufficient Brain Activity to Stuttering*, SCI. NEWS, July 13, 1996, at 23; Jacqueline Shannon, *Speaking Easy: For Kids Who Stutter, Early Treatment Can Make the Words Flow Smoothly*, HEALTH, April, 1991, at 38 (reviewing possible psychological, physiological, and neurological causes and indicating the potential for a strong, negative emotional impact resulting from the condition); *Help for 10 Million Americans Who Suffer Speech Problems*, U.S. NEWS & WORLD REP., September 11, 1978, at 70 (interviewing Dr. Christy L. Ludlow and discussing such speech difficulties as stuttering, lispings, and mispronunciation of words).

profound, but relatively short-term impact of intermittent chemotherapy or radiation therapy on the cancer patient.

Fourth, PMDs such as lupus and migraine headaches may be exacerbated by stress. Therefore, it would not be unusual to find a student's symptoms increasing in severity immediately before or during a required moot court competition, a law review write-on competition, or exams. Legal educators and administrators should not view the timing of the student's problem as "convenient" or "opportunistic," but should investigate whether the PMD is one that is normally exacerbated by stress.

Finally, a PMD may result in psychological problems (e.g., depression or negative self-concepts),<sup>28</sup> social problems (e.g., the difficulty experienced by paralyzed or hearing-impaired students in interacting with non-disabled students in the informal settings in which much discussion, learning, and networking takes place),<sup>29</sup> and stigma (e.g., a student with HIV/AIDS).

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<sup>28</sup> See, e.g., Gordon J. Casebolt & Chastity L. Walker, *Lifting the Shadows; part 1: Dealing with Depression*, PARAPLEGIA NEWS, August 1, 1996, at 68 (discussing depression in individuals with spinal cord paralysis); Susan Perry, *When Speaking is a Struggle: Stuttering*, CURRENT HEALTH 2, March, 1990, at 12 (discussing the negative self-image and social isolation which often accompanies stuttering); *Help for 10 Million Americans Who Suffer Speech Problems*, supra note 27 (interviewing Dr. Christy L. Ludlow and discussing such speech difficulties as stuttering, lisping, and mispronunciation of words and the shyness and low self-esteem which often accompany them). But see, Ramiro Martinez & Kenneth W. Sewell, *Self-Concept of Adults with Visual Impairments*, J. REHABILITATION, April, 1996, at 55. Martinez and Sewell state:

The hypothesis that individuals with visual impairments would exhibit more negative self-concept scores than persons with full vision was not substantiated by the present study[; with the authors speculating] [f]irst, it is generally known that adolescents are far more concerned with "fitting in" than are adults. Perhaps as people grow older, they come to realize that being different is not as bad as they once thought and this realization is reflected in a more adaptive self-concept. However, there is a second alternative interpretation. It could be the case that only those persons with visual impairment who already possess a more positive self-concept will pursue and succeed in college.

*Id.* The results of the study by Martinez and Sewell suggest the need for a case-by-case assessment of the psychological impact of an individual's disability.

<sup>29</sup> See, e.g., West et al., supra note 13, at 462 ("[a] barrier identified by a large number of students with disabilities centered on the social isolation, ostracism, or scorn they felt from their instructors and fellow students, either because of their disabilities or because they requested accommodations to which other students were not entitled."); see also Cathaleen A. Roach, *A River Runs Through It: Tapping into the Informational Stream to Move Students from Isolation to Autonomy*, 36 ARIZ. L. REV. 667 (1994) (discussing the

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difficulties faced by minorities and non-traditional students in social integration and the detrimental educational impact of lacking access to the informal educational process which accompanies social integration).

In conclusion, a PMD may directly reduce a student's ability to engage in the pursuit of a law school education, and the resulting reduction in a student's ability to function will require accommodation. Further, a PMD may result in secondary effects that interfere with academic achievement, such as psychological problems, stigma, and social problems. If secondary effects constitute disabilities, the student must receive accommodations for them. Even if a secondary effect does not, by itself, constitute a "disability," the best view is that it should be addressed by law school administrators and legal educators as part of the overall assistance provided to the disabled law student.

*B. Learning Disabilities, Attention Deficit Disorder, and Attention-Deficit Hyperactivity Disorder.*<sup>30</sup>

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<sup>30</sup> Because learning disabilities, Attention Deficit Disorder (ADD) and Attention-Deficit Hyperactivity Disorder (ADHD) are discussed in The American Psychiatric Association's DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 4th ed. Washington, D.C., American Psychiatric Assoc., (1994) [hereinafter DSM-IV], it can be argued that these disabilities are psychological or psychiatric in nature. Because they have a direct and profound negative impact on the ability to learn and are not primarily emotional in nature, this article treats them as comprising a separate category of disabilities.

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Learning Disabilities (LDs),<sup>31</sup> Attention Deficit Disorder (ADD),<sup>32</sup> and

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<sup>31</sup> The Rehabilitation Act and the ADA include “mental impairments” in their definitions of disability. *See, e.g., infra* note 110 and accompanying text. The regulations which implement this legislation refer to “specific learning disabilities.” *See, e.g., infra* note 121. However, neither the laws nor the regulations define “learning disabilities.”

There are many definitions of learning disabilities. A definition which has gained wide acceptance among academics and learning disabilities specialists is used by the National Joint Committee on Learning Disabilities:

Learning Disabilities is a general term that refers to a heterogeneous group of disorders manifested by significant difficulties in the acquisition and use of listening, speaking, reading, writing, reasoning, or mathematical abilities. These disorders are intrinsic to the individual, presumed to be due to central nervous system dysfunction, and may occur across the lifespan. Problems in self-regulatory behaviors, social perception, and social interaction may exist with learning disabilities but do not themselves constitute a learning disability. Although learning disabilities may occur concomitantly with other handicapping conditions (e.g., sensory impairment, mental retardation, serious emotional disturbance), or with extrinsic influences (such as cultural differences, insufficient or inappropriate instruction), they are not the result of those conditions or influences.

NATIONAL JOINT COMMITTEE ON LEARNING DISABILITIES, COLLECTIVE PERSPECTIVES ON ISSUES AFFECTING LEARNING DISABILITIES (1994).

The Individuals With Disabilities Education Act, 20 U.S.C. §§ 1400-1461 (1988) and its implementing regulation, 34 C.F.R. § 300.7(b)(10), define “specific learning disability” as a

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

*Id.*

These definitions have been criticized for not including social deficits. *See, e.g., Runyan & Smith, supra* note 7, at 318-19 & nn.7-9.

For a case which has adopted the IDEA definition due to the lack of statutory or regulatory definition under the Rehabilitation Act or ADA, see *Argen v. New York State Bd. of Law Exam'rs*, 860 F. Supp. 84, 87 (W.D.N.Y. 1994).

For in-depth treatments of learning abilities and law students, see Eichorn, *supra* note 7; Runyan & Smith, *supra* note 7 (including an appendix which lists and describes many common learning disabilities and a questionnaire for to be used in assessing whether a student may need to be referred for testing for a learning disability); Robert W. Edwards, Note & Comment, *The Rights of Students with Learning Disabilities and the Responsibilities of Institutions of Higher Education Under the Americans with Disabilities*

Attention-Deficit Hyperactivity Disorder (ADHD)<sup>33</sup> are relatively specific neurological or biochemical conditions which impair a student's ability to take in, retain, recall, comprehend, analyze, process or manipulate, organize, and/or express (either verbally or in writing) information, concepts, and ideas.<sup>34</sup> These disabilities, principally ADD and ADHD, also include neurological or biochemical conditions which undermine a student's ability to concentrate, stay "on task," avoid being distracted by noise or other stimuli, and organize his or her

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*Act*, 2 J.L. & POL'Y 213 (1994). For a general discussion of learning disabilities and a history of the development of the term "learning disability," see Alfreda A. Sellers Diamond, *L.D. Law: The Learning Disabled Law Student as a Part of a Diverse Law School Environment*, 22 S.U. L. REV. 69, 70-75 (1994); KENNETH A. KAVALE & STEVEN R. FORNESS, *THE NATURE OF LEARNING DISABILITIES: CRITICAL ELEMENTS OF DIAGNOSIS AND CLASSIFICATION* (1995), see generally Ron Nelson & Benjamin Lignugaris-Kraft, *Postsecondary Education for Students with Learning Disabilities*, 56 *Exceptional Children* 246 (1989) (examining possible reasons for the apparent increase in learning disabled students in colleges and universities, as well as outlining existing and potential assistance for learning disabled students in postsecondary institutions).

<sup>32</sup> Although the Rehabilitation Act and the ADA include "mental impairments" in their definitions of disability, see, e.g., *infra* note 110 and accompanying text, they do not define ADD. Nor do the regulations which implement the legislation, but which do refer to "specific learning disabilities." See *infra* note 121.

There are many definitions of ADD in professional use. On this much everyone agrees: ADD is characterized by excessive inattention, impulsiveness, and activity; it usually begins during childhood; and it is a life-long condition. See generally Penelope Krener, *Adult Attention-Deficit Disorder*, 164 W. J. MED. 259 (1996). For discussions of ADD and the diagnostic tools used in determining whether ADD is present, see James D. McKinney et al., *Educational Assessment of Students with Attention Deficit Disorder*, *EXCEPTIONAL CHILDREN*, October, 1993, at 125 (including criteria for diagnosing ADD); Cynthia A. Riccio et al., *Neurological Basis of Attention Deficit Hyperactivity Disorder*, *EXCEPTIONAL CHILDREN*, October, 1993, at 118 (discussing the neuroanatomical, neurochemical, and neurophysiological etiologies of ADD, including ADHD).

<sup>33</sup> ADHD is a subtype of ADD which is characterized by a particularly high level of activity. See Riccio et al., *supra* note 32 (discussing the neuroanatomical, neurochemical, and neurophysiological etiologies of ADD, including ADHD). See generally, Hani R. Khouzam, *Attention Deficit Hyperactivity Disorder in Adults: Guidelines for Evaluation and Treatment*, 37 *CONSULTANT* 2159 (1997) (including criteria for diagnosing ADHD); Steven R. Pliszka, *Attention-Deficit Hyperactivity Disorder: A Clinical Review*, 43 *AM. FAM. PHYSICIAN* 1267 (1991) (including criteria for diagnosing ADHD). For a less sympathetic view of the existence of ADHD, see Robert Reid et al., *Attention Deficit Hyperactivity Disorder as a Disability Category: A Critique*, *EXCEPTIONAL CHILDREN*, December, 1993, at 198 (Although the article is critical of ADHD as a disability classification, it contains a comprehensive analysis of the asserted causes of ADHD, its diagnostic criteria, and common treatments for individuals diagnosed with ADHD.).

<sup>34</sup> For a similar description, see Eichorn, *supra* note 7, at 33-35.

life and work.

A person with a specific learning disability typically does not perform at an expected level of ability for her age and possesses a large discrepancy between intellectual ability, as measured by tests, and actual performance in one or more domains:<sup>35</sup> “(i) Oral expression; (ii) Listening comprehension; (iii) Written

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<sup>35</sup> The American Psychiatric Association’s DSM-IV describes the diagnostic technique and criteria for learning disabilities:

Learning Disorders are diagnosed when the individual’s achievement on individually administered, standardized tests in reading, mathematics, or written expression is substantially below that expected for age, schooling, and level of intelligence. . . . Substantially below is usually defined as a discrepancy of more than 2 standard deviations between achievement and IQ . . . .

*Supra* note 30, at 46. As an example of the type of documentation and diagnostic criteria required by a law school in order to receive accommodations for a learning disability, Adams refers to the University of Houston Law Center’s HANDBOOK FOR STUDENTS AND APPLICANTS WITH DISABILITIES (1993). She indicates that:

[t]he handbook requires that students wishing accommodation for learning disabilities provide professional testing and evaluation results: The four criteria necessary to establish a student’s eligibility for learning disability adjustments or accommodations are: (1) average or above average intelligence as measured by a standardized intelligence test which includes assessment of verbal and non-verbal abilities; (2) the presence of a cognitive-achievement discrepancy or an intra-cognitive discrepancy indicated by a score on a standardized test of achievement which is 1.5 standard deviations or more below the level corresponding to a student’s sub-scale or full-scale IQ; (3) the presence of disorders in cognitive or sensory processing such as those related to memory, language, or attention; and (4) an absence of other primary causal factors leading to achievement below expectations such as visual or auditory disabilities, emotional or behavioral disorders, a lack of opportunity to learn due to cultural or socio-economic circumstances, or deficiencies in intellectual ability.

Susan Johanne Adams, *Because They’re Otherwise Qualified: Accommodating Learning Disabled Law School Writers*, 46 J. LEGAL EDUC. 189, 198 n.36 (1996).

The DSM-IV and the University of Houston Law Center Handbook for Students and Applicants with Disabilities indicate a significant level of agreement in the definition of, and the methods for, diagnosing LDs. They also indicate the continuing controversy concerning how great the discrepancy must be between achievement and intelligence. Because it requires a discrepancy of two standard deviations, the DSM-IV definition is more restrictive than the definition used by The University of Houston Law Center. Under the current legal framework, a law school has significant latitude in defining what constitutes a learning disability, as well as when a law student has ADD and ADHD. The institution’s willingness to assist individuals possessing some level of a learning disability will drive the decision as to what degree of disparity is sufficient to constitute a learning disability for the purpose of the classification of disability and the accompanying accommodations.

expression; (iv) Basic reading skill; (v) Reading comprehension; (vi) Mathematics calculation; or (vii) Mathematics reasoning.”<sup>36</sup>

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<sup>36</sup> 34 C.F.R. § 300.541(a)(2) (1998). Although learning disabilities are too diverse to permit a comprehensive listing and description, Diamond provides a good summary of the principal learning disabilities:

[Dyscalculia is] difficulty in performing mathematical computation . . . . Dyslexic individuals may experience an impaired ability to read or understand what is read, aloud or silently, difficulty in processing written or oral language and difficulty in sequencing and organizing information. The individual may exhibit delayed spoken language, reversal of letters, confusion with time/space opposites, as well as reduced comprehension . . . . [Dysgraphic individuals] have difficulty in expressing written language. Dysgraphic individuals often have illegible handwriting. Learning disabled individuals may be aphasic and, therefore, have a severe inability to interpret or use language. Individuals suffering from aphasia may experience an inability to understand the meaning of spoken words and may not be able to give meaning to words heard (auditory or receptive aphasia). Aphasic individuals may suffer from an inability to remember the pattern of movements required to speak words. These individuals may know how to say a word, but can not form the sounds to do so (expressive aphasia). Individuals suffering from aphasia may substitute inappropriate words for structurally related words. These individuals might, for example use “illiterate” instead of “illegitimate”. Lastly, the learning disabled individual may be perceptually disabled. These individuals experience an inadequate ability of the brain to correctly recognize, organize, and interpret sensory input. The perceptually disabled individual may appear confused and may be frustrated when being spoken to or when reading.

Diamond, *supra* note 31, at nn.12-14.

Learning disabilities are the most common form of disability identified by law students.<sup>37</sup> The potential impact of learning disabilities on the study and practice of law is rather obvious, but the causes of these disabilities are not as obvious.

To simplify greatly, the eyes, ears, and body parts required for speaking and writing, the related nervous system, and the brain constitute a complex meta-system. The brain itself is a complex system in which distinct brain sections are relatively specialized and have significant responsibility for performing a particular physical or mental task. Operations such as seeing, reading, hearing, listening, memorizing and recalling information, generating options, staying focused and on task, performing mathematical operations, analyzing and organizing information and concepts, and expressing (either verbally or in writing) information, concepts, and ideas require that the relevant parts of the brain properly perform their specialized functions. These operations also require that distinct and sometimes distant brain sites communicate effectively and coordinate their activity in an appropriate manner, both with each other and with the relevant sense organs, speech organs, and body parts (such as hands).<sup>38</sup>

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<sup>37</sup> See Runyan & Smith, *supra* note 7, at 320 (stating that a survey “reported in October 1989 [indicated] that out of a total law school population of 120,000 students, 600 [or 6% of all disabled students] identified themselves as learning disabled.”). Runyan and Smith noted that:

[i]n the 1989-90 AALS survey of the 175 ABA-approved law schools, 147 responding law schools identified 725 disabled students, of whom 235 were learning disabled. The survey indicates that among the categories of handicapping conditions, learning disabilities contains the largest number of students. A comparison of the results of the AALS survey with [the other survey] indicates that law school administrators are probably not aware of all the learning disabled students attending their institutions.

*Id.* at 320-21 (footnotes omitted).

Stone reports that of the 1187 students who requested reasonable accommodations on exams during the 1994-95 academic year at the 80 schools he surveyed, 641, or 54%, claimed a learning disability. Stone, *supra* note 4, at 570 (figure 2). Stone hypothesizes:

A possible explanation for this high percentage of requests by learning disabled students may be that these students have been offered such accommodations in high schools and colleges as well as in law school admission tests. It may carry less of a stigma for a learning disabled student, who has in the past been offered additional time to complete exams or a separate exam room to reduce distractions, to make such a request in law school.

*Id.* at 570. It is “estimated that at least 80 percent of all LD adults have disorders of written language.” Adams, *supra* note 35, at 201 n.49 (citing Susan A. Vogel, *Issues and Concerns in LD College Programming*, ADULTS WITH LEARNING DISABILITIES: CLINICAL STUDIES, 239, 257 (Doris J. Johnson & Jane W. Blalock, (1987)).

<sup>38</sup> See, e.g., Adams, *supra* note 35, at 200-01 (discussing the interrelationship between various skills required to write effectively).

This meta-system is able to operate effectively only when the neuroanatomy<sup>39</sup> and neurochemistry<sup>40</sup> of each relevant section of the brain, the communication lines between each relevant brain section, the communication lines between the brain, the sense and speech organs and other relevant body parts, and the sense and speech organs and other relevant body parts themselves function properly and are in proper balance. A problem with a single part of the overall system may result in a profound cognitive and functional deficit.<sup>41</sup>

As with all physiological attributes, significant differences exist between individuals in the efficiency and effectiveness with which the parts of this meta-system function.<sup>42</sup> In most individuals of above-average and high intelligence, all parts of the system function particularly well. In law school students with LDs, ADD, or ADHD, one or more parts of the system do not function as efficiently or effectively as the other parts. Thus, although a student may be of “average and above average intelligence,” she may suffer from a “deficit in the processing of visual and/or auditory information,” resulting in a “severe discrepancy between [general] aptitude and achievement” in situations in which “sensory and/or physical impairment [is not] a causative factor.”<sup>43</sup>

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<sup>39</sup> See, e.g., Coleman et al., *supra* note 5, at 2 “Because psychiatrists did not recognize [Disorder of Written Expression] as a separate disability until 1986, much remains unknown about the disorder, including its prevalence and exact etiology. It is generally thought, however, that DWE is caused by a defect of brain function, organization, or “wiring,” and not by demonstrable anatomical brain pathology.” *Id.* (footnotes omitted).

<sup>40</sup> See, e.g., Riccio et al., *supra* note 32, at 118 (discussing the neuroanatomical, neurochemical, and neurophysiological etiologies of ADD, including ADHD).

<sup>41</sup> See generally Diamond, *supra* note 31, at nn. 10-11 and accompanying text (discussing various theories concerning the origin of specific learning disabilities).

<sup>42</sup> Some learning disabilities and cases of ADD and ADHD are genetic in origin. Others are environmental in origin, and their existence could have been prevented or their severity could have been minimized. See Lucile F. Newman & Ute K. Papkalla, *Many Causes of Learning Disorders are Avoidable*, BROWN U. CHILD BEHAVIOR & DEVELOPMENT LETTER, November, 1989, at 1 (discussing fetal drug exposure, alcohol-related birth defects, very low birth weight, neonatal illness, lead poisoning, and malnutrition as causes of learning disabilities).

<sup>43</sup> Runyan & Smith, *supra* note 7, at 319 (citing Michael Spagna & Deidre Semoff, University of California at Berkeley Resource Guide: Students Identified As Having Specific Learning Disabilities (Spring 1990) (unpublished paper, available from University of California, Berkeley, Disabled Students' Program)).

For example, consider a law student with dyslexia.<sup>44</sup> Although he<sup>45</sup> may have high overall intelligence, his ability to input information visually may be significantly limited. Although he may take a long time to read, he may perform adequately in class discussions. A different, non-dyslexic law student may be a highly effective reader, but may suffer from aphasia,<sup>46</sup> and thus have difficulty comprehending verbal information. Although highly prepared, this student may have great difficulty following and participating in class.

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<sup>44</sup> “Developmental dyslexia is a specific learning disability characterized by difficulty in learning to read. Some dyslexics also may have difficulty in learning to write, to spell and, sometimes, to speak or to work with numbers.” *Facts About Dyslexia*, CHILDREN TODAY, November 1985, at 23. For general discussions of dyslexia, including causes, diagnostic criteria, and treatment, see Margaret J. Snowling, *Dyslexia, a Hundred Years on: A Verbal Not a Visual Disorder, Which Responds to Early Intervention*, 313 BRIT. MED. J. 1096 (1996); George W. Hynd, *Dyslexia and Development: Neurobiological Aspects of Extra-ordinary Brains*, 263 SCI. 841 (1994)(book review); *Facts About Dyslexia, supra*.

<sup>45</sup> See Hynd, *supra* note 44, at 841 (“Developmental dyslexia is a widespread disorder, affecting some 5 to 10 percent of all children, adolescent, and adults. More boys than girls are affected . . .”).

<sup>46</sup> For a discussion of aphasia, see the quoted material *supra* note 36.

LDs, ADD, and ADHD possess several characteristics which result in suspicion or disdain by law school administrators, legal educators, and non-disabled law students.<sup>47</sup> First, these disabilities usually involve one or more of the mental, communicative, expressive, or organizational skills which are related to being a competent attorney. Although a person with such a disability may be highly intelligent, the student's performance may give the appearance that she lacks the intellect, ability, drive, or discipline required to be a competent attorney. Thus, it is easy to dismiss the student simply as not being "cut out" to be an attorney.<sup>48</sup> For example, a person with an LD which makes it difficult for her to express herself verbally may appear unprepared in class, even though she is quite prepared and could give good answers in writing. The student could be a quite proficient attorney in an area which does not require a significant amount of spontaneous verbal communication.

Second, LDs, ADD, and ADHD are not directly observable<sup>49</sup> and are not

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<sup>47</sup> See Beth Greenbaum et al., *Adults with Learning Disabilities: Educational and Social Experiences During College*, 61 EXCEPTONAL CHILDREN 460 (1995) (providing a wide-ranging discussion and an excellent overview of the literature concerning the educational and social experiences of individuals with learning disabilities, although not at the professional school level).

<sup>48</sup> See, e.g., Patricia Nealon, *BU Loses Suit Brought by Students; Judge Chastises School for Policy on Learning-Disabled*, BOSTON GLOBE, Aug. 16, 1997, at B1 (stating that United States District Court Judge Patti B. Saris is reported to have indicated that Boston University's new, and less accommodating, policy towards learning disabled students was a result of "the beliefs of its president . . . and his staff, who she found were motivated by 'uninformed stereotypes[,] . . . that many students with learning disabilities - like the infamous, nonexistent 'Somnolent Samantha' - are lazy fakers, and that many evaluators are 'snake-oil salesmen' who over diagnose the disability."); see also Paul T. Wangerin, *A Little Assistance Regarding Academic Assistance Programs: An Introduction to Academic Assistance Programs*, 21 J. CONTEMP. L. 169 (1995) (reviewing LAW SCHOOL ADMISSION COUNCIL, INTRODUCTION TO ACADEMIC ASSISTANCE PROGRAMS) [hereinafter Wangerin, *Assistance*]. Wangerin noted:

Those who are familiar with modern education trends know that the definition of learning disability has expanded dramatically. In the past, students who did poorly in school were usually diagnosed as stupid, lazy, or spoiled. Accordingly, they were often treated in a dismissive manner. Now, however, many students who do poorly in school are diagnosed as learning disabled.

*Id.* at 182 (footnote omitted).

<sup>49</sup> The invisible nature of learning disorders and other mental impairments results in the need for particularly good documentation of the impairment and the resulting disability. See, e.g., Coleman et al., *supra* note 5, at 4 n.14 (stating that "[b]oth courts and commentators agree that documentation is particularly important for mental disorders, including learning disabilities, because they are not obvious" and citing to cases and law

subject to the same level of scientific verification and understanding as are PMDs. Most PMDs either are visible or are subject to verification by well-accepted imaging or laboratory tests. On the other hand, LDs, ADD, and ADHD are not externally visible and are diagnosed by methods which are, by comparison to PMDs, qualitative and subjective.<sup>50</sup> Thus, diagnosis remains more of an art than for PMDs.<sup>51</sup> The causes of LDs, ADD, and ADHD are less well understood than are the causes of most PMDs. This lack of understanding contributes to the suspicion and disdain surrounding these disabilities.

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review articles making that point.).

<sup>50</sup> Consider the subjectivity inherent in the following statement in the diagnostic criteria for ADHD in the DSM-IV: “persistent pattern of inattention and/or hyperactivity-impulsivity that is more frequent and severe than is typically observed in individuals at a comparable age and level of development.” DSM-IV, *supra* note 30 at 46..

<sup>51</sup> Recent advances in the understanding of brain function and in real-time brain imaging soon may permit both more “scientific” diagnostic techniques and a greater understanding of the etiology and impact of specific LDs, ADD, and ADHD. *See, e.g.*, Riccio et al., *supra* note 32 (discussing the neuroanatomical, neurochemical, and neurophysiological etiologies of ADD, including ADHD).

Third, diagnoses of these disabilities, particularly learning disabilities, may be made relatively late in an individual's academic career, such as during law school; such diagnoses also may be made at what appear to be opportunistic times, for instance immediately before final examinations.<sup>52</sup> The timing of a diagnosis, combined with the academic success which permitted the student to be accepted to law school, may make the diagnosis suspect in the eyes of many individuals.<sup>53</sup> However, the existence of LDs, ADD, and ADHD has been recognized only relatively recently, and many K-12 schools still do not have comprehensive and effective screening programs or remediation programs; thus, some learning disabled students are not identified until they enter college or law school.<sup>54</sup> Further, many learning disabled students do not realize they possess a disability and remain undiagnosed until they enter the pedagogically different, more stressful, and more intellectually challenging law school environment, where their native abilities and prior coping mechanisms<sup>55</sup> are insufficient.

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<sup>52</sup> Particularly for first-year students, this timing is not entirely unexpected. It may take several months before the first-year student realizes she is experiencing more than the average amount of difficulty with law school.

<sup>53</sup> See Nealon, *supra* note 48. Undoubtedly, there is a potential for opportunism and "doctor shopping" among law students. However, the existence of some questionable diagnoses should not deter the law school in assisting the vast majority of students who possess real impairments.

<sup>54</sup> For the proposition that a relatively large number of college-level students have undiagnosed learning disabilities, see, e.g., Greenbaum et al., *supra* note 47, at 462 (indicating that 16%, 8 of 49, of the disabled former University of Maryland undergraduate students participating in the study did not have their learning disability identified until they reached college).

<sup>55</sup> As undergraduates and high school students, bright students with learning disabilities may be able to compensate for their deficiencies and compete successfully with their peers. It is not until the student reaches the much more competitive law school environment that their learning disabilities become apparent and their compensatory strategies no longer permit them to compete successfully with their peers. See, e.g., Coleman et al., *supra* note 5, at 3 ("In fact, most children with milder forms of [Disorder of Written Expression] learn to compensate for the disability . . ."); Runyan & Smith, *supra* note 7.

It is not unusual for students to be identified as having learning disabilities after they enter a professional school. These students are generally very bright and possibly gifted. They have learned to compensate for and mask their disabilities. Their ability to compensate may diminish with the pace and demands of professional school, and their undiagnosed learning disabilities might then impede their academic progress. The underlying problem may be diagnosed only after students face academic probation or dismissal.

*Id.* at 323 (footnote omitted). In addition, this situation arises because students with writing difficulties are able to avoid high school and college classes in which writing is

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required. *See, e.g.*, Coleman et al., *supra* note 5, at 3.

Many individuals with DWE are not diagnosed as having the disorder until they are in law school. In part, this is because persons with DWE are often able to avoid dealing with the disorder while in college by selecting majors in which writing is not a critical skill and avoiding classes in which grades are based on papers.

*Id.* at 7 n.25. A similar observation is made by Adams as a result of an anonymous survey conducted at the Chicago-Kent College of Law.

In many high schools, writing is simply not taught with consistency and rigor. At the college level, many students easily avoid most composition classes and choose majors that do not require essay examinations or frequent analytical papers. Perhaps more worrying are the students who wrote frequently as undergraduates but received no useful feedback about their writing skills and, as a consequence, may have developed an unrealistic sense of their abilities. If a student has followed a course of study that has not stressed or has not required writing, the legal writing course may expose a writing deficit for the first time.

Adams, *supra* note 35, at 199 (footnotes omitted); *see also* Paul T. Wangerin, *Law School Academic Support Programs*, 40 HASTINGS L.J. 771, 779 n.38 (1989) (noting that some types of learning disabilities go undiagnosed because “students who had highly technical undergraduate or high school educations may have gone through many years of schooling without ever having written an essay exam or a narrative paper, and perhaps without having read literature other than the technical literature in their field.”) [hereinafter, Wangerin, *Programs*].

Fourth, LDs, ADD, and ADHD are difficult for the layperson to distinguish from simple lack of ability, lack of discipline, or laziness. Thus, there seems to be a normative bias against these disabilities. Life is unfair. Unlike Lake Woebegone<sup>56</sup> where all children are above average, not everyone in the real world is blessed with athletic, artistic, musical, literary, verbal, mathematical, or other ability.<sup>57</sup> Even those who are blessed with intellectual talent or ability find they have strengths and weaknesses. For example, an otherwise highly intelligent person may find that she struggles to be even “average” in learning a foreign language. To many individuals, LDs, ADD, and ADHD simply are a manifestation of life’s caprice to which they, themselves, were subject and in which they, themselves, both won and lost.

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<sup>56</sup> The mythical Lake Woebegone is the creation of Garrison Keeler, who is a comedian, author, and storyteller, and who also is the host of *A Prairie Home Companion* on public radio.

<sup>57</sup> See Ruth Shalit, *Defining Disability Down: Why Johnny Can’t Read, Write, or Sit Still*, NEW REPUBLIC, August 25, 1997, at 16. Shalit notes:

“In the space of twenty years, American psychiatry has gone from blaming Johnny’s mother to blaming Johnny’s brain,” says Dr. Lawrence Diller, an assistant clinical professor of behavioral pediatrics at the University of California at San Francisco. The problem, says Dr. Diller, is that in a variant of the Lake Woebegone effect, “Bs and Cs have become unacceptable to the middle classes. Average is a pejorative.” And yet, as he points out, “someone has got to be average.”

*Id.*

Finally, there is a tendency to view ability globally; we view people as being “athletic,” “artistic,” “musical,” or “intellectually gifted,” or not. We forget each of these seemingly global abilities involves a wide variety of aptitudes.<sup>58</sup> A person may be quite gifted intellectually and still suffer from a specific learning disability which makes her appear inept, uninterested, or unintelligent.

Despite the suspicion with which they are viewed, LDs, ADD, and ADHD are real. Unfortunately, those conditions which are neurological in origin are incurable. The functional impairment caused by the condition may be lessened by training, the use of compensatory learning and other strategies,<sup>59</sup> or minor adjustments in classroom procedure and presentation by the professor.<sup>60</sup> Conditions which possess a biochemical component may respond to medication.<sup>61</sup>

An LD or a case of ADD or ADHD is relatively stable in nature and severity, particularly when it is neurological in nature. Thus, there will usually be little need to monitor the disability’s existence and severity. The impact of the disability may differ substantially, however, depending upon a particular professor’s classroom style, the type (statutes or cases) and amount of reading which is required in a course, and the intellectual functions necessary to process and work with the course material.

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<sup>58</sup> For a classic example, consider Michael Jordan. Arguably the greatest basketball player in history, his considerable athletic ability did not easily translate to baseball.

<sup>59</sup> See, e.g., Coleman et al., *supra* note 5, at 3 (“Although [Disorder of Written Expression] appears to be a lifelong disorder, remediation may decrease the severity of the impairment. In fact, most children with milder forms of [Disorder of Written Expression] learn to compensate for the disability . . .”).

<sup>60</sup> For example, a student with aphasia, who has difficulty processing verbal information, might be aided in class by the use of diagrams.

<sup>61</sup> For example, Ritalin is prescribed for ADD. See Maria L. Chang, *Feeling Blue? Chemicals in Our Brains, and Controversial New Drugs, can change our Moods and Emotions*, SCI. WORLD, October 6, 1997, at 12; Edward M. Hallowell, *What I’ve Learned From A.D.D.: Attention Deficit Disorder*, PSYCHOL. TODAY, May 15, 1997, at 40.

The existence of a learning disability or a case of ADD or ADHD may also result in, or coexist with, difficulties which may further interfere with academic achievement: psychological problems,<sup>62</sup> stigma,<sup>63</sup> social problems,<sup>64</sup> and a fear

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<sup>62</sup> See, e.g., Tamekia Tate, *A Perspective from an African American College Student With Learning Disabilities, Learning Left from Right: "No Struggle, No Progress,"* AFRICAN AMERICAN ADOLESCENTS AND ADULTS WITH LEARNING DISABILITIES: AN OVERVIEW OF ASSESSMENT ISSUES 29 (Noel Gregg et al. eds., 1996); Adams, *supra* note 35, at 208-09; David Feifel, M.D. *Attention-Deficit Hyperactivity Disorder in Adults*, POST-GRADUATE MED., September 1, 1996, at 207; Judge Jeffry Gallet, *The Judge Who Could not Tell His Right From His Left and Other Tales of Learning Disabilities*, 37 BUFF. L. REV. 739 (1988) (highlighting Judge Gallet discussing his diagnosis as a dyslexic at 34 and his experiences prior to, and after, the diagnosis); Kenneth A. Kavale & Steven R. Forness, *Learning Disability Grows Up: Rehabilitation Issues for Individuals with Learning Disabilities*, J. REHABILITATION, January, 1996, at 34 (examining the special needs and problems of adults with learning disabilities, including low self-esteem and employment, social, and academic problems); Krener, *supra* note 32; Nelson & Lignugaris-Kraft, *supra* note 31, at 260 (counseling frequently is required and offered to college students with learning disabilities in order to "help students with their social and interpersonal skills and to provide support in coping with the stresses of academia.").

The American Psychiatric Association's DSM-IV states:

Demoralization, low self-esteem, and deficits in social skills may be associated with Learning Disorders . . . . There may be underlying abnormalities in cognitive processing (e.g., deficits in visual perception, linguistic processing, attention, or memory, or a combination of these) that often precede or are associated with Learning Disorders.

DSM-IV *supra* note 30, at 47.

<sup>63</sup> See, e.g., Diamond, *supra* note 31, at nn. 23-24 and accompanying text (discussing the desire of learning disabled students to "pass" for individuals without learning disability); David M. Engel & Alfred S. Konefsky, *Law Students with Disabilities: Removing Barriers in the Law School Community*, 38 BUFF. L. REV. 551, 557 (1990). Adams nicely summarizes the theme of this paragraph:

Another characteristic common in LD students, one that can make both teaching and learning more difficult, is the presence of a variety of psychological problems that are manifested in an educational setting, including denial of the disability and unwillingness to seek out help. This should hardly come as a surprise, given that the unidentified LD student is often, from a young age, viewed as bright-but-lazy, sloppy, or unable to focus energies. Such students are a source of disappointment and disapproval to untrained teachers who see much promise in them and whose assumptions are rarely rewarded. But even if the disorder has been diagnosed, the student may still face a good deal of negative feedback and personal frustration.

Adams, *supra* note 35, at 193.

Adequate precautions regarding confidentiality may reduce or eliminate the risk of stigma for students with non-obvious impairments. However, some actions which the law school may encourage, such as participation in an academic support program, counseling,

of being labeled as someone falsely seeking preferential treatment.<sup>65</sup> The psychological impact of the diagnosis may be particularly severe in both a recently diagnosed student and in a student who performed extremely well as an undergraduate, but finds her disability significantly impairs her law school performance. Indeed, the depression or loss of self-esteem which accompanies the diagnosis and the realization of one's limitation may be, at least in the short-term, disabling in itself. Even if these secondary effects do not, by themselves, rise to the level of a legal "disability," a comprehensive approach to students with LDs, ADD, and/or ADHD must address these effects through counseling or other appropriate actions.

C. *Emotional Disabilities.*

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or assistance from a writing specialist, may, if seen by other students, lead the other students to conclude the participant possesses a non-obvious disability, thus resulting in stigma.

<sup>64</sup> See, e.g., Kavale & Forness, *supra* note 62 (examining, with comprehensive citation to the relevant literature, the special needs and problems of adults with learning disabilities, including social difficulties).

<sup>65</sup> See, e.g., Coleman et al., *supra* note 5, at 9 n.31 and accompanying text; Diamond, *supra* note 31, at n.24. Diamond notes:

Faculty coordinators for the academic support program for disabled law students at the School of Law of the State University of New York at Buffalo report that students were hesitant in requesting accommodations for their disabilities because they "feared being looked down upon if their disabilities became known." People would equate a learning disability with a lack of intelligence or, worse, with a phony plea for special treatment.

*Id.* (citing Engel & Konefsky, *supra* note 63, at 559); see also Nealon, *supra* note 48, at B1 (quoting Judge Patti B. Saris referring to "uninformed stereotypes . . . that many students with learning disabilities . . . are lazy fakers.").

Emotional disabilities (EDs)<sup>66</sup> comprise a wide variety of neurological, biochemical, and other psychological conditions.<sup>67</sup> Relatively common EDs include depression,<sup>68</sup> manic-depressive disorder,<sup>69</sup> obsessive-compulsive

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<sup>66</sup> The Rehabilitation Act and the ADA mention “mental impairments,” as do the implementing regulations. *See, e.g., infra* note 110 and accompanying text. The phrase “mental impairment” is not defined by either the Rehabilitation Act or the ADA. However, regulations indicate the phrase includes “any mental or psychological disorder such as . . . emotional or mental illness” 28 C.F.R. § 35.104 (1998). The phrases “mental impairment” and “any mental or psychological disorder such as . . . emotional or mental illness” provide little guidance concerning what constitutes an emotional or mental illness which would qualify as a disability. Given the large number of emotional and mental illnesses, it is not surprising that neither Congress nor the administrative agencies responsible for implementing regulatory schemes have defined precisely such illnesses. In light of Congress’s apparent desire to provide broad coverage by both the Rehabilitation Act and the ADA, policy would seem to dictate an expansive interpretation of what constitutes a “mental impairment” or an “emotional or mental illness.” Even with an expansive interpretation, the requirement in the definition of “disability” that the impairment “substantially limit[] . . . [a] major life activit[y]” would ensure that although a wide range of impairments or illnesses could be classified as disabilities, the functional impact of the impairment or illness would need to be substantial, that is, truly disabling. *See infra* Part II.

<sup>67</sup> For a discussion of mental and emotional illness, legal education, and disability law, see Stone, *supra* note 4. For general discussions of mental illness and disability law, see JOHN W. PARRY, MENTAL DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT (2d ed. 1997) [hereinafter MENTAL DISABILITIES]; John M. Casey, Comment, *From Agoraphobia to Xenophobia: Phobias and Other Anxiety Disorders Under the Americans with Disabilities Act*, 17 U. PUGET SOUND L. REV. 381 (1994) (focusing on Title I of the ADA, but providing an overview of the various major categories of emotional and mental illnesses); Peter M. Panken et al., *Psychiatric Disabilities Under the Americans with Disabilities Act*, SC29 ALI-ABA 295 (1997).

<sup>68</sup> For general discussions of depression, including causes, diagnostic criteria, and treatment, see *Depression in Adults*, AM. FAM. PHYSICIAN, May 15, 1995, at 1701; *Stress, Biochemistry and Depression*, AM. FAM. PHYSICIAN, March, 1989, at 376; Casebolt & Walker, *supra* note 28.

<sup>69</sup> For general discussions of manic-depressive (or bipolar) disorder, including causes, diagnostic criteria, and treatment, see Bruce Bower, *Manic Depression: Success Story Dims; Effectiveness of Lithium Treatments*, SCI. NEWS, May 25, 1991, at 324 (describing the disorder as “periods of severe depression alternating with episodes of uncontrolled elation, restlessness, racing thoughts and delusions of grandeur. Periods of normal mood typically occur between manic and depressive episodes.”); Steven C. Dilsaver, *Bipolar Disorder*, AM. FAM. PHYSICIAN, September, 1989, at 156; *Manic Depression-DNA Links; Studies Identify Chromosomes Linked to Manic-Depression*, SCI. NEWS, April 6, 1996, at 221 (describing the disorder as “alternating bouts of depression and agitated elation”); Martin E. Marty, *Schizophrenia and Manic-Depressive Disorder: The Biological Roots of*

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 disorder,<sup>70</sup> panic attacks,<sup>71</sup> generalized anxiety disorder,<sup>72</sup> social phobia,<sup>73</sup>

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*Mental Illness as Revealed by the Landmark Study of Identical Twins*, SECOND OPINION, April 1, 1995, at 94 (book review).

<sup>70</sup> For general discussions of obsessive-compulsive disorder, including causes, diagnostic criteria, and treatment, see John S. March et al., *Obsessive-Compulsive Disorder*, AM. FAM. PHYSICIAN, May, 1989, at 175 (“patients with obsessive-compulsive disorder complain of anxiety-producing intrusive thoughts and/or perform repetitive, anxiety-reducing rituals.”); Jerome H. Nymberg & Barbara Van Noppen, *Obsessive-Compulsive Disorder: A Concealed Diagnosis*, AM. FAM. PHYSICIAN, April, 1994, at 1129 (citing the Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R)’s definition “recurrent obsessions or compulsions sufficiently severe to cause marked distress, be time-consuming, or significantly interfere with the person’s normal routine, occupational functioning, or usual social activities or relationships with others.”); Raymond Pary, M.D. et al., *Obsessive-Compulsive Disorder*, POST-GRADUATE MED., December 1, 1994, at 119. Pary et al. note:

Obsessions are recurrent ideas, impulses, or mental images that are intrusive and irrational. . . . [T]hey persist despite attempts to disregard them and efforts to counteract them with other ideas or actions. Persons who have obsessions perceive them as troubling products of their own mind. Compulsions are behaviors that are recognized as unreasonable or excessive but nevertheless are performed repetitively as a protective measure to ward off a feared situation or conflict.

*Id.*

<sup>71</sup> There are numerous articles which discuss panic attacks, including their causes, diagnostic criteria, and treatment. See, for example, Patricia E. Blumenreich & Steven B. Lippmann, *Phobias*, POST-GRADUATE MED., July, 1994, at 125. Blumenreich and Lippmann note:

Panic attacks are the essential feature of panic disorder and, at least early in their presentation, are unexpected. Anxiety is their main symptom. Panic attacks may last minutes or hours. Symptoms that occur as part of the attack may eventually be associated with a specific place or situation, which the person may then avoid because of fear of a future episode.

*Id.*; see also Douglas Kahn, *Panic Disorder*, 155 W. J. MED. 517 (1991); David A. Katerndahl & Janet P. Realini, *Where Do Panic Attack Sufferers Seek Care?*, 40 J. FAM. PRAC., at 237

<sup>72</sup> For a good discussion of generalized anxiety disorder, including causes, diagnostic criteria, and treatment, see Elizabeth J. Walley et al., *Management of Common Anxiety Disorders*, AM. FAM. PHYSICIAN, December, 1994, at 1745. Describing general anxiety disorder, Walley states:

Generalized anxiety disorder is the most common of the anxiety disorders, with a prevalence of 2 to 8 percent in the adult population. . . . It is defined as

agoraphobia,<sup>74</sup> and schizophrenia.<sup>75</sup> EDs may result in a variety of symptoms which substantially limit a student's ability to perform intellectual tasks: fatigue, inability to concentrate, profound and disabling fear of speaking spontaneously before large groups of people, compulsion to perform time-consuming and

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unrealistic or excessive anxiety and worry about two or more life circumstances for at least six months. Patients with generalized anxiety disorder, however, may exhibit little occupational or social dysfunction. Official classification in DSM-IV also requires at least six symptoms listed under motor tension, autonomic hyperactivity, vigilance and scanning.

*Id.*

<sup>73</sup> For a general discussion of social phobia, including causes, diagnostic criteria, and treatment, see Blumenreich & Lippmann, *supra* note 71, at 126. Blumenreich and Lippmann describe social phobia as:

a persistent, irrational fear of social situations in which humiliation, embarrassment, or scrutiny may occur. A person may have one or more social phobic fears. The most common fears are of . . . speaking . . . in public . . . . Anxiety is high in the phobic situation, and diaphoresis, breathing difficulty, palpitations, tremors, or even fainting may occur. Persons with social phobia fear that others will notice their anxiety and ridicule them, but they do not fear a panic attack. The diagnosis is made only if persistent anxiety compromises the person's normal routine, relationships, or lifestyle or if the person has marked distress about the phobia.

*Id.*

<sup>74</sup> For a general discussion of agoraphobia, including causes, diagnostic criteria, and treatment, see Blumenreich & Lippmann, *supra* note 71, at 125. Blumenreich and Lippmann describe agoraphobia as:

the fear of being in situations or places from which escape could be difficult or embarrassing or in which help may not be available if incapacitating or embarrassing symptoms develop. . . . Typical fears include . . . being in a crowd . . . . Avoidance of such anxiety-provoking situations often incapacitates the agoraphobic person, who progressively restricts activities and in some cases becomes housebound. . . . Agoraphobia is often a consequence of a series of panic attacks.

*Id.* (footnotes omitted).

<sup>75</sup> For general discussions of schizophrenia, including causes, diagnostic criteria, and treatment, see Trevor Turner, *Schizophrenia: ABC of Mental Health*, 314 BRIT. MED. J. 108 (1997) (describing schizophrenia as a severe mental illness in which the brain does not function normally and in which the patient may experience hallucinations, delusions, concentration difficulties, as well as other symptoms); Norman L. Kelter, *Pathoanatomy of Schizophrenia*, PERSP. PSYCHIATRIC CARE, April 15, 1996, at 32 ("Schizophrenia is related to physiological and anatomical disorders in the brain . . . . Physiological alterations thought to contribute to schizophrenia include increased levels of subcortical dopamine . . . and reductions in glucose utilization . . .").

disruptive rituals due to obsessive thoughts, and negative thoughts and beliefs concerning the student's ability to perform tasks within the student's ability.<sup>76</sup>

At the risk of profound oversimplification, EDs arise from physical problems,<sup>77</sup> problems with thought patterns and the assumptions on which they are based, or a combination of the two. Physical problems may be structural (neuroanatomical and neurophysiological) or biochemical in nature. Structural problems may inhibit or distort the thought and other processes involved in the perception, input, storage, recall, processing, and output of internal and external stimuli. In addition, structural problems may affect the ways in which emotions, moods, dispositions, feelings, thoughts, and perceptions are generated, perceived, processed, and acted upon. Biochemical problems, such as the underproduction of certain neurotransmitters, can prevent a particular part of the brain from functioning properly (causing or predisposing one to particular emotions, moods, dispositions, feelings, thoughts, and perceptions) or prevent different parts of the brain from communicating effectively.

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<sup>76</sup> These effects are discussed in the works cited in notes 68-75, *supra*.

<sup>77</sup> See generally L.S. Pilowsky, *Understanding Schizophrenia: Structural and Functional Abnormalities of the Brain are Present in the Condition*, 305 BRIT. MED. J. 327 (1992); Daniel E. Koshland, Jr., *Nature, Nurture, and Behavior; Biochemical Causes for Mental Disease*, 235 SCI. 1445 (1987) (discussing suspected biochemical causes of mental illness); Joseph Alper, *Biology and Mental Illness; Researchers are Coming Closer to Understanding the Mechanisms of Depression, Manic Depression, and Schizophrenia*, ATLANTIC, December, 1983, at 70 (discussing the general impact of brain function, both structural and biochemical, on mental illness).

EDs which have a physical origin are particularly chronic. EDs, especially those caused by a biochemical imbalance, may often be treated and somewhat controlled or ameliorated by medication. In addition, certain EDs, such as panic attacks, may be partially controlled or ameliorated through counseling, training in relaxation techniques, and simple understanding of the nature of the disorder.

Problems with thought patterns and the assumptions on which they are based are rooted in conscious or unconscious attitudes, values, beliefs, perspectives, opinions, and assumptions, as well as the manner in which the individual thinks through intellectual, emotional, and social situations. These problems are loosely analogous to a bug in a software program. Even though the computer's hardware functions properly, the software does not function in a manner which achieves the desired or appropriate ends. For example, a person who was continually told as a child that she was ugly and stupid may develop feelings of low self-esteem and an attitude that she is stupid and cannot do the work required in law school. Like defective computer software, EDs based on these problems may require extensive work to debug and rewrite the mental software. This may require lengthy psychotherapy or counseling, although medication may also be of assistance in the short term.

In addition to their different etiologies, EDs have several characteristics which may affect their nature and severity, as well as treatment options and appropriate accommodations. First, EDs may be primary or secondary. A primary ED results directly from a problem with the brain's physical structure and biochemistry, or from atypical thought-patterns and underlying assumptions. For example, a manic-depressive disorder caused by fluctuations in biochemical balances in the brain is primary in nature because the mental illness is the principal illness. Secondary EDs, particularly depression, may result from the occurrence of a PMD, the diagnosis of an LD, ADD, or ADHD, or the existence of another ED.<sup>78</sup>

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<sup>78</sup> See, e.g., Casebolt & Walker, *supra* note 28; Katerndahl & Realini, *supra* note 71 (noting the association between a diagnosis of panic disorder and depression and suicide); Walley et al., *supra* note 72, at 1747 ("Secondary depression is common [when generalized anxiety disorder occurs] and improves when the primary anxiety is treated.") (footnote omitted).

Second, stress, particularly acute stress, may trigger or exacerbate an ED. A student who coped well with the stress of undergraduate studies may find herself affected for the first time when faced with the chronic and generally greater stress of law school.<sup>79</sup> A student who copes well with the general stress of law school may experience an ED during a particularly stressful situation, such as when she is called on in class, is required to participate in a moot court oral argument, is required to produce a complex written work product under a short deadline, or is required to take an exam. It cannot be emphasized too strongly that stress-induced EDs, just like stress-induced PMDs, may not be triggered until the final exam period, or until a final exam itself. The legal educator and law school administrator must understand that an ED may present itself or reach a debilitating level only in certain situations or under certain conditions.

Minor accommodations may relieve the debilitating aspects of a mental illness even though the underlying disease remains. For example, a student who suffers from a panic disorder may find it disabling in the educational context only when called on in class. Even though the illness remains and the student may suffer panic attacks in situations which are unrelated to education, she may find the disorder to be controllable (with respect to education) by being exempted from class participation.

Third, and related to the previous point, an ED may change in severity over time depending upon the combination of external stimuli, such as stress, and internal chemical balances. Even a student who takes medication which “controls” or ameliorates an ED may experience fluctuations in the ED’s severity.<sup>80</sup> Medication may help control or ameliorate an ED, but medication

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<sup>79</sup> Law school-induced stress is discussed in a large number of articles. *See, e.g.*, Roach, *supra* note 29; Stephen B. Shanfield & G. Andrew H. Benjamin, *Psychiatric Distress in Law Students*, 35 J. LEGAL EDUC. 65 (1985); Wangerin, *Programs*, *supra* note 55; Lawrence Silver, Note, *Anxiety and the First Semester of Law School*, 1968 WIS. L. REV. 1201 *cited in* Jacquelyn H. Slotkin, *An Institutional Commitment to Minorities and Diversity: The Evolution of a Law School Academic Support Program*, 12 T.M. COOLEY L. REV. 559 n.25 (1995).

<sup>80</sup> Medication may help ameliorate a biochemical imbalance, but does not fix the underlying physiological causes of the imbalance. While medication may ameliorate the impact of EDs which are rooted in thought patterns and their underlying assumptions, medication does not fix the underlying problem. For example, depression and obsessive-compulsive disorder sometimes may be caused by an imbalance in the level of a neurotransmitter called serotonin. The imbalance in the serotonin level may be caused by an underproduction of the neurotransmitter or too many serotonin receptors at critical points in the brain (which “take up” serotonin more quickly than in a “normal” brain, thus lowering the serotonin level). A psychiatrist may prescribe a selective serotonin reuptake inhibitor to limit the ability of serotonin to be utilized, thus keeping the serotonin level at a higher, more normal level. While the medication may “control” the emotional disorder by

does not cure it. Seemingly opportunistic exacerbations of EDs at exam time may reflect the stress-related disruption of intricate biochemical balances. Law school administrators and legal educators must have reasonable expectations about the possibility of the student being able to control or to cure certain EDs.

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helping to maintain a more appropriate serotonin balance, it does not “cure” the underlying physical problem. A patient whose condition is thus “controlled” may experience seemingly inexplicable fluctuations in the severity of the underlying condition as a result of subtle biochemical changes which are related to some external stimulus (such as stress or a death in the family).

Fourth, EDs usually cause a functional impairment in one or more of the mental, communicative, expressive, or organizational skills which are related to being a competent attorney. Although a person with an ED may be highly intelligent, the ED may make the student appear to lack the intellect, ability, drive, desire, or discipline required to be an attorney. For example, a person with a panic disorder may perform poorly when called on in class even though she is consistently and fully prepared; to the world she will seem to lack the discipline to prepare and the intellect to analyze the material. Thus, it is easy to dismiss the student as simply not being “cut out” to be an attorney. Of course, not every student who performs poorly suffers from an ED (or other disability), but legal educators and law school administrators must attempt to understand fully each student’s situation when evaluating poor in-class or exam performance and when assessing discipline and intellect.

Fifth, EDs often are treated with particular suspicion by law school administrators and legal educators because EDs are unseen and can persist for years despite aggressive treatment. Further, because of the profound stigma attached to EDs, most students with EDs attempt to act normally and not show any outward sign of their disability. As with LDs and other unseen disabilities, it is appropriate to require a student to provide thorough documentation of an ED<sup>81</sup> by a trained professional.<sup>82</sup>

Finally, many people erroneously view EDs as the result of a lack of willpower or character; they do not understand that someone who suffers from an ED cannot simply think or will it away.<sup>83</sup> The neurological, biochemical, and ingrained psychological aspects of EDs must be fully appreciated.

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<sup>81</sup> The invisible nature of mental impairments results in the need for particularly good documentation of the impairment and the resulting disability. *See, e.g.*, Coleman et al., *supra* note 5, at 4 n.14 (stating that “[b]oth courts and commentators agree that documentation is particularly important for mental disorders [and] learning disabilities, because they are not obvious” and citing cases and law review articles making that point).

<sup>82</sup> For example, it does not seem unreasonable to require a diagnosis to be made by a psychiatrist or psychologist rather than a social worker or school counselor.

<sup>83</sup> A very interesting and accessible book which discusses the intimate link between body, mind, social ability, and emotions is ANTONIO R. DAMASIO, *DESCARTES’ ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* (1994).

Of all the disabilities discussed, emotional disabilities may require particular sensitivity and discretion on the part of the law school administrator and legal educators. Profound stigma is attached to EDs. The student with an ED may be particularly reluctant to self-identify,<sup>84</sup> and even after self-identifying may be reluctant to discuss her condition and its impact on her educational process.

The issue of medication is also problematic for students with an ED. Unlike a person with a PMD, such as diabetes, who gladly may take medication to control the disease, a person with an ED may be reluctant to take medication, even if it “controls” the ED. This may be because the medication produces a mild to strong sedative effect which impairs the student’s ability to concentrate and to think, speak, and write clearly. For example, a tranquilizer such as Xanax often is prescribed to a student with a panic disorder. The student may conclude that the tranquilizer’s sedative effect so diminishes her ability to concentrate on her studies and to follow the discussion in class that it is seriously interfering with her educational experience. She may reasonably decide it is to her overall educational advantage to be exempted from being called on in class, rather than to take the tranquilizer and suffer its effects.

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<sup>84</sup> Stone reports that of the 1187 students who requested reasonable accommodations on exams during the 1994-95 academic year at the 80 schools he surveyed, 23, or 1.9%, claimed a mental illness disability. Stone, *supra* note 4, at 570 (figure 2). Stone hypothesized:

In contrast [to the much higher percentage of accommodation requests involving learning disabilities], a student diagnosed with a mental disorder may believe the price is too high to self-identify and request a modification in course examinations. The danger of acknowledging a mental disorder may prove too significant a risk because the student fears that such information may affect his or her future ability to sit for the bar exam or to satisfy the character and fitness committee of a state’s bar examiners.

*Id.* at 570.

A student may also be reluctant to take medication which would alter her personality, even if “for the better.”<sup>85</sup> Further, a student may be concerned about the ED medication’s side effects, which could include nausea, headaches, weight gain, and decreased sexual desire and performance. Side effects are of particular concern to the student who is pregnant or who is planning to have a child. Considering all aspects of the situation, the student may reasonably and legitimately conclude the medication’s side effects outweigh any possible educational benefits. Yet, she might be criticized by law school administrators or legal educators who wonder why her condition has not improved over time and why she is not taking active steps to “cure” or “control” her illness with available medication.<sup>86</sup>

On the other hand, should the student decide to take medication, the medication’s side effects may impair the student’s educational performance in other ways. Even if the side effect does not rise to the level of a disability,<sup>87</sup> it should be treated as part of the underlying ED and the student should be granted needed accommodations, such as additional time to take examinations.<sup>88</sup>

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<sup>85</sup> Over the years, I have had numerous discussions with law students and personal friends who have faced this issue. Sometimes, a reluctance to take medication is a direct result of the underlying emotional disability. For example, a paranoid schizophrenic may believe doctors are part of a plot against her and that the medication is really a poison. Even individuals with cases of depression or obsessive-compulsive disorder may worry that although the medication will control their disorder, their resulting personality will be artificial; that the personality will not really be their own, but rather a chemical construct. They worry about losing control of themselves and their lives to the drug they would be taking.

<sup>86</sup> This is not a mere hypothetical example. I have witnessed precisely this situation throughout my teaching career.

<sup>87</sup> The effects of medication taken to control mental or emotional illnesses have been held to result in a substantial limitation to major life activities. *See, e.g., Guice-Mills v. Derwinski*, 967 F.2d 794 (2d Cir. 1992) (finding nurse to be an “individual with a handicap” because antidepressant medications interfered with her ability to arrive at work on time); *Dees v. Austin Travis County Mental Health & Mental Retardation*, 860 F. Supp. 1186 (W.D. Texas 1994) (finding side effects of medication which limited ability to work to qualify person as disabled under the ADA).

<sup>88</sup> The issue of medication places the student in a “damned-if-she-does” and “damned-if-she-doesn’t” situation. On the one hand, a student may be criticized for not taking medication which would control her ED. On the other hand, if she takes medication which might control her ED, but the medication has side effects which require additional accommodations, she may be criticized for requesting accommodations which are not directly related to the underlying ED. The legal educators and law school administrators with whom she deals must understand the difficulty of her decision and should respect it. It seems reasonable, however, to suggest to the student that she ask her psychiatrist whether there is any medication which would help her to achieve some

From this outline of the three major categories of physical and mental impairments which may lead to disabilities, it is possible to see the depth and complexity of the hindrances under which many law students struggle and with which legal educators and law school administrators need to be aware. A brief outline of the statutory and regulatory framework which governs how legal educators and law school administrators should address a student possessing a disability will show how important knowledge of impediments can be when it comes to deciding whether a particular individual is disabled and what is the nature of any resulting accommodations.

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measure of control of her ED, but with reduced side effects. However, absolutely no pressure should be placed on the student to alter her medication or change the dosage.

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II. AN OVERVIEW OF THE STATUTORY AND REGULATORY FRAMEWORK  
GOVERNING THE TREATMENT OF DISABLED LAW STUDENTS.

The treatment of disabled students by law schools is governed by Section 504 of the Rehabilitation Act of 1973, as amended (Rehabilitation Act),<sup>89</sup> and the Americans with Disabilities Act of 1990 (ADA).<sup>90</sup> Part II provides an overview of the principal requirements of these acts and their implementing regulations. The remaining parts of this article frequently return to this overview and examine the interpretational difficulties inherent in the statutory and regulatory schemes.

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<sup>89</sup> Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, as amended, codified in relevant part for educational institutions at 29 U.S.C. § 794 (1998) [hereinafter “Rehabilitation Act”]. For a general overview of the Rehabilitation Act, including procedural issues, see *DISABILITIES AND THE LAW*, *supra* note 7, at §§ 3.01-.12. The Rehabilitation Act’s history is set forth at S. REP. NO. 93-318 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2076, 2078-79.

<sup>90</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C.A. §§ 12101-12213 (1998)); 47 U.S.C.A. § 225 (1998) [hereinafter “ADA”]. For general discussions of the Rehabilitation Act, see PERRITT, JR., *supra* note 7 (providing a general overview of the ADA, including procedural issues involved in alleged violations of the ADA); 2 HENRY H. PERRITT, JR., *AMERICANS WITH DISABILITIES ACT HANDBOOK* (3d ed. 1997) (providing a general overview of the ADA, including procedural issues involved in alleged violations of the ADA); *DISABILITIES AND THE LAW*, *supra* note 7, at §§ 2.01-.05. The ADA’s history can be found in REAMS ET AL., *DISABILITY LAW IN THE UNITED STATES: A LEGISLATIVE HISTORY OF THE AMERICANS WITH DISABILITIES ACT OF 1990* PUB. LAW 101-336 (1992).

Section 504 of the Rehabilitation Act reaches public and private law schools because it applies to “any program or activity receiving Federal financial assistance”<sup>91</sup> and defines “program or activity” in such a way as to include public and private law schools.<sup>92</sup> Section 504 provides that “[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under” any covered program or activity.<sup>93</sup> Most law schools receive federal financial assistance.<sup>94</sup> Model regulations for implementing Section 504 are located at 28 C.F.R. pt. 104;<sup>95</sup> the model regulations are used by federal agencies to develop individual regulatory schemes which implement the application of Section 504 to particular federally funded

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<sup>91</sup> 29 U.S.C.A. § 794(a) (1998).

<sup>92</sup> *Id.* at § 794(b). “[P]rogram or activity” is defined to include “all of the operations of . . . a college, university, or other postsecondary institution, or a public system of higher education . . . any part of which is extended Federal financial assistance.” *Id.* at § 794(b)(2)(A). “[P]rogram or activity” also is defined to include “an entire corporation, partnership, or other private [entity], or an entire sole proprietorship . . . which is principally engaged in the business of providing education . . . any part of which is extended Federal financial assistance.” *Id.* at § 794(b)(3)(A).

<sup>93</sup> *Id.* at § 794(a). The phrase “individual with a disability” is defined in 29 U.S.C.A. § 706(8) (1998), and it is discussed in detail *infra* in Part III.

The following excerpt from *Gill v. Franklin Pierce Law Ctr.*, 899 F. Supp. 850 (D.N.H. 1995), a Section 504 case, explains the basic requirements surrounding the “otherwise qualified individual with a disability” standard:

“An otherwise qualified person is one who is able to meet all of a program’s requirements in spite of his handicap.” The determination of whether an individual is “otherwise qualified” involves two steps. First, as the Supreme Court’s language in *Southeastern Community College* suggests, the court must consider whether an individual can meet a program’s requirements in spite of his or her handicap or disability. If the individual is unable to do so, the court must further consider whether any “reasonable accommodation” by the program would enable the individual to meet the program’s requirements. If an individual can meet the program’s requirements with reasonable accommodations, then the individual is “otherwise qualified” to participate in the program.

*Id.* at 853-54 (citations omitted).

<sup>94</sup> See Laura F. Rothstein, *Bar Admissions and the Americans with Disabilities Act*, HOUS. LAW., October 1994, at 34.

<sup>95</sup> The rather complex history of the regulatory scheme which implements Section 504 is explained in DISABILITIES AND THE LAW, *supra* note 7, at §§ 3.07 and 8.07. The Department of Justice’s (DOJ) model regulations, which serve as the basis for regulations issued by federal agencies, are located at 28 C.F.R. pt. 104. The regulations most relevant to postsecondary education are found at 34 C.F.R. §§ 104.41-47 (1998) (pertaining to the application of Section 504 to postsecondary education).

programs.

Public law schools are governed by Title II<sup>96</sup> of the ADA,<sup>97</sup> which applies to “any State or local government . . . [or] any department, agency . . . or other instrumentality of a State or States or local government.”<sup>98</sup> Title II provides that “[s]ubject to the provisions of this subchapter, 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.”<sup>99</sup> A disabled individual is qualified if she can meet the law school’s “essential eligibility requirements” either “with or without reasonable modifications.”<sup>100</sup> Regulations for

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<sup>96</sup> “With respect to employment, the Title II regulations make public entities subject to Title I of the ADA, which prohibits discrimination in matters of employment, and/or § 504 of the Rehabilitation Act.” Bonnie Poitras Tucker and Joseph F. Smith, Jr., *Accommodating Law Faculty with Disabilities*, 46 J. LEGAL EDUC. 157, 158 n.9 (1996).

<sup>97</sup> Most litigation has occurred in the context of, and most law review and practitioner-oriented materials concern, Title I, which governs employment, and Title III, which concerns public accommodations. For a general treatment of Title II issues, see the general references to the ADA, *supra* note 90; John J. Coleman, III & Marcel L. Debruge, *A Practitioner’s Introduction to ADA Title II*, 45 ALA. L. REV. 55 (1993).

<sup>98</sup> 42 U.S.C.A. § 12131(1) (West 1998).

<sup>99</sup> 42 U.S.C.A. § 12132 (West 1998). The ADA defines a “qualified individual with a disability” as “an individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” 42 U.S.C.A. § 12131(2) (West 1998).

<sup>100</sup> Reasonable modifications are discussed in Parts IV and V, *infra*.

The issue of what constitutes an “essential eligibility requirement” under the ADA is complex. Does it constitute the requirements for a law degree, only? Does a student possess the “essential eligibility requirements” if she can maintain the requisite grade point average, pass all required courses, and successfully complete any other requirements for the degree? Or, “is it appropriate for the school to consider whether the applicant will actually be able to practice law?” Coleman et al., *supra* note 5, at 5 n.21 (including a brief discussion, with citations, of this issue). This issue has not yet been settled by regulation or the courts. There are strong views that the more restrictive practicing-attorney standard should apply. See, e.g., Arthur Frakt, *Learning Disabilities: Law School Dilemma*, NAT’L L.J., Aug. 1, 1994, at A19 cited in Adams, *supra* note 35, at 189 n.1. Frakt, who is the dean of Widener University School of Law, opined: “An individual who lacks the ability to think, reason and solve problems under exam pressures probably will be unable to resolve problems in a timely manner that come up in the practice of law.” *Id.*

For the purpose of this article, the less stringent standard applies; that is, a student possesses the “essential eligibility requirements” if she can maintain the requisite grade point average, pass all required courses, and successfully complete any other requirements for the degree. As a normative matter, I believe law schools should use the less stringent

implementing Title II are the responsibility of the Department of Justice (DOJ) and are located at 28 C.F.R. §§ 35.101-190.

Title III of the ADA, Public Accommodations and Services Operated by Private Entities, provides that “[n]o individual<sup>101</sup> 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.”<sup>102</sup> Title III makes private law schools subject to ADA

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standard. First, some law students go on to careers other than the practice of law. To apply the more restrictive standard to them might require them to leave law school even though the law degree is a requirement of the career they have chosen (a good example of this is the student who goes on to teach business law in a university’s business school). Second, the bar examiners are responsible for certifying an individual is fit to practice law, that is, possesses the essential eligibility requirements for the receipt of a law license, either restricted or not. Third, there are many disabilities which would have only a minimal impact if the person were to practice in a particular area. For example, the student who suffers from panic attacks when speaking in public probably would be quite comfortable in an office practice involving estate planning.

For a representative article which demonstrates the difficulty of establishing essential eligibility requirement issue in the educational context, see George A. Fritsma & Steven B. Dowd, *Educators’ Responsibilities in Implementing the ADA*, RADIOLOGIC TECH., July 17, 1996, at 521 (discussing the establishment of a list of essential requirements for education in general and for radiologic science education programs in particular). Fritsma and Dowd state, correctly, I believe, that

[a]lthough separating the essential requirements for a professional academic program from the essential functions of its target professional position may seem artificial, the ADA clearly demands it. . . . [In addition, a]lthough educational programs often are considered to be “gatekeepers” for employers, completion of an educational program is not a guarantee that graduates will be able to perform every job in every setting. That determination must be made by the employer.

*Id.* Thus, according to the authors, the essential eligibility requirements for a degree program need not, and under the ADA should not, include “job performance-type” criteria.

<sup>101</sup> The statute does not include the requirement that the “individual” be “qualified.” The omission of the modifier “qualified” is appropriate because Title III was intended to prevent discrimination and to ensure reasonable accommodations in a wide variety of public accommodations, accommodations available to every individual. Thus, there would be no need to “qualify” for these public accommodations. When dealing with a law school education, “qualified” should be judicially read into the statute because it is clear that the public accommodation of “postgraduate private [law] school[s]” may limit participation to those individuals who are able to meet reasonable essential eligibility requirements.

<sup>102</sup> 42 U.S.C.A. § 12182(a) (1998). In § 12182(b), the general rule against

requirements by defining “public accommodations” to include “postgraduate private [law] school[s].”<sup>103</sup> Regulations implementing Title III are located at 28 C.F.R. §§ 36.101-.608.

The ADA did not lower the standards imposed by the Rehabilitation Act, but rather was intended to expand the types of protection provided by the Rehabilitation Act to entities which do not receive federal aid.<sup>104</sup> Indeed,

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discrimination is given a lengthy and detailed construction. *See* 42 U.S.C.A. § 12182(a) (1998). Also, “[w]ith respect to employment issues, [private law schools] are subject to Title I of the ADA. 42 U.S.C. § 12111(5) (1994).” Tucker and Smith, Jr., *supra* note 96, at 158 n.9.

<sup>103</sup> 42 U.S.C.A. § 12181(7)(I) (1998). Title III does not apply to “religious organizations or [law school] entities controlled by religious organizations.” 42 U.S.C.A. § 12187 (1998); *see also* 28 C.F.R. § 36.102(e) (“This part does not apply to . . . any religious entity . . .”).

<sup>104</sup> *See* 56 Fed. Reg. 35,696 (1991).

[g]iven 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 litigation brought under the Rehabilitation Act of 1973. 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.<sup>105</sup>

Putting a gloss on it, the Rehabilitation Act and the ADA both prohibit discrimination against qualified disabled individuals and require that such individuals receive “reasonable accommodations” which will permit them to have access to, and take a meaningful part in law school courses and activities.<sup>106</sup>

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<sup>105</sup> Robert W. Edwards, Note & Comment, *The Rights of Students with Learning Disabilities and the Responsibilities of Institutions of Higher Education Under the Americans with Disabilities Act*, 2 J.L. & POL’Y 213, 217-18 (1994) (footnotes omitted) (citing H.R. REP. NO. 485, Part 2, 101st Cong., 2d Sess. at 53-55 (1990) to indicate this is in keeping with congressional intent). See also Wayne A. Hill, Jr., Note, *Americans with Disabilities Act of 1990: Significant Overlap with Section 504 for Colleges and Universities*, 18 J.C. & U.L. 389 (1992); Robert B. Fitzpatrick, *The Meaning of Disability*, SB07 ALI-ABA 29, 32 (1996) (discussing the intended similarity of interpretation with respect to “handicap” and “disability”). Statutory and regulatory provisions which indicate congressional intent to interpret the ADA and Section 504 of the Rehabilitation Act in a similar fashion include 42 U.S.C.A. §§ 12117(b), 12133, 12134(b), 12201 (1998); 28 C.F.R. § 35.103(a) (“Rule of interpretation. Except as otherwise provided in this part, this part shall not be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 791) or the regulations issued by Federal agencies pursuant to that title.”); 28 C.F.R. § 36.103 (indicating that “[e]xcept as otherwise provided . . . this part shall not be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 791) or the regulations issued by Federal agencies pursuant to that title . . . [and that t]his part does not affect the obligations of a recipient of Federal financial assistance to comply with the requirements of section 504 of the Rehabilitation Act of 1973 . . . and the regulations issued by Federal agencies implementing section 504.”); 29 C.F.R. pt. 1630, app. § 1630 (1998) (indicating Congress intended that Rehabilitation Act case law should be adopted to the many similar definitions in the ADA).

For a comprehensive analysis of the relationship between the Rehabilitation Act and Title II of the ADA, see Mark C. Weber, *Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act*, 36 WM. & MARY L. REV. 1089 (1995).

<sup>106</sup> State laws which prohibit discrimination against individuals with disabilities are beyond the scope of this article. For a general discussion of some state laws focusing on employment-related matters, see DISABILITIES AND THE LAW, *supra* note 7, §§ 5.01-.04. The provisions of the ADA are not intended to “invalidate or limit the remedies, rights, and

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procedures of . . . any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals than are afforded” by the relevant provisions of the ADA. *See* 42 U.S.C.A. § 12201(b) (1998).

## III. THE LEGAL DEFINITION OF “DISABILITY.”

The federal legal framework establishes the required and the permissible responses by law schools towards disabled law students. Determining whether an impairment constitutes a disability is both the legal and practical starting point. Thus, the issue of what constitutes a “disability” is of great importance.

To the legal realist, a “disability” ultimately is whatever a court says it is in a particular case.<sup>107</sup> However, few cases directly consider whether a particular impairment constitutes a disability. As should be the case, the vast majority of determinations are made informally without litigation. In these situations, the interpretation of “disability” agreed upon or acceded to by the law student, the law school administrator, and other participants in the process is dispositive.<sup>108</sup>

Definitions necessarily are imprecise and ambiguous because they attempt to represent complex concepts and myriad factual scenarios using the imprecise medium of language. Imprecision and ambiguity are particularly common when, as with “disability,” the concept underlying the definition is both non-observable and qualitative in nature. Thus, although a statutory definition of “disability” exists, an examination of the definition’s components will demonstrate how those individuals who use “disability” as an identifier often find themselves at odds.

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<sup>107</sup> See, e.g., Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897) (“a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; and so of a legal right.”). Holmes also noted that “[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.” *Id.* at 461.

<sup>108</sup> See JAMES BRITTON, LANGUAGE AND LEARNING 7-8, 11-32, 97-126 (1970) (examining how language and definitions are “means of organizing a representation of the world . . . and that the representation so created constitutes the world we operate in . . . and [influences how we] interact with people . . .”).

The Rehabilitation Act and the ADA employ substantially identical definitions of “disability.”<sup>109</sup> According to the ADA, “The term ‘disability’ means, with respect to an individual (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”<sup>110</sup>

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<sup>109</sup> The Rehabilitation Act of 1973 originally used the term “handicap” to describe an individual with a sufficiently severe physical or mental impairment. In 1992, the Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, § 102(f), 106 Stat. 4344, 4348-49 (1992) adopted the term “disability.”

Congress first adopted the term “disability” in 1990, when it passed the ADA. Congress adopted “disability” to reflect the perceived preference of disabled individuals. H.R. REP. NO. 485, 101st Cong., 2d Sess., pt 2 at 50-51. Congress did not intend any substantive change to result from the change in terminology. *Id.*; *see also* 28 C.F.R. pt. 35, app. A § 35.104 (1998) (section-by-section analysis of “disability” indicates both that the definition of disability “is comparable to the definition of the term ‘individual with handicaps’ in section 7(8) of the Rehabilitation Act” and that the adoption of “disability” in the ADA “represent[ed] an effort by Congress to make use of up-to-date, currently accepted terminology . . . [which was] most in line with the sensibilities of most Americans with disabilities. No change in definition or substance is intended nor should one be attributed to this change in phraseology.”).

Although most administrative regulations use “disabled,” some regulations still use “handicapped.” *See, e.g.*, 34 CFR § 104.3(k)(1998) (defining “qualified handicapped person”). For a general discussion of the history of the terminology employed in federal legislation and regulatory schemes, see *DISABILITIES AND THE LAW*, *supra* note 7, at § 1.03. For a comprehensive analysis of the meaning of disability in the context of Title I of the ADA and the Rehabilitation Act, much of which is transferable to Title II of the ADA, see Fitzpatrick, *supra* note 105.

<sup>110</sup> 42 U.S.C.A. § 12102(2) (1998). This definition applies to the entire ADA. The Rehabilitation Act’s definition of disability states:

Subject [to various specific exceptions and limitations], the term “individual with a disability” means, for purposes of . . . [section 794, which is the code location of section 504 of the Rehabilitation Act] any person who (i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

29 U.S.C.A. § 706(8)(B) (1998).

Both the Rehabilitation Act and the ADA have additional provisions which modify and qualify the general definition of disability. For example, the ADA modifies its general definition of disability with the following provision:

- (a) Homosexuality and Bisexuality. For purposes of the definition of “disability” in section 12102(2) of this title, homosexuality and bisexuality are not impairments and as such are not disabilities under this chapter [which constitutes the main portion of the ADA, including Titles I, II, and III].
- (b) Certain Conditions. Under this chapter, the term “disability” shall not include--(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments,

The most relevant part of the definition is Subsection “A.” A law student usually seeks an accommodation after asserting the current existence of a physical or mental impairment which has so significantly diminished her ability to function that it “substantially limits” some “major life activity.”<sup>111</sup>

A. *Issues Raised by the Statutory Definition of Disability.*

Despite its apparently straight-forward language, the statutory definition of disability raises four difficult issues that must be considered in every determination of whether a law student is disabled: (1) What is a “major life activity” for the purpose of determining whether a law student suffers from a disability?<sup>112</sup> (2) What is a “physical or mental impairment?” (3) At what point does a physical or mental impairment become so severe that it “substantially limits” the law student from performing a major life activity? (4) What standard for performance or function governs the determination whether a law student’s ability to function or to perform some major life activity has been substantially limited: the student’s present capabilities, the student’s former capabilities, the average person’s capabilities, the average law student’s capabilities, or the capabilities of some other real or hypothetical group or individual?<sup>113</sup>

1. What is a “major life activity.”

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- or other sexual behavior disorders;
  - (2) compulsive gambling, kleptomania, or pyromania; or
  - (3) psychoactive substance use disorders resulting from current illegal use of drugs.

42 U.S.C. § 12211 (1998). Similar provisions of the Rehabilitation Act are codified at 29 U.S.C. §§ 706(E)-(F) (1998). Regulations also contain provisions which clarify their basic definitions of disability. *See, e.g.*, 29 C.F.R. § 1630.3 (“Exceptions to the definitions of ‘Disability’ and ‘Qualified Individual with a Disability.’”).

<sup>111</sup> There are sound policy reasons for including subsections “B” and “C” in the definition of disability. For a discussion of these subsections and the policies which animate them, see PERRITT, *supra* note 7, at §§ 3.4 and 3.5.

<sup>112</sup> As the subsequent discussion will make clear, what constitutes a disability is highly contextual. A physical or mental impairment which might constitute a disability for a student in one line of study might not constitute a disability for a student in another line of study. It is for that reason I phrase the question with the qualifier, “law student.”

<sup>113</sup> All anti-discrimination statutes must use some definition or classification to describe those persons who may not be discriminated against. The Rehabilitation Act and ADA require a standard for differentiating between individuals who are disabled and individuals who are not disabled. Given the inherently ambiguous and contextual nature of what constitutes a “disability,” neither the Rehabilitation Act nor the ADA can use obvious and bright-line attributes such as gender.

Tucked into the middle of the definition of disability is the requirement that the physical or mental impairment affect a “major life activity.” Neither the Rehabilitation Act nor the ADA define what constitutes a major life activity; however, regulations specify that major life activities include “caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”<sup>114</sup> The Equal Employment Opportunity Commission (EEOC) Compliance Manual defines “major life activity” to include sitting and “mental and emotional processes such as thinking, concentrating, and interacting with others.”<sup>115</sup>

The major life activities of learning, “thinking, concentrating, and interacting with others” are directly related to law school education. In addition, the major life activities of sitting, walking, seeing, hearing, and speaking obviously have a substantial, if more indirect role in law school education.

Although “a major life activity” is not defined by the relevant statutes, the

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<sup>114</sup> See, e.g., 28 C.F.R. § 35.104 (1998) (DOJ’s regulations implementing Title II of the ADA); 28 C.F.R. § 36.104 (1998) (DOJ’s regulations implementing Title III of the ADA); 28 C.F.R. § 41.31(b)(2) (1998) (DOJ’s regulations implementing Executive Order 12250, “which requires the Department of Justice to coordinate the implementation of section 504 of the Rehabilitation Act of 1973,” 28 C.F.R. § 41.1 (1998)); see also 29 C.F.R. § 1630.2(i) (1998) (regulations of the EEOC, which is responsible for promulgating regulations implementing Title I of the ADA). The Appendix to Part 1630, Interpretive Guidance on Title I of the Americans with Disabilities Act, explains this regulation as follows:

This term adopts the definition of the term “major life activities” found in the regulations implementing section 504 of the Rehabilitation Act at 34 CFR part 104. “Major life activities” are those basic activities that the average person in the general population can perform with little or no difficulty. Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive. For example, other major life activities include, but are not limited to, sitting, standing, lifting, reaching.

29 C.F.R. pt. 1630, app. § 1630 (1998). In *Sutton v. United Air Lines, Inc.*, the Tenth Circuit Court of Appeals held that a pilots’ uncorrected vision was a physical impairment within meaning of ADA. 130 F.3d 893 (10th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3783 (U.S. June 1, 1998) (No.97-1943). However, the determination of whether an individual impairment substantially limits a major life activity should take into consideration mitigating or corrective measures utilized by individual. *Id.* Also, a pilots’ corrected vision does not substantially limit their major life activity of seeing. *Id.*

<sup>115</sup> EEOC Compliance Manual, vol. 2. EEOC Order 915.002, 902 (3/14/95). Although the Compliance Manual is intended to assist in the implementation of Title I of the ADA, it is persuasive authority regarding the meaning of “major life activity” for the purpose of Title II and Title III of the ADA, as well as for Section 504 of the Rehabilitation Act.

regulatory language ensures the phrase's application to law students is not subject to significant dispute. Other parts of the definition of disability, however, generate more question and debate.

2. What is a physical or mental impairment?

The phrase "physical or mental impairment" is included in both the ADA<sup>116</sup> and the Rehabilitation Act,<sup>117</sup> but it is not defined, and specific impairments are not enumerated. Given the wide variety of physical and mental conditions which can adversely affect an individual's ability to perform a major life activity, it is not surprising that Congress neither defined what constitutes a physical or mental impairment nor listed the universe of possible impairments.<sup>118</sup> However, the ADA's legislative history provides some guidance when it states that "physical or mental impairment" includes:

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 psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disability.<sup>119</sup>

The DOJ model regulation for Section 504 of the Rehabilitation Act employs a substantially similar definition.<sup>120</sup> The DOJ's model regulation provides further guidance when it states that "[t]he term 'physical or mental impairment' includes,

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<sup>116</sup> The definition is set forth *supra* in the text which accompanies note 110.

<sup>117</sup> The definition is set forth *supra* in note 110.

<sup>118</sup> See 29 C.F.R. pt. 1630, app. § 1630 (1998) (In offering extensive commentary on the meaning of "substantially limits," the EEOC stated that "[t]he ADA and this part, like the Rehabilitation Act of 1973, do not attempt a 'laundry list' of impairments that are 'disabilities.' The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.").

<sup>119</sup> H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2 (1990), at 50 (citing HEW regulations, 42 Fed. Reg. 22,685 (May 4, 1977), and HUD regulations, 54 Fed. Reg. 3232 (Jan. 23, 1989)); H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 3 (1990), at 27; S. Rep. No. 116, 101st Cong., 1st Sess. (1989), at 21-22 (emphasis added). The EEOC, which is responsible for promulgating regulations implementing Title I of the ADA, adopted a substantially similar definition in 29 C.F.R. § 1630.2(h)(1-2) (1998).

<sup>120</sup> 28 C.F.R. § 41.31(b) (1998).

but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.”<sup>121</sup>

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<sup>121</sup> 28 C.F.R. § 41.31(b)(1) (1998). An identical definition is contained in the DOJ’s regulation implementing the Rehabilitation Act, 28 C.F.R. § 42.540(k)(2)(i) (1998). The DOJ’s regulation implementing Title II of the ADA states:

The phrase *physical or mental impairment* includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

28 C.F.R. § 35.104. The DOJ’s regulation implementing Title III of the ADA, 28 C.F.R. § 36.104 provides an identical definition as the definition implementing Title II. *See also* 56 Fed. Reg. 35,694, 35,698-99 (in which the DOJ’s regulations are analyzed).

Several factors suggest “impairment” should be construed broadly to cover the widest possible variety of physical and mental conditions and disorders: the lack of language in the statutes and regulations that would limit the type of impairments beyond the requirement they be “physical or mental,” the use of “any” in the legislative history and the model regulation, the lengthy list of impairments in the DOJ’s model regulations, and Congress’ clearly stated purpose of assisting the some 43,000,000 individuals with disabilities.<sup>122</sup> A broad interpretation of impairment certainly would include the physical and mental impairments discussed in Part I.<sup>123</sup> The “substantially limits”<sup>124</sup> and “major life activity” requirements in the definition of disability will ensure that an expansive interpretation of impairment does not result in people inappropriately being classified as disabled.

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<sup>122</sup> See generally 42 U.S.C.A. § 12101 (1998) (containing Congress’ findings with respect to disabled individuals and a statement of Congress’ purposes in passing the ADA.) In its findings, Congress states “that . . . some 43,000,000 Americans have one or more physical or mental disabilities.” 42 U.S.C.A. § 12101(a)(1) (1998). The statement that these 43,000,000 Americans have “disabilities,” not mere “impairments,” suggests Congress intended the definition of “disability” to be interpreted expansively.

<sup>123</sup> Although dealing with Title I, the EEOC has suggested that impairment should be broadly construed:

The ADA and this part, like the Rehabilitation Act of 1973, do not attempt a “laundry list” of impairments that are disabilities. The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors. . . . Other impairments, however, such as HIV infection, are inherently substantially limiting.

29 C.F.R. pt. 1630, app. § 1630 (1998) (offering an extensive commentary on the meaning of “substantially limits,” which is defined in 29 C.F.R. § 1630.2(j)).

<sup>124</sup> This phrase is examined in Part III.A.3., *infra*.

Before leaving the topic of impairments, it is necessary to consider briefly whether “mental impairment” could be interpreted reasonably to include several factors that might affect adversely an individual’s ability to learn, think, and obtain an education: (a) a previous lack of educational opportunity, (b) cultural deprivation, (c) a general, congenital lack of intellectual ability, and (d) a general, chronic unwillingness to work very hard. If judged by their potential negative impact on academic functioning and performance, each factor might be considered a mental impairment. However, if judged by their causes, rational grounds exist for excluding each factor from the legal interpretation of mental impairment.

A previous lack of educational opportunity and cultural deprivation<sup>125</sup> are social conditions that are unrelated to an individual’s inherent intellectual ability or emotional structure.<sup>126</sup> From a law student’s perspective, a previous lack of educational opportunity means the individual attended schools lacking the instruction, books, equipment and technology, and curriculum required for the student to acquire the spectrum of basic knowledge; the level of skill in reading, comprehension, writing, and analysis; the basic study habits; and the basic attitudes, values, and beliefs concerning learning and performance which are necessary for law school-level performance.

Cultural deprivation occurs when an individual grows up without being exposed to the social, business, professional, or linguistic experiences which provide the context for learning about and practicing law. For example, a student

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<sup>125</sup> The EEOC has made it clear it does not consider educational and cultural disadvantages to be impairments for the purpose of establishing a disability under Title I of the ADA. Although pertaining to “substantially limits” as defined in 29 C.F.R. § 1630.2(j) (1998), the EEOC made it clear that:

[i]t is important to remember that the restriction on the performance of the major life activity must be the result of a condition that is an impairment. As noted earlier, advanced age, physical or personality characteristics, or *environmental, cultural, and economic disadvantages are not impairments*. Consequently, even if such factors substantially limit an individual’s ability to perform a major life activity, this limitation will not constitute a disability. *For example, an individual who is unable to read because he or she was never taught to read would not be an individual with a disability because lack of education is not an impairment*. However, an individual who is unable to read because of dyslexia would be an individual with a disability because dyslexia, a learning disability, is an impairment.

29 C.F.R. pt. 1630, app. § 1630.2(j) (1998) (emphases added); *see also* 56 Fed. Reg. 35,694, 35,699 (indicating Title II does not cover cultural disadvantages).

<sup>126</sup> However, *see supra* note 42 and the discussion of environmental factors which may influence the development of learning disabilities. Many of these factors are correlated with lower socio-economic standing, which, in turn, is correlated with cultural deprivation.

whose father works on a cleaning crew and whose mother is a waitress probably will be disadvantaged vis-a-vis a student whose father is a bank vice-president and whose mother is an attorney. By the time she reaches law school, the latter student will have had more exposure to “professional language” and mores, as well as discussions of business situations, law, and the legal system.

Lack of educational opportunity and cultural deprivation may place a student at a relative disadvantage; however, the student’s basic physical capabilities, intellectual abilities, and emotional structures are not impaired. The disadvantaged student can, perhaps with more difficulty at first, learn the required skills, information, and mores of law study and legal practice. The “accommodation” or “remedy” for such students is different than for a disabled student, at least for physically and emotionally disabled students. The proper place to address problems resulting from educational deprivation is in an academic support program. The proper place to address problems resulting from cultural deprivation is in a practitioner-student mentoring program. In addition, as a practical matter, it would be difficult to define educational and cultural deficiencies, screen for them, and tailor accommodations for each student. Finally, these situations are not necessarily related to impaired performance, which is the essence of the concept of “disability.”

A congenital lack of intellectual ability, although relating to mental functioning, is also not a disability. Life is not fair. Ability of every type (athletic, artistic, dramatic, mathematic, and literary) is not found in equal measure in everyone. In life’s game of genetic roulette, there are those who are lucky and those who are not. For every Michael Jordan, Vincent Van Gogh, Meryl Streep, Stephen Hawkings, or Maya Angelou, there is someone at the other end of the distribution of genetic potential. As politically incorrect as it may be to say, there are many people who lack the genetic potential and the resulting intellectual ability to successfully complete a course of study at any law school, pass the bar examination in any state, and become a competent practicing attorney.<sup>127</sup> These people may feel unlucky, but they are not disabled in the sense contemplated by Congress.

Finally, a chronic unwillingness to work hard is not, except perhaps in rare circumstances, a mental impairment. Again, although it may be politically incorrect to say, there are a large number of people of above average or high

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<sup>127</sup> See, e.g., Wangerin, *Programs*, *supra* note 55 (indicating that some students are simply not intellectually able to succeed in any law school, with or without the intervention of an academic support program).

intelligence who do not work very hard. This may be due to laziness or to a lack of direction or goals. When such a student seeks admission to law school with a low or moderate GPA, or seeks readmission to law school after flunking out, the admissions committee must ponder the choices which are available to the student and to the school. But under the relevant statutes, one of those choices is not to classify the student as disabled.<sup>128</sup>

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<sup>128</sup> As with any general rule, there are exceptions. Certain neurological conditions (such as ADD) may result in an inability to stay focused on task or to maintain the motivation to follow through on tasks. In addition, certain emotional diseases (such as depression) may result in the same behaviors.

3. What does “substantially limits” mean?

A physical or mental impairment constitutes a disability only when it is so profound that it “substantially limits” a person’s ability to engage in one or more major life activities. While the meaning of the “major life activity” and “physical or mental impairment” components of disability are relatively obvious and indisputable, the phrase “substantially limits” introduces a multitude of practical and policy concerns which make it difficult to apply to concrete cases. And, unfortunately, “substantially limits” is not defined by either the Rehabilitation Act or the ADA.

The phrase “substantially limits” emphasizes the functional aspect of disability. The use of “limit” in conjunction with “major life activity” indicates a requirement that the physical or mental impairment result in a diminished ability to function, that a reduction in real-world performance of a major life activity must occur.<sup>129</sup>

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<sup>129</sup> The functional, performance-oriented definition of “disability” created by the “substantially limits” requirement is both practical and normatively just. The definition is practical because it limits to a manageable number the students who are “disabled.” Many law students possess some physical or mental impairment, that is, some physical or mental “imperfection” or “problem.” If the mere existence of a physical or mental “imperfection” or “problem” constituted a disability, a significant proportion of the law student population could be classified as disabled. This would be an unworkable situation and a situation which clearly is outside of Congress’ intent or purpose. A student’s imperfection or problem rises to the level of a disability only when it is so severe that it “substantially limits” the student’s ability to perform some education-related “major life activity.”

The definition of “disability” is normatively just because its functional, performance-oriented nature confers disability status, with the attendant right to reasonable accommodations, only upon those individuals who are substantially limited in a major life activity. The concept of equal opportunity, a level playing field, is deeply embedded in our individual and collective psyches. Indeed, Congress specifically indicated that “the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity [and] full participation” for individuals with disabilities. 42 U.S.C.A. § 12101(a)(8) (1998). The congressional declaration of purposes for the Rehabilitation Act also includes “the guarantee of equal opportunity.” 29 U.S.C. § 701(b)(1)(F) (1998). At the same time, there is the somewhat contradictory understanding that fate ensures that physical and mental attributes are not now, and never will be distributed equally. Thus, to some extent, we all must play the hand we are dealt.

These conflicting perspectives are harmonized through a definition of disability which is based on a person’s ability to function. An individual with a physical or mental condition which substantially limits her ability to perform a relevant major life activity is considered disabled and is permitted to obtain appropriate assistance in the form of reasonable accommodations. Thus, consistent with the concept of equal opportunity, an

The federal regulations implementing the statutes, as well as comments which accompany them, recognize the functional, performance-oriented nature of “substantially limits.”<sup>130</sup>

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attempt is made to provide the disabled individual with a level playing field. An individual with a physical or mental condition which does not substantially limit her ability to perform a relevant major life activity must do the best she can. The functional impairment is minor, or is comparatively so, and accommodations would constitute an unfair advantage over the many others who must struggle with some type of minor functional impairment. She must make do with the hand she was dealt.

The law does not seem to, and it should not, define as a disability a common condition which if corrected by the individual with minimal effort or expense would permit the individual to function normally. For example, my uncorrected vision approaches 20/200; with correction, my vision is 20/20. I possess a physical problem which, if uncorrected, would substantially limit my ability to read, to get around, and to perform a variety of other tasks required to work. However, my extremely poor uncorrected eyesight is not a disability because, with glasses, it does not interfere with my ability to function.

<sup>130</sup> For example, the section-by-section analysis which accompanies the DOJ’s regulations implementing Title II of the ADA emphasizes the functional, performance-oriented nature of “substantially limits.”

A person is considered an individual with a disability for purposes of Test A, the first prong of the definition, when the individual’s important life *activities* are restricted as to the conditions, manner, or duration under which they can be *performed* in comparison to most people. A person with a minor, trivial impairment, such as a simple infected finger, is not impaired in a major life activity. A person who can walk for 10 miles continuously is not substantially limited in walking merely because, on the eleventh mile, he or she begins to experience pain, because most people would not be able to walk eleven miles without experiencing some discomfort.

28 C.F.R. pt. 35, app. § 35.104 (1998) (emphasis added).

The EEOC regulation defining “substantially limits” for Title I purposes emphasizes the ability to function or perform certain tasks when it states that “substantially limits” means an individual is:

- (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.

29 C.F.R. § 1630.2(j)(1) (1998) (emphasis added).

In addition, the EEOC offered an extensive commentary on the meaning of “substantially limits,” as defined in § 1630.2(j). The following are selected excerpts which demonstrate the functional, performance-oriented nature of “substantially limits.”

Many impairments do not impact an individual’s life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of the individual’s life activities.

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The ADA and this part, like the Rehabilitation Act of 1973, do not attempt a “laundry list” of impairments that are disabilities. The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual.

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On the other hand, temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities.

....

An impairment that prevents an individual from performing a major life activity substantially limits that major life activity.

....

Alternatively, an impairment is substantially limiting if it significantly restricts the duration, manner or condition under which an individual can perform a particular major life activity compared to the average person in the general population’s ability to perform that same major life activity.

As is appropriate for a function-oriented standard, “substantially limits” establishes a qualitative guideline, not a quantitative or a bright-line test. Even the most ardent textualist immediately would be forced to concede that “substantially” speaks more to informed and reasoned evaluation than to exacting measurement. Further, the determination of an impairment’s magnitude and its real-world impact on a student’s ability to perform major life activities clearly requires a qualitative, case-by-case assessment.<sup>131</sup> An assessment of whether an impairment meets the “substantially limits” requirements is made more difficult by the fact that not only may impairments appear in unique combinations, but a given impairment may be contextual,<sup>132</sup> temporary,<sup>133</sup> intermittent,<sup>134</sup> deteriorating,<sup>135</sup>

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<sup>131</sup> See, e.g., EEOC commentary with respect to “substantially limits” set forth *supra* at note 129 and the EEOC’s further observation that “[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis.” 29 C.F.R. pt. 1630, app. § 1630.2(j) (1998).

Some functional impairments are so severe it is obvious the “substantially limits” requirement is met. For example, a student who is quadriplegic, totally deaf, or totally blind possesses such a profound functional impairment that she is disabled under any interpretation of “substantially limits,” and without regard to the standard employed to determine when an impairment substantially limits the ability to perform a major life activity. See 28 C.F.R. pt. 35, app. A § 35.104 (1998). The EEOC states:

For example, a person who is paraplegic is substantially limited in the major life activity of walking, a person who is blind is substantially limited in the major life activity of seeing, and a person who is mentally retarded is substantially limited in the major life activity of learning. A person with traumatic brain injury is substantially limited in the major life activities of caring for one’s self, learning, and working because of memory deficit, confusion, contextual difficulties, and inability to reason appropriately.

*Id.* But see 29 C.F.R. pt. 1630, app. § 1630.2(j) (1998) (“Many impairments do not impact an individual’s life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of the individual’s major life activities.”).

<sup>132</sup> Three examples will illustrate impairments in this category. First, a student with a general anxiety disorder and who suffers from panic attacks may “freeze” or have a panic attack when faced with the three-hour time limit of an examination, but not when faced with a three-week deadline for a legal writing memorandum. Second, a student who is a quadriplegic may be substantially limited in her ability to take examinations (which involves the major life activity of writing), but may not be substantially limited for the purpose of participating in class (which involves the major life activity of talking). Third, a student with dyslexia may be substantially limited in her ability to read (which involves the major life activities of seeing and reading), but may not be substantially limited for the purpose of participating in class or moot court oral arguments (which involves the major life activity of speaking).

<sup>133</sup> For example, a student may suffer profound depression for several months after the death of a spouse or may be greatly limited in the ability to take notes over the time it takes a broken wrist to heal. See also 29 C.F.R. pt. 1630, app. § 1630.2(j) (1998)

or improving.<sup>136</sup>

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(“[T]emporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza.”).

<sup>134</sup> A student may have a condition which usually is controlled or which usually is non-debilitating, but which occasionally results in severe limitations on her ability to function. For example, the student may suffer an occasional diabetic episode, or an epileptic seizure, or a short-term exacerbation of a case of lupus. Another group of students who experience intermittent impairment includes students undergoing periodic treatments such as chemotherapy or radiation therapy.

There is case authority in Title I situations which indicates that conditions which leave the individual only intermittently impaired do not constitute a disability. *See, e.g.*, *Hamm v. Runyon*, 51 F.3d 721 (7th Cir. 1995) (arthritis); *Branch v. City of New Orleans*, Civ. A. No. 93-1273, 1995 WL 295320 (E.D. La. May 8, 1995) (Crohn’s disease). It seems safe to speculate that the more frequent and more severe the exacerbations, the more likely it is the impairment will be classified as a disability.

<sup>135</sup> For example, the impairments suffered by a student with a degenerative disease such as muscular dystrophy or a progressive disease like AIDS would be expected to increase in severity over time.

<sup>136</sup> For example, a student with cancer may no longer be substantially limited in any respect if the cancer is cured.

Even under the best of circumstances, an impairment's impact on the major life activities which affect a law student's education and academic performance may be almost impossible to assess. Consider the difficulty in attempting to measure or to quantify whether a student is substantially limited in the ability to obtain a legal education by a mild case of dyslexia, by the lack of concentration resulting from a mild case of ADD or depression, or by an intermittent case of carpal tunnel syndrome.

Given both Congress' purpose of promoting opportunities for individuals who suffer from functional limitations and the qualitative nature of the assessment process, as a matter of law, "substantially" should be construed in a lenient manner, as a low hurdle. The "major life activity" requirement in the definition of disability will ensure an expansive interpretation of "substantially limits" does not result in a student being classified inappropriately as disabled. Further, the requirement that any accommodation given to a student be reasonable<sup>137</sup> will help ensure a disabled student does not obtain an unfair advantage.

The impact of everyday practices on the parameters of "substantially limits" adds another level of complexity to interpreting the phrase. The relevant statutes and regulations do not address whether an impairment which is controlled by medication or compensated for by a device may still be considered to substantially limit a major life activity. If, for example, a student's diabetes, epilepsy, or depression is controlled by medication, does the impairment still substantially limit a major life activity? Or, if a student with a lower-leg amputation can walk with a prosthetic lower leg, does the impairment still substantially limit a major life activity? Some case law indicates an impairment which is controlled by medication may not qualify as a disability. The cases suggest an impairment may not qualify as a disability unless the required medication itself causes a substantial limitation in the individual's ability to engage in a major life activity.<sup>138</sup>

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<sup>137</sup> See the discussion of what constitutes a "reasonable" accommodation, *infra* Part IV.

<sup>138</sup> See, e.g., *Mackie v. Runyon*, 804 F. Supp. 1508 (M.D. Fla. 1992) (finding that a disability did not exist for Rehabilitation Act purposes when medication was controlling a mental illness); *Deckert v. City of Ulysses*, No. 93-1295-PFK, 1995 WL 580074 (D. Kan. Sept. 6, 1995) (finding that when controlled by insulin, diabetes is not a disability), *aff'd* 105 F.3d 669 (10<sup>th</sup> Cir. 1996).

Despite case law to the contrary, the better position is that an impairment which would substantially limit a student's ability to obtain an education in the absence of medication or other assistance continues to constitute a disability even if the underlying impairment is controlled or ameliorated.<sup>139</sup> First, this interpretation is most in line with Congress' clear purpose of promoting opportunities for individuals who suffer from functional limitations. Second, even though an impairment may be "controlled," the impairment's impact on the student's life may still be disabling considering the totality of circumstances. Consider, for example, the diabetic student whose illness is "controlled" by insulin, exercise, and diet. The process of obtaining and administering insulin, as well as monitoring its impact through several daily, self-administered blood sugar tests, may be quite time-consuming and disruptive of a "normal" routine. The same is

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<sup>139</sup> The EEOC, which oversees the implementation of Title I of the ADA, supports this view. In the EEOC's Section-by-Section Analysis of Comments and Revisions to 29 C.F.R. § 1630.2(j), the EEOC stated:

The Commission has revised the interpretative guidance accompanying Sec. 1630.2(j) to make clear that the determination of whether an impairment substantially limits one or more major activities is to be made without regard to the availability of medicines, assistive devices, or other mitigating measures. This interpretation is consistent with the legislative history of the ADA. See S. Rep. No. 116, 101st Cong., 1st Sess. 23 (1989) . . . ; H.R. Rep. No. 485 part 2, 101st Cong., 2d Sess. 52 (1990) . . . ; House Judiciary Report at 28. The Commission has also revised the examples in the third paragraph of this section's guidance. The examples now focus on the individual's capacity to perform major life activities rather than on the presence or absence of mitigating measures. These revisions respond to comments from disability rights groups, which were concerned that the discussion could be misconstrued to exclude from ADA coverage individuals with disabilities who function well because of assistive devices or other mitigating measures.

56 Fed. Reg 35,726, 35,727. In the EEOC's extensive commentary on the meaning of "substantially limits," the commentary states:

An individual who uses artificial legs would likewise be substantially limited in the major life activity of walking because the individual is unable to walk without the aid of prosthetic devices. Similarly, a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication. It should be noted that the term "average person" is not intended to imply a precise mathematical "average."

. . . .

The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices.

29 C.F.R. pt. 1630, app. § 1630.2(j) (1998) (citations omitted).

true of maintaining the required exercise and nutritional regimes. Finally, “controlling” a disease usually means minimizing, not eliminating its symptoms. The diabetic student will still experience good days and bad days, and even on good days will likely have some periods when her blood sugar level is out of balance. Consider, also, the student who suffers from depression or panic attacks. As the discussion in Part I indicated, the medication prescribed by the student’s psychiatrist is likely to cause drowsiness and diminish her ability to concentrate. Similar to the diabetic student, she will still have good days and days in which the depression or panic attacks are disabling despite the medication. A policy which supports the student’s educational endeavors would construe “substantially limits” in a expansive manner and consider these students to be disabled. However, it would be appropriate for a law school administrator to tactfully and non-intrusively monitor the students’ individual situations and to grant them accommodations only at times when their conditions affected their educational endeavors and only to the extent the accommodations are reasonable and required.

The existence of highly specific, but profound learning disabilities further complicates the task of interpreting and applying the “substantially limits” standard. If a student suffers from such a learning disability, should this mean she is substantially limited in her ability to learn and to obtain a law school education? The statutes do not address the issue. However, by defining impairment to include a “specific learning disability,” the legislative history and various regulations<sup>140</sup> strongly imply that a profound, but highly specific learning disability should be considered to substantially limit the student’s ability to learn. Further, the use of such terms as “learning” and “thinking”<sup>141</sup> in describing major life activities suggest the impairment need not affect the totality of the individual’s intellectual activity.

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<sup>140</sup> See *supra* note 121.

<sup>141</sup> See *supra* Part III.A.1 (discussing “major life activities”).

Consider the following example: A student has dyscalculia, a learning disability which limits the student's ability to think and perform arithmetic and mathematical operations. In the overall law school context, this learning disability probably would not substantially limit the student's ability to learn and to obtain a legal education. It does not impair her general ability to read, comprehend, analyze, organize, research, write, or speak. However, in certain subjects, such as Income Taxation, the student's learning disability would constitute a mental impairment which would probably substantially limit her ability to pass the course. If she were a borderline student, a low grade could force her onto academic probation or result in her dismissal from law school. If the course is required, her inability to pass the course would result in her being unable to graduate from law school. Given the profound impact which dyscalculia would have on her performance, as well as the profound impact which a poor or failing grade could have on her career, "substantially limits" should be construed to include "substantially interferes" with a particular type of learning or with a particular class. Even if the class is not required and the student is not in academic difficulty, the fact that the disability would profoundly and adversely affect her performance should result in her being considered disabled. Classifying as "disabled" a student with a specific learning disability such as dyscalculia would result in equally specific accommodations, thus preventing other students from being disadvantaged or the disabled student from being inappropriately advantaged.<sup>142</sup>

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<sup>142</sup> Some learning disabilities are relatively global in their impact. For example, dyslexia and DWE affect reading comprehension and writing, respectively. Such basic skills have an impact throughout the curriculum.

Some impairments represent a middle ground. Consider the student who suffers from panic attacks when called upon in class. She has an impairment which substantially limits her ability to participate in class discussion. But is that significant enough to say she is substantially limited in her ability to learn, to obtain a law school education? On the one hand, it does affect her ability to participate in--and concentrate while sitting through--her classes. On the other hand, it does not affect her ability to read and assimilate course material, complete research and writing requirements, participate in the law review write-on competition, and take examinations.

The example in the text presents a very specific situation. Because the situation does demonstrate a substantial limitation on the student's ability to learn, and does constitute a disability, I believe the previous, and broader, examples in this footnote also would be considered to constitute substantial limitations on the student's ability to engage in the major life activity of learning. Even though each student would be considered to be disabled, the situations in which they were afforded accommodations, as well as the nature of the accommodations, would differ.

Whether temporary impairments, even if severe, “substantially limit” a student’s ability to engage in a major life activity presents another interpretational quandary. For example, does a student who broke both her legs in a car accident have a disability? What about a student who broke her writing hand? The issue of temporary impairments is not directly addressed either by statute or regulation. However, commentary by the administrative agencies charged with promulgating the relevant regulatory frameworks suggests that a temporary impairment is not a disability within the meaning intended by Congress.<sup>143</sup> This position seems correct as a matter of policy because the inclusion of temporary impairments would dramatically increase the number of qualifying disabilities and the amount of litigation and administrative activity concerning the determination of whether a

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<sup>143</sup> The section-by-section analysis which accompanies the DOJ’s regulations implementing Title II of the ADA states in relevant part:

The Department received many comments on the proposed rule’s inclusion of the word “temporary” in the definition of “disability.” The preamble indicated that impairments are not necessarily excluded from the definition of “disability” simply because they are temporary, but that the duration, or expected duration, of an impairment is one factor that may properly be considered in determining whether the impairment substantially limits a major life activity. The preamble recognized, however, that temporary impairments, such as a broken leg, are not commonly regarded as disabilities, and only in rare circumstances would the degree of the limitation and its expected duration be substantial. Nevertheless, many commenters objected to inclusion of the word “temporary” both because it is not in the statute and because it is not contained in the definition of “disability” set forth in the title 1 regulations of the Equal Employment Opportunity Commission (EEOC).

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The question of whether a temporary impairment is a disability must be resolved on a case-by-case basis, taking into consideration both the duration (or expected duration) of the impairment and the extent to which it actually limits a major life activity of the affected individual.

28 C.F.R. pt. 35, app. A § 35.104 (1998). In the EEOC’s extensive commentary on the meaning of “substantially limits,” with respect to the issue of whether a temporary impairment is a disability, the EEOC stated in relevant part:

Many impairments do not impact an individual’s life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of the individual’s major life activities.

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On the other hand, temporary, non-chronic impairments of short duration, with little or not long term or permanent impact, are usually not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza. Similarly, except in rare circumstances, obesity is not considered a disabling impairment.

29 C.F.R. pt. 1630, app. § 1630.2(j) (1998).

specific impairment qualified for disability status. Of course, nothing prohibits the law school administrator from granting a temporarily impaired student accommodations similar to those granted to a disabled student. Further, to promote the student's educational progress, the law school administrator should do so.

Because many disabilities are contextual, law school decision makers require an education-related definition of "substantially limits" if they are to make consistent determinations. Based on the discussion so far in this article, I would advocate the following definition of "substantially limits:"

A physical or mental impairment substantially limits a student's ability to engage in the major life activity of learning in the form of obtaining a legal education if in the absence of an accommodation the student is unable to perform a required, important, or beneficial part of the educational program at approximately the same level as she would have performed that activity if she possessed the functional capabilities of the person or group against which her current and relevant real-world functional capabilities are being assessed. A required part of the educational program is a course or activity, the successful completion of which is a prerequisite for completion of the course of study and graduation. Important parts of the educational program include, but are not limited to the following: sitting, standing, comprehending verbal or written material, taking class notes, speaking, participating in class, researching, analyzing course or research materials, organizing an analysis of course or research material, writing, and taking examinations. A beneficial part of the educational program includes, but is not limited to participating in internship or externship programs, law review, and moot court or mock trial competitions.<sup>144</sup>

This definition of "substantially limits" is appropriate because it views the physical or mental impairment in functional terms, that is, in terms of its impact on the student's real-world performance.<sup>145</sup> The use of "at *approximately* the same level" recognizes the imprecision of disability diagnosis and functional assessment, as well as the variation in ability to perform among the non-disabled

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<sup>144</sup> For some physical or mental impairments, the impairment is the equivalent of the major life activity. For example, quadriplegia is essentially the equivalent of the loss of the major life activity of walking. On the other hand, there is a less direct relationship between the impairment and other major life activities, such as learning. A person who is disabled with respect to one major life activity (e.g., speaking) is not necessarily substantially limited in other major life activities, such as walking or learning.

<sup>145</sup> No type or amount of accommodation will permit individuals with certain profound physical limitations (e.g., blindness, total deafness, paralysis, traumatic brain injury) to possess even the approximate level of physical functional capabilities as the comparison group. Nonetheless, this is a useful definition for educational purposes.

population. The requirement that the student's real-world performance be judged against some person or group, whether actual or hypothetical, recognizes that the assessment of whether a person's ability to function is substantially limited may only be made in comparison to some standard.

4. What should be the applicable standard?

Although not an explicit part of the definition of "disability," as are "major life activity," "physical or mental impairment," or "substantially limits," the standard by which the law student will be judged must be examined and clarified. Most people will agree that a "non-disabled" frame-of-reference or standard is required to determine whether a student possesses an impairment and whether the impairment substantially limits the student's ability to engage in a major life activity. In keeping with the qualitative, case-by-case nature of disability-related determinations, this standard must reflect the nature of the relevant major life activity (learning and education-related activities) and must reflect the specific situation in which the determination of disability is relevant.<sup>146</sup>

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<sup>146</sup> The selection of an overall standard for use in diagnosing the existence, extent, and impact of physical and mental impairments involves normative concerns. Too lenient a standard, that is, a standard which is overinclusive, may be unfair both to the "disabled" student and to non-disabled students. The "disabled" student may suffer stigma and the emotional and self-esteem difficulties which sometimes are attendant to being classified as disabled; further, the "disabled" student's use of accommodations may prevent her from developing fully her intellectual and other practice-related skills and abilities. Non-disabled students may be disadvantaged by accommodations made for the putatively disabled student. On the other hand, too strict a standard for classifying a student as disabled, that is, a standard which is underinclusive, would be unfair to a truly disabled student. It would deny her the right to the reasonable accommodations which would permit her to compete with non-disabled students and to fully develop her intellectual and other practice-related skills and abilities.

Neither the Rehabilitation Act nor the ADA provides a direct and specific standard for use in assessing either the existence of an impairment or when an impairment begins to substantially limit a major life activity. The DOJ regulations which relate to Title II of the ADA suggest a “most people” standard.<sup>147</sup> The EEOC’s regulations which relate to the employment-related issues raised by Title I of the ADA adopt an “average-person-in-the-general-population” standard in its definition of “substantially limits.”<sup>148</sup> The EEOC recognizes, however, that whether a person is substantially limited must be considered in light of that person’s level of skill, training, and ability.<sup>149</sup> Given the absence of a clear regulatory standard for the Rehabilitation Act, Title II of the ADA (governing public law schools), and Title III of the ADA (governing private law schools), several more specific standards should be employed. The applicability of any of the following standards depends upon the nature of the impairment, its cause, and the purpose for which the standard is being applied.

a. The “Individual’s-Former-Intellectual-Capabilities” Standard.

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<sup>147</sup> See 28 C.F.R. pt. 35, app. A § 35.104 (1998) (“A person is considered an individual with a disability for purposes of Test A, the first prong of the definition, when the individual’s important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people.”).

<sup>148</sup> See 29 C.F.R. § 1630.2(j) (1998). The regulations define “substantially limits” in relevant part as follows:

(j) *Substantially limits.*

(1) The term *substantially limits* means:

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

....

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

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

*Id.*

<sup>149</sup> *Id.*

When illness or accident cause a change in a student's functional intellectual capabilities, the student's former functional capabilities and real-world performance<sup>150</sup> will provide the most appropriate standard.<sup>151</sup> The student's present and prior functional capabilities and real-world performance should be compared to determine if the student has become substantially limited with respect to the major life activity of learning in the context of obtaining a legal education.<sup>152</sup>

<sup>150</sup> The use of "functional abilities" and "real-world performance" is both conscious and important. There often is a significant difference between the results of a laboratory, diagnostic, or standardized test which purports to measure ability and performance in the real world. For example, every law professor knows a student with a high LSAT who flunked out of law school or finished in the bottom of her class and also knows a student with a low LSAT who placed in the top of her class.

<sup>151</sup> The use of the student's own capabilities also is appropriate when testing for the existence of a learning disability. However, in the case of a learning disability the student's current aptitudes and achievement levels are compared against each other in order to determine whether there is a substantial disparity between them in one or more categories. For a discussion of learning disabilities, as well as descriptions of diagnostic techniques, see *supra* Part I.B.

<sup>152</sup> The EEOC appears to take a different position. The EEOC states:

[A]n individual is not substantially limited in working just because he or she is unable to perform a particular job for one employer, or because he or she is unable to perform a specialized job or profession requiring extraordinary skill, prowess or talent. For example, an individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working. Nor would a professional baseball pitcher who develops a bad elbow and can no longer throw a baseball be considered substantially limited in the major life activity of working. In both of these examples, the individuals are not substantially limited in the ability to perform any other major life activity and, with regard to the major life activity of working, are only unable to perform either a particular specialized job or a narrow range of jobs.

29 C.F.R. pt. 1630, app. § 1630.2(j) (1998).

Particularly troublesome to the position of this article is the example of the baseball pitcher who no longer has the ability to compete at the professional level. I believe the EEOC confuses "substantially limits" and "qualified" (or "essential eligibility requirements" for Title II purposes). The baseball player who can no longer throw a baseball does have an impairment (the bad elbow) which has substantially limited his ability to engage in a particular, specialized type of work. For the purpose of that type of work, he is disabled; however, because he can not meet the qualifications for the job, he need not be retained. As a baseball player, he is disabled. However, under the statutory definition of "disability," he is not disabled from the major life activity of work because he can perform jobs other than the "particular specialized job" of pitcher or the "narrow range of jobs" as a baseball player.

In my example, the students may be impaired in their ability to pursue the particular, specialized type of educational activity, a law school education. Thus, they are disabled.

The student's former capabilities and level of real-world performance should, to the extent possible, be used as a guide to the level of reasonable accommodations to which the student is entitled.

This standard has practical and normative advantages over the "most people" or "average-person-in-the-general-population" standards. First, in the context of academia, this standard would be based on relatively objective evidence. By the time a student enters law school, she usually has compiled a record of standardized tests which have measured her functional capabilities and a history of grades which reflect her real-world academic performance.<sup>153</sup> This record provides real-life data against which the student's current abilities and performance can be compared.

Second, a student's pre-accident or pre-illness record is a more normatively just standard than is an alternative standard based on a hypothetical person or group. The following hypotheticals illustrate these points.

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However, they still must meet the essential eligibility requirements of passing the required courses, maintaining the required grade point average, and fulfilling any other requirements in order to stay in school and obtain their degree.

<sup>153</sup> Although standardized tests do not measure every aspect of intelligence or ability and arguably may be culturally biased and too narrow in their definition of intelligence as reflected in what they purport to measure, they are a relatively objective means of making some comparisons between peoples' intellectual capabilities. Whatever the limitations of the tests' ability to make measurements concerning two or more peoples' relative intelligence or ability, a single individual's reduced performance on a standardized test in the aftermath of illness or accident is fairly compelling evidence that her capabilities have changed. Further, a person's grade point average and ability as demonstrated in extracurricular activities such as drama or debate do provide some measure of the person's ability to perform certain tasks (such as arguing to a jury) in the real world.

First, consider Abby. Abby scored in the twenty-fifth percentile on her SAT, had a 2.8 grade point average in college (where she majored in political science), scored in the fifteenth percentile on her LSAT, and finished in the fifteenth percentile of her first-year law school class with a 2.05 grade point average. During the summer after her first year of law school, Abby suffered brain damage in an automobile accident. The brain damage was verified by an MRI test.

Abby believes her intellectual functioning has been impaired. To test this belief, she retook the LSAT and scored in the thirteenth percentile. In addition, she was tested by a learning disability specialist who concluded that while Abby's general reasoning capabilities have not been affected, the speed at which she is able to read and comprehend written material has been reduced slightly. On the basis of the MRI, a comparison of the two LSAT scores, and the specialist's testing, Abby alleges she is disabled. She seeks an accommodation of additional time on her examinations during the fall semester of her second year of law school.

Now, consider Betty, a student in Abby's law school class. Betty scored in the ninety-ninth percentile on her SAT, had a 3.90 grade point average in college (where she double-majored in biochemistry and genetics), scored in the ninety-sixth percentile on her LSAT, and finished in the top three percent of her first-year law school class with a 3.57 grade point average. During the summer after her first year of law school, she also suffered brain damage in an automobile accident. The brain damage was verified by an MRI test.

Betty also believes her intellectual functioning has been impaired. To test this belief, she also retook the LSAT and scored in the fifty-third percentile. In addition, she also was tested by a learning disability specialist who concluded that while Betty's reasoning capabilities have not been affected, the speed at which she is able to read and comprehend written material has been reduced significantly. On the basis of the MRI, a comparison of the two LSAT scores, and the specialist's testing, Betty alleges she is disabled. She seeks an accommodation of additional time on her examinations during the fall semester of her second year of law school.

Two points are evident. First, prior to their accidents, neither woman was disabled. Neither woman suffered from mental retardation or any pre-existing learning disability. Both women were able to meet the academic requirements of the law school program. Abby's pre-accident record simply, yet strongly, suggests she was not as intellectually gifted as Betty. Second, both women suffered functional impairments due to their accidents which reduced their ability to engage in the major life activity of learning.

Now for the critical questions: What standard is to be used in determining whether Abby and Betty are disabled and against what standard do we judge

whether they have been substantially limited with respect to the major life activity of learning?

The EEOC regulations referred to previously suggest we should use an “average-person-in-the-general-population” standard. The DOJ comments suggest that the similar “most persons” standard is appropriate. But should we use an “average person” or “most person” standard? Should we compare Abby’s and Betty’s current intellectual capabilities to the average person in the general population? If we use this standard, neither Abby nor Betty are disabled. Based on their current LSAT scores, they appear to both possess intellectual capabilities equal to or greater than the average person. Yet, they have both suffered functional impairments. The functional impairment suffered by Betty seems particularly substantial; her LSAT score has dropped by forty-three percentage points.<sup>154</sup>

The EEOC regulations also suggest the use of a standard in which Abby and Betty are compared to the “average person having similar training, skills, and abilities.”<sup>155</sup> Should we use an “average-law-student” or an “average-law-student-at-the-particular-law-school” standard? Should we ask whether Abby’s and Betty’s intellectual capabilities are substantially limited when compared to the average law student nationwide or the average law student at the particular law school? Either of the “law student” standards would lead to an absurd result. Abby would be considered disabled because she has a physical/mental impairment and cannot perform at the level of the average law student. Thus, Abby would be considered disabled even though her ability to function was not affected appreciably, and even though prior to the accident she could not even begin to approach the performance of the average law student, either nationally or at the particular institution.<sup>156</sup> On the other hand, Betty would not be considered disabled because, even though she has suffered a profound physical/mental impairment, the second LSAT score suggests she can perform at a

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<sup>154</sup> To take the “average person” or “most persons” test to its logical conclusion, then no individual who indicates intellectual ability or functional capability above the societal mean would be deemed disabled. This would wipe out almost all learning disabilities among law students. Few people would agree with this extreme result.

<sup>155</sup> See PERRITT, *supra* note 7, at § 3.3. Perritt’s statement is based on 29 C.F.R. § 1630.2(j)(3)(i) (1996).

<sup>156</sup> Unless Abby attended one of the most elite law schools, her standing in the 15th percentile of her first-year class undoubtedly would place her below the average law student standard, whether measured nationally or at her law school. Abby’s situation also raises the question of whether any student in the bottom of her class could claim that they were disabled because they are unable to compete with the average student in the class.

level higher than that of the average law student, both nationally and at her institution. Betty would not be considered disabled even though she suffered a substantially greater reduction in her ability to perform.

The better solution would be to assess whether each student has an impairment which substantially limits her ability to learn or think by comparing her current functional abilities to the functional abilities she possessed and the real-world performance she exhibited prior to her accident. If the purpose of accommodation of disabilities is to assist people in reaching their given/original potentials, the case for considering Betty to be disabled is much stronger than for considering Abby to be disabled.<sup>157</sup>

When a person's functional capabilities, particularly specific ones change over time due to illness or accident, and when there is a record of prior functional ability and actual performance, the standard to be used in determining substantial limitation should be the individual's prior ability and level of functioning. To demonstrate why the individual's former capabilities and real-world performance should serve as a standard only in the *intellectual* context, let us alter the nature of the impairment which adversely affects academic performance.

Again, consider Abby and Betty under the same facts as in the previous hypothetical. For each woman, the existence of brain damage is verified by an MRI test and other neurological testing. The functional limitation resulting for each woman is that she is incapable of using her right arm with which she wrote and used in typing. On the basis of the medical tests and the functional limitations, each woman asserts that she is substantially limited in the ability to engage in the major life activity of writing and typing and is, therefore, disabled. Each woman seeks accommodations, including notetakers for class and scribes for their examinations. They also seek an extra hour on their examinations because the use of dictation makes editing more difficult.

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<sup>157</sup> Separate, but related, questions concern the nature of any accommodations they should be afforded and whether they can meet the essential eligibility requirements for remaining in the law school program. Because the impairment/disability concerns the speed at which they can process information, extra time on the final exam seems like an appropriate accommodation, and, it is likely they both will be able to meet the essential eligibility requirements. A more difficult, and sadder, situation would occur if one of the women had received such profound brain damage that she no longer could meet the essential eligibility requirements even with accommodations.

Again, the critical questions become: What standard is to be used in determining whether Abby and Betty are disabled and against what standard do we judge whether they have been substantially limited with respect to the major life activities of writing and typing? Although each woman suffered an impairment which affects her ability to engage in pursuing a law school education, her intellectual capacities are unimpaired. It is unlikely that any record exists of each woman's ability to write at any particular speed. In addition, the speed at which people write and type is relatively narrowly distributed. No logical reason exists, therefore, to believe that prior to the accidents either woman possessed the ability to write or type significantly faster than the other. Thus, it would make little sense to measure Abby's and Betty's current capacities against their old capacities for the purpose of determining whether they are substantially limited. Further, what would we do if we did know the speed at which each used to write and type? Would we have to find them notetakers and scribes who could, or would, write and type at exactly the same speed? Most people would agree that the former-capabilities standard is of little use in this situation, but the average-person standard will serve well enough.

Nor is a law-student standard especially helpful. Law students learn to do many new things during their first year, but few would rank learning to type or write faster on a list of personal achievements. Unless there is a reason to believe there is a difference between the average person in the general population and the average law student, there is no reason to deviate from an "average-person-in-the-general-population" or "most persons" standard in this scenario. Thus, every question of disability in an academic setting does not presuppose the use of the "individual's-former-intellectual-capabilities" standard.

b. The "average-person" standard for assessing non-intellectual impairments.

As our hypotheticals illustrated, the average person in the general population is an appropriate standard for determining when an individual suffers from a substantial impairment of gross or fine motor skills, eyesight, hearing, speech, or general physical health. There does not appear to be any correlation between the distribution of these physical attributes and intellectual ability and other intangibles necessary for academic success.<sup>158</sup> Thus, in the absence of credible

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<sup>158</sup> In *Price et al. v. National Bd. of Med. Exam'rs*, 966 F. Supp. 419 (S.D. W. Va. 1997), three medical students with learning disabilities sought injunctive relief requiring defendant to extend the time for the medical licensing exam and to provide them each with a private room in which to take the exam. After reviewing the relevant legislative history, statutes, regulations, and case law, the court concluded that

evidence of such a correlation, it may be presumed that these physical attributes are normally distributed throughout the law school student population without respect to such measures as an individual's LSAT score or law school grade point average.

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a "learning disability" does not always qualify as a disability under the ADA. In order to be a person with a disability under the ADA, the individual must have a physical or mental impairment and that impairment must substantially limit a major life activity. The comparison to "most people" is required to determine whether a learning disability rises to the level of a disability under the ADA. *Id.* at 426 (citations omitted).

Despite the popular wisdom concerning a link between genius and madness, there does not appear to be a correlation between intellectual ability and emotional health. Thus, without some satisfactory evidence of such a link, the emotional health of the average person in the general population should be used for determining whether a law student suffers from an emotional or mental impairment and whether any such impairment substantially limits the student's ability to pursue a law school education. The law student should not be required to submit documentation in which her condition is compared to that of the average law school student.

- c. Average or median class member or average of those meeting the minimum requirements for retention.

Once a student is admitted, the question remains concerning the appropriate benchmark for assessing intellectual disabilities.<sup>159</sup> The spectrum of reasonable standards contains two extremes. First, an "average class member" standard could be used. A physical or mental impairment which had a negative impact on intellectual functioning could be measured against the intellectual functioning and actual performance of the hypothetical average member of the class of which the student is a member. Again, the Abby and Betty hypothetical demonstrate the problem with this standard. Abby would be deemed disabled because she is impaired and performs significantly below the performance level of the average member of her class; Betty, although severely injured, would not be deemed disabled because at least on the LSAT she performed higher than the average member of the class.

Second, an alternative standard would be the

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<sup>159</sup> For physical and emotional disabilities, the average member of the entering class could serve as an acceptable benchmark, although the lack of information about non-observable conditions among the class probably makes the average person in the general population standard more workable.

intellectual capabilities and performance level of the members of the class who are near the academic eligibility threshold, that is, who are at the edge of being unable to function at the expected level. Under this standard, Abby might be considered disabled and Betty would not. Although this standard conflates the standard for determining the existence of an impairment and whether it substantially limits the student's ability to function with the standard for minimum eligibility requirements, it seems a workable approach.

*C. Summary.*

The definition of "disability" is the heart of both the ADA and the Rehabilitation Act. The determination that an individual is disabled triggers a host of rights and responsibilities. "Disability," however, is a complex and indeterminate concept which must be applied to a multitude of physical and mental conditions possessed in varying degrees and combinations by individuals involved in innumerable unique situations. As a result, the definition of "disability" comprises indefinite and elastic phrases such as "major life activity," "physical or mental impairment," and "substantially limits." Complicating matters is the inherent uncertainty involved in diagnosing the existence and assessing the impact of a physical or mental impairment. Except in the limited context of litigation, there will never be an authoritative determination of whether a student is disabled. In the vast majority of cases, the determination of whether a student is disabled will be made by a law school administrator or other university official. In the end, it will be the administrator's or official's attitudes and beliefs, not the definition of disability which will

be dispositive. If, for example, a university official's policy towards learning disabled students is based on "uninformed stereotypes . . . that many students with learning disabilities . . . are lazy fakers, and that many evaluators are 'snake-oil salesmen' who overdiagnose the disability,"<sup>160</sup> then regardless of the definition of disability or the evidence presented, it is unlikely that the purposes of the Rehabilitation Act or the ADA will be fulfilled.

#### IV. THE CURRENT CONCEPTION OF ACCOMMODATION.

Once a student has established that she is disabled, she is entitled to reasonable accommodations which will permit her to participate in the law school program as long as she is, accommodations included, qualified to do so. As currently conceived, an accommodation provides logistical or administrative assistance, relieves the student of a requirement made on non-disabled students, or provides extra time to complete a required task. I will argue that accommodations should be interpreted to include a more comprehensive and sophisticated method of establishing what accommodations are reasonable and providing students with a variety of optional programs and services.

A. *What Accommodations are Made for Disabled Students?*<sup>161</sup>

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<sup>160</sup> See Nealon, *supra* note 48, at B1 (statement of Judge Saris).

<sup>161</sup> See generally Runyan & Smith, *supra* note 7 (discussing a wide variety of accommodations and providing citations to relevant education literature).

Disabled law students currently are granted a wide variety of accommodations. The relevant statutory and regulatory schemes do not define what constitutes a permissible accommodation. The lack of specificity undoubtedly results from Congress' recognition of the diverse nature of disabilities and the many situations in which a disabled student might require an accommodation.

In practice, accommodations are as varied as the types, combinations, and levels of disabilities which give rise to them. Professor Stone's survey indicated that "[w]hen a disabled student sought a reasonable accommodation by reason of a disability, . . . the primary request was for additional time in completing the course examination," followed in descending order of frequency by requests for a separate exam room, extra rest time during the exam, provision of a computer or other equipment, extension for written assignments, enlarged print sizes, an unexplained category named "other," a modification in exam format ("from essay exam to either multiple choice or short answer questions"), or a waiver of course assignment.<sup>162</sup> Professor Stone's empirical study and my anecdote-driven non-scientific survey, indicate that requests for accommodation are almost always granted. Common, and relatively non-controversial law school-related accommodations include: (1) relocating classes to more accessible rooms;<sup>163</sup> (2) relocating classes to first-floor rooms which provide easier escape in the event of a fire, severe weather, or earthquake; (3) providing priority registration or rescheduling classes to

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<sup>162</sup> Stone, *supra* note 4, at 571.

<sup>163</sup> See *McGregor v. Louisiana State Univ. Bd. of Supervisors*, 3 F.3d 850, 856 (5th Cir. 1993) ("It is undisputed that classes were switched so that [the student] would attend them in the new instead of the old building, for easier access with a wheelchair.").

assist with logistical<sup>164</sup> and medical needs;<sup>165</sup> (4) providing a signer for the hearing impaired; (5) providing a note taker or a copy of notes taken by classmates;<sup>166</sup> (6) allowing classes to be tape recorded;<sup>167</sup> (7) providing a scribe or voice-recognition word processing program;<sup>168</sup> (8) providing tutors or an academic support program;<sup>169</sup> (9) providing an exemption from being called on in class or from participating fully in moot court arguments;<sup>170</sup> (10) providing exam modifications<sup>171</sup>

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<sup>164</sup> For example, a university's (or town's) bus service for disabled students may be unable to pick up a student after an evening class, or transport a student in time for an 8 a.m. class, or provide any service during the weekend.

<sup>165</sup> For example, a diabetic student may need to eat or to take an insulin shot at a particular time of day, or a student taking anti-depression medication may be too drowsy early in the morning to effectively participate in class.

<sup>166</sup> For example, this service may be needed by a student with a disability such as quadriplegia or a neuromuscular disorder which affects the student's arm and writing hand.

<sup>167</sup> For example, this service may be needed by a student who must miss a day of class due to illness or by a student with arthritis or a neuromuscular disease who wishes to take her own class notes, but who could not write continuously for a 50-minute class.

<sup>168</sup> For example, this service may be needed by a student who is physically unable to write or to type her required memos, briefs, and case comments due to paralysis, a neuromuscular disease, or arthritis.

<sup>169</sup> *McGregor v. Louisiana State Univ. Bd. of Supervisors*, 3 F.3d 850, 855-56 (5<sup>th</sup> Cir. 1993) (noting that the law school had provided the accommodation of "assign[ing] a professor] the specific task of providing [the disabled student] with concentrated and individualized tutorial instruction. [The professor] attested that he spent one hour each week working with [the student] outside class, which is considerably more time than he has ever spent with any other student.").

<sup>170</sup> For example, a student with a panic disorder, who has difficulty comprehending spoken language, or who is profoundly hearing impaired might be exempted from in-class participation or participation in a full-fledged moot court oral argument. Instead, she might discuss the class material or moot court problem with her professor in a private setting. This would provide the student with the opportunity to participate in the given-and-take of class participation or oral argument in a more favorable setting.

<sup>171</sup> Section 504's regulations provide:

*Course examinations.* In its course examinations or other procedures for evaluating students' academic achievement in its program, a recipient to which this subpart applies shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represents the student's

such as rest breaks,<sup>172</sup> extra time to complete tests,<sup>173</sup> a quiet or private room,<sup>174</sup> a scribe or the

achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure).

34 C.F.R. § 104.44(c) (1998). Runyan and Smith provide the following list of possible exam modifications:

Additional testing modifications include (1) administering oral rather than written examinations or allowing tape recorded or dictated answers; (2) allowing a reader for a student with reading difficulties or providing recorded exam questions; (3) assigning an assistant to ensure that the student understands the directions on an examination or to clarify a particular exam question; (4) providing a private exam room for a student who has attention deficit disorder or who is distractible (a proctor can be assigned); (5) allowing the use of a typewriter or a computer for students with visual perception and visual processing problems; (6) arranging exam schedules to allow adequate time between tests.

Runyan & Smith, *supra* note 7, at 329-30 (footnotes omitted).

<sup>172</sup> This may be necessary for someone who is diabetic and needs to eat at regular intervals or for someone who finds it difficult to write for an prolonged periods due to an orthopedic problem, a neuromuscular disease, arthritis, or carpal tunnel syndrome. *See, e.g. McGregor*, 3 F.3d at 856 (noting that the law school had accommodated a wheelchair-bound student who had been allowed extra exam time by granting him "permission to eat and drink in the room to maintain his sugar level.')

<sup>173</sup> *See, e.g., id.* (noting that the law school had provided a disabled student in a wheelchair the accommodation of "extra examination time" which included being "allowed eight hours, instead of the usual four, to complete the [Criminal Law] examination."); *Murphy v. Franklin Pierce Law Ctr.*, No. 95-1003, 1995 WL 325791, \*3 (1st Cir. May 31, 1995) (unpublished opinion) (finding that accommodations which included "an extra hour in which to complete her exams . . . satisfied the Law Center's obligation to provide reasonable accommodations."); Runyan & Smith, *supra* note 7, at 328 ("Among the testing modifications for learning disabled students, extended examination time is probably the most frequently requested accommodation.')

The amount of extra time depends upon the nature of the situation. With respect to learning disabled students, Runyan and Smith indicate:

The amount of additional time a student may require will depend on several factors, including the type of learning disability, degree of compensation, and the type of examination. For example, a student who has trouble with organization, spelling, and word omissions will need extra time on an essay exam but may not need as much on a multiple-choice exam. A student who is a slow reader may need extra time on an essay exam and may need even more time on a multiple-choice exam. Students who need to have the questions read aloud or their answers transcribed will also need extra time, and those with dysgraphia may need extra time to write. A student who has been recently diagnosed with specific learning disabilities and who has relatively limited experience compensating for the disability may require lengthy time extensions at first.

ability to type a final exam;<sup>175</sup> (11) providing the visually impaired with course materials and exams in large-type format; (12) making minor alterations in classroom presentation style;<sup>176</sup> (13) providing extra time for writing assignments and law review or moot court write-on competitions;<sup>177</sup> and (14) providing recorded casebooks and course materials or providing a reader.<sup>178</sup>

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Runyan & Smith, *supra* note 7, at 329 (footnote omitted).

For student reaction to the accommodation of extra time, see, for example, Greenbaum et al., *supra* note 47 (specific page number unavailable online) (“When asked what service was most helpful, [approximately half] of the [survey] participants cited testing accommodations ‘Really helpful because I couldn’t finish the test in the normal amount of time.’”).

<sup>174</sup> See Runyan & Smith, *supra* note 7, at 330.

<sup>175</sup> This modification may be required if a student has dysgraphia, which frequently results in illegible penmanship, or a neuromuscular disease or arthritis. With the advent and increasingly low cost of voice recognition word processing programs, a school also may permit the student to directly dictate the exam answer if she has difficulty writing.

<sup>176</sup> See generally Runyan & Smith, *supra* note 7, at 331-32 and accompanying notes (including a wide variety of suggestions).

<sup>177</sup> Examples of where extra time may be required include situations in which a student suffers from dyslexia or other reading-comprehension difficulty, suffers from ADD or ADHD and has difficulty concentrating, or tires easily due to a neuromuscular disease or AIDS.

<sup>178</sup> These accommodations may be helpful when the student is visually impaired or suffers from dyslexia or some other reading comprehension difficulty.

More controversial and, therefore, less common accommodations raise the specter of altering essential course or curricular requirements.<sup>179</sup> Accommodations of this type include: (1) altering the format of an examination;<sup>180</sup> (2) permitting the use of an editor or proofreader on exams or writing

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<sup>179</sup> Although the question of what constitutes the set of “essential eligibility requirements” is beyond the scope of this article, several short comments are appropriate.

The law concerning “essential eligibility requirements” is unsettled, however, it is clear that schools may dismiss disabled students who, despite reasonable accommodations, are unable to maintain the minimum grade point requirement. *See, e.g.*, *Murphy v. Franklin Pierce Law Ctr.*, No. 95-1003, 1995 WL 325791 (1st Cir. 1995) (indicating a law school lawfully dismissed a student with a visual impairment because she failed to meet the school’s minimum grade requirements and to satisfy the terms of her probation despite the fact that her disability may have prevented her from fulfilling those requirements; no reasonable accommodations would enable the student to satisfactorily perform in the program); *McGregor v. Louisiana State Univ. Bd. of Supervisors*, Civ. A. No. 91-4328, 1992 WL 189489 (E.D. La. July 24, 1992), *aff’d*, 3 F.3d 850 (5th Cir. 1993) (finding law school did not violate Section 504 by dismissing a student with orthopedic and neurological disabilities who, despite some accommodation, did not attain the requisite GPA); *Aloia v. New York Law Sch.*, No. 88 Civ. 3184 (CSH), 1988 WL 80236 (S.D.N.Y. 1988) (holding that an individual with Central Nervous System Metabolic Disorder was not otherwise qualified to be a law student because his grades had fallen below the requisite 2.0 average for two semesters).

Second, a school should consider what constitutes an “essential eligibility requirement” in order to facilitate its disability-related decision making. As a general rule, the more directly the requested accommodation impacts on the educational experience of learning to analyze, research, write, and speak like a lawyer, the more directly it impinges on an essential eligibility requirement. *See Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19 (1st Cir. 1991) (en banc), and accompanying quoted material located *infra* note 187.

Third, the school may wish to consider whether the essential eligibility requirements will be driven by its role as an educational institution (which will focus its attention on degree requirements) or by its role as a professional school (which will add the requirement that the individual possess whatever skills and abilities the law school determines are required for the practice of law). What the law school should consider has not yet been decided by the courts.

<sup>180</sup> This modification may be appropriate if, for example, the change is made from multiple-choice to essay for a dyslexic student, or from essay to multiple choice for a student with handwriting and organization difficulties.

Different exam formats test different types of skills. For example, an essay exam tests the student’s ability to read and analyze a more complex fact pattern; organize the relevant issues, rules, and facts; and produce a succinct, understandable written product. A multiple-choice exam places greater weight on reading comprehension and the ability to quickly solve problems of a relatively specific nature. A true-false or short-answer format may, but does not always, test the ability to memorize and to recall relatively specific facts.

assignments; (3) permitting the use of a spellchecker program for examinations which are typed using a computer word processing program; (4) altering course requirements;<sup>181</sup> (5) permitting a disabled student to miss more than allotted number of classes;<sup>182</sup> (6) providing a reduced course load, particularly during the first year or when a student with a writing problem has writing assignments such as an independent research paper;<sup>183</sup> (7) extending

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<sup>181</sup> For example, a modification might involve permitting a student with dyscalcula not to take Income Tax. *See* *McGregor v. Louisiana State Univ. Bd. of Supervisors*, 3 F.3d 850, 856 (5th Cir. 1993) (noting that law school had provided the accommodation of “readmitt[ing the law student] as a freshman on scholastic probation . . . without waiting [the standard] additional year after reapplying to return.”); *see also* Runyan & Smith, *supra* note 7, at 331.

To accommodate a learning disabled student [under the Rehabilitation Act and the ADA], it may also be necessary to waive a course requirement. For example, if a school requires legal accounting, it may be reasonable to waive the course for a student with dyscalculia or dyslexia. Similarly, part of the requirements for a particular course might be waived or modified. A student with dyscalculia or dyslexia might, for instance, have problems understanding a balance sheet in Corporations. Modifications must be made as long as they do not constitute a “fundamental alteration of the program.”

*Id.* (footnotes omitted).

<sup>182</sup> This accommodation might be used when, for example, a student with AIDS is afflicted with colds, pneumonia, or other illness related to her failing immune system. The accommodation of altering the number of permissible absences might be combined with tape recording classes and providing the student with class notes. In that manner, the student could have the benefits of being “present” at the class. Some may object that permitting the student to be “present” through a tape recording does not require the student to engage in the class discussion. Unless the class is so small that each student is called on daily or frequently, this is not a compelling argument. In any event, the disabled student might be called on more frequently when she is present, might engage in telephone conversations or interactive e-mail discussion with her professor, or some other compensatory activity to simulate being called on in class.

<sup>183</sup> *See, e.g.,* *McGregor v. Louisiana State Univ. Bd. of Supervisors*, 3 F.3d 850, 857 (5th Cir. 1993) (noting that the law school deviated from its policy of requiring students to take a full load and provided a disabled student in a wheelchair the accommodation of a reduced course load scheduled “so that [the student] had a day between classes for rest or treatment.”); *Murphy v. Franklin Pierce Law Ctr.*, No. 95-1003, 1995 WL 325791, \*1 (1st Cir. May 31, 1995) (unpublished opinion) (noting that law school provided a disabled student with an eye condition a reduced load of “only nine credits [whereas] the usual minimum at the Law Center is twelve.”); Runyan & Smith, *supra* note 7, at 330.

the time within which to graduate;<sup>184</sup> or (8) permitting examinations to be taken at home.<sup>185</sup>

*B. What Factors Should Be Considered in Determining Whether an Accommodation is "Reasonable?"*

Most requests for accommodations are granted because of 1) the accommodation's low cost; 2) a logical connection between the accommodation and the specific disability; or 3) the accommodation is far less expensive and time-consuming than litigating the issue of whether the accommodation must be provided. However, in order to protect the school from expensive accommodations which are not needed and to protect non-disabled students from being injured by disabled students being over-accommodated, the law requires that law school decision makers should determine whether the requested accommodation is "reasonable" and provide only those accommodations which are reasonable.

Like "disability," "reasonable" is a complex and indeterminate concept which must be applied to a wide range of disabilities and circumstances. The determination of whether an accommodation is "reasonable" requires the identification and good-faith, judicious weighing of a range of competing interests which are viewed within the totality of circumstances. The analysis is complicated by the fact that an accommodation's

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<sup>184</sup> See Runyan & Smith, *supra* note 7, at 330. Runyon and Smith note:

Policies of the ABA accreditation committee provide that full-time students will "normally" complete the requirements for a J.D. degree in five years; part-time students, in six years. Because the time limits are neither stated in mandatory language nor contained in a standard, they do not limit a law school's discretionary power to extend the time needed for a disabled student to complete a J.D. degree.

*Id.* at 330-31 (footnotes omitted).

<sup>185</sup> *McGregor*, 3 F.3d at 856 (noting that law school had accommodated the student by "allow[ing him] to take three of his examinations at home.").

impact is difficult to predict and to assess. As with the existence of a "disability," there will be no authoritative determination of whether an accommodation is reasonable unless the issue is litigated. In the majority of situations, the decision whether an accommodation is reasonable will be made by a law school administrator or other university official. In the end, therefore, it will be the administrator's or official's attitudes and beliefs (and her assessment of the risks and costs of litigation) which will be dispositive, not a list of factors. Nonetheless, a decision, judicial or otherwise, of whether a requested accommodation is "reasonable" should consider the following factors:

1. The most critical factor in assessing whether an accommodation is reasonable is the accommodation's relationship to the law school's essential functions, that is, how the accommodation relates to what the law school is attempting to accomplish for all its students.<sup>186</sup> There seems to be no consensus on this issue, at least beyond such vague statements as "a goal of law school is to assist the student to learn to 'think like a lawyer.'" The process of developing a list of essential functions will require an evaluation of the range of research,

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<sup>186</sup> In *Wynne v Tufts University School of Medicine*, a frequently cited Section 504 case dealing with reasonable accommodations in the professional school context, the court indicated the requirement of providing a reasonable accommodation would be met [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 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.

*Wynne v. Tufts Univ. Sch. Of Med.*, 932 F.2d 19, 26 (1st Cir. 1991) (emphases added). Under the standard established in *Wynne*, the law school should compile a detailed and fact-specific record of its investigation, consideration, and reasoning.

analytical, verbal, writing, and work-related skills which the law school is attempting to develop in its students.

However difficult it would be to create a list of essential functions, several common scenarios in which accommodations are sought will illustrate the importance of a clearly defined understanding of the essential objectives of a law school education. Consider a student who suffers from panic attacks and who seeks the accommodation of an exemption from class participation. Is class participation an essential element of a law school education?<sup>187</sup> If it is, then her request is unreasonable. Or consider a student with AIDS who misses classes in excess of the maximum imposed by the professor in her syllabus because of AIDS-related illnesses. Is class presence an essential element of a law school education?<sup>188</sup> If it is, then the disabled student's

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<sup>187</sup> The question of *what goals the law school is attempting to accomplish* frequently cannot be separated cleanly from the question of *what methods the law school is using to accomplish the goals*. For example, many legal educators would assert that a goal of law school is to help the student learn to quickly analyze problems and provide articulate answers while under time and mental pressure similar to that experienced in a large meeting or courtroom situation. Calling on students in class is the *method* adopted to achieve the *goal*. To many legal educators, it is impossible to separate the *goal* and the *method*. To them, doing away with or modifying the method of calling on students in class is tantamount to abandoning the goal of teaching students to think and speak while under pressure.

<sup>188</sup> For a discussion of presence as an essential function in the work place, see Matthew I. Kozinets, *The Americans with Disabilities Act: Does the ADA Protect a Person with the Chronic Fatigue Syndrome from Employment Discrimination?*, 13 HOFSTRA LAB. L.J. 139 (1995); Audrey E. Smith, Comment, *The "Presence is an Essential Function" Myth: The ADA's Trapdoor for the Chronically Ill*, 19 SEATTLE U. L. REV. 163 (1995).

Relevant by analogy is *Maczaczuj v. New York*, 956 F. Supp. 403 (W.D.N.Y. 1997), in which the court denied a prospective graduate student's motion for preliminary injunction under ADA's Title II. The university denied admission to a person suffering from anxiety disorder, social phobia, and severe panic attacks who sought to attend via telephone a one-day residency program required as part of the degree program. The court found the "defendants' arguments regarding the pedagogical purposes of the residency program to be persuasive." *Id.* at 409. The purposes of the residency program included:

intellectual interchange among students from diverse cultural and professional backgrounds, interactive analysis of students' perspectives on assigned readings,

request to be exempted from the requirement is unreasonable.<sup>189</sup> Finally, consider a dyslexic student who takes more than an average amount of time to read material. Is the ability to complete a lengthy multiple-choice exam within a three-hour period an essential element of a law school education? If it is, then the dyslexic student's request for additional time is unreasonable. Without a list of law school essential functions, that is, the goals of a law school education, decision makers will not have anything concrete by which to measure whether an accommodation is reasonable.

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and efficient contact between students and professors. The activities in the residency give students an opportunity to demonstrate, and for faculty to assess, student abilities to employ critical thinking, analysis, and mastery of course content.

*Id.* at 404 n.1. The court adopted the administrator's argument that the "intensive academic interaction" among the students and with faculty would "develop [the students'] critical thinking and communication skills." *Id.* at 409. In addition, the court agreed with the contention "that allowing an individual to participate over the phone would not only interfere with that individual's educational experience, it would also interfere with the educational experience of the students in the classroom." *Id.*

<sup>189</sup> This scenario illustrates the potential for the creative use of accommodations. The professor has a legitimate concern that a student who is absent will miss the benefits of hearing the professor's questions and analysis, as well as the participating students' responses. (With an attendance, as opposed to a participation, requirement, the attending student's actual involvement in the class discussion is not an issue. After all, a student may be present and gain the benefit of being present without being called on or volunteering to participate in the discussion.) If the disabled student has a classmate tape the class, or if the school can arrange to videotape the class, then the disabled student will be able to attend, and gain the benefit of the class, in an alternative method.

2. Directly related to the essential functions of law school is the pedagogical impact of the accommodation. The professor is best situated to evaluate and establish the methods (case study, problems, hypotheticals raised in class versus problems to be worked in preparation for class, etc.) which are most suited to develop the knowledge<sup>190</sup> and skills or abilities<sup>191</sup> which she feels must be acquired by the student, both for the purpose of the course and for the purpose of practicing law. Many accommodations may interfere with the professor's desired pedagogy, as the following three examples illustrate.

First, consider the professor who believes tax students should have a practical, problem-oriented exposure to tax law. The professor uses a casebook which contains many technical problems involving the need to determine fractions and percentages and to perform other, similar arithmetic calculations. A student with dyscalculia asks to be excused from preparation and in-class discussion of the assigned problems. She indicates she is willing to discuss the cases' basic facts (but not any arithmetic calculations in the cases), the statutes and regulations, and the policies on which the statutes and regulations are based. She also asks the professor to provide her with an examination which emphasizes these matters and excludes problems involving numbers.

Second, the professor believes students must be able to analyze problems immediately upon hearing them. Therefore, she uses hypotheticals which are introduced in class. A student has a mild case of aphasia, which impairs her ability to process

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<sup>190</sup> For example, acquiring knowledge of tax law.

<sup>191</sup> For example, being able to quickly analyze a spontaneously presented problem and provide the answer in front of a room full of people.

information received aurally. As a result, she is unable to follow class discussion and to effectively participate in class discussion. She asks for the accommodation of receiving the hypotheticals in written form the night before class so she can read them and prepare answers. With that level of preparation, she can both follow and participate in class discussion.

Finally, consider the professor who believes students need to be able to answer hypothetical questions in front of groups of people. Therefore, the professor sometimes uses a Socratic approach in which she calls on students in class. A student who has a panic disorder and suffers panic attacks when called on in class, or when worrying about being called on in class, asks to be excused from class participation. The student suggests that she meet privately with the professor and engage in a Socratic-type dialogue with the professor in that setting.

Are the requested accommodations reasonable? In each case, the requested accommodation undermines the professor's pedagogical approach, but each requested accommodation is related directly to the student's disability. Although I believe a professor's good faith judgment should be accorded significant discretion, particularly when there has been a searching discussion of alternatives, I would grant all the accommodations except for the student's request for an alternative exam. I would, however, grant the student extra time for the exam and permit her to use a calculator. I would reject immediately and unequivocally any request that the professor in the first example change her casebook or her basic pedagogical approach.

3. Academic freedom is another important factor in determining whether an accommodation is reasonable. Academic freedom gives the individual professor significant latitude to make a reasoned evaluation for her course concerning educational issues such as what constitutes essential coverage, the skills which need to be developed, and the best method of developing those skills.<sup>192</sup> This judgment is frequently a function of direct experience in practice; years of study, teaching, and research in the area; analysis of the pattern and content of bar exam questions; and an understanding, based on discussions with practitioners, of the knowledge and skill base required to practice in a particular area of the law or law in general. Class requirements established by the professor concerning issues of skill, coverage, and classroom methodology should be given significant deference.<sup>193</sup> For example, the

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<sup>192</sup> Edwards has framed the issue of academic freedom and reasonable accommodations in a particularly succinct and thorough manner:

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. Traditionally, courts have granted substantial deference to schools in deciding cases involving the alteration of academic programs. In *Sweezy v. New Hampshire*, [354 U.S. 234 (1957),] the concurring opinion . . . 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. 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."

Edwards, *supra* note 31, at 229-30. The deference may be based on the belief that "[c]ourts are particularly ill-equipped to evaluate academic performance." *Id.* at 230 n.88 (citing *Univ. of Mo. v. Horowitz*, 435 U.S. 78, 92 (1978)).

<sup>193</sup> For general discussions of the deference accorded by courts to professor's judgments concerning what is an essential aspect of the course or program, see James Leonard, *Judicial Deference to Academic Standards Under Section 504 of the*

professor may conclude that a particular book, a particular range of coverage in the book, and a particular method of presenting the material (tax problems involving complicated arithmetic operations versus reading and analyzing cases) are essential elements of a tax course. Law school administrators and courts should be reluctant to invade the academic freedom traditionally accorded to faculty members regarding such matters.<sup>194</sup> Other class requirements, such as attendance requirements, should be given less deference and should not be considered essential aspects of the course of study. For example, the professor's decision that a student will fail the course if she misses more than ten of sixty classes is entitled to less deference, particularly if some surrogate for class attendance, such as tape recording or video recording the class can be used.

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*Rehabilitation Act and Titles II and III of the Americans with Disabilities Act*, 75 NEB. L. REV. 27, 87 (1996) (examining the competing factors involved in deference to academic institutions and indicating a preference for "striking a balance among competing factors] in favor of academic deference"); Runyan & Smith, *supra* note 7; Brigid Hurley, Note, *Accommodating Learning Disabled Students in Higher Education: Schools' Legal Obligations Under Section 504 of the Rehabilitation Act*, 32 B.C. L. REV. 1051, 1095-1102 (1991) (discussing the proper level of deference which should be accorded to academic decisions); Ketchum, *supra* note 7 (noting the historical deference accorded decisions made by academic institutions, but noting at 215-16 that their status as former law students and lawyers results in some judges giving less deference to law school disability decision making than disability decision making by other professional schools).

<sup>194</sup> Thus, a request for an accommodation, which would have the effect of lowering the academic requirements or academic standards applied by a professor to a disabled student, need not be granted. Both the Rehabilitation Act and the ADA require disabled students to meet the essential eligibility requirements which are applied to all students.

4. The cost/benefit ratio of the requested accommodation in light of available funding is another legitimate factor.<sup>195</sup> Many, if not most accommodations cost little or nothing beyond the value of the administrator's or professor's time, and little time is typically required. For example, it costs nothing for a professor not to call on a student who has a panic disorder. In addition, allowing a student extra time on an examination has no cost beyond the time of the law school administrator who must implement the logistical arrangements. However, when more than a minimal expense is involved it is reasonable to consider the cost and benefit of the requested accommodation. Consider the student who cannot take notes due to a neuromuscular disease. A range of potential accommodations with associated possible expenses exist. For example, prepared class notes could be accommodated by providing the student with photocopies of notes taken by other students, taping the classes and having a secretary transcribe them within a day or two, or having a court reporter record the class and provide a typed transcript of the class the same day. The school has a legitimate concern in minimizing the cost of the accommodation if it can be done without jeopardizing the student's educational experience. The cost of providing a same-day transcript may not be worth the marginal benefit over receiving a secretary-generated transcript within one or two days.

In a related vein, the cost/benefit ratio to the student must be considered, particularly with accommodations not requested by the student.<sup>196</sup> When

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<sup>195</sup> See, e.g., *School Bd. of Nassau Co. v. Arline*, 480 U.S. 273, 287-88 n.17 (1987) (quoting *Southeastern Community College v. Davis*, 442 U.S. 397, 412 (1979) (indicating that an educational institution need not implement accommodations under the Rehabilitation Act which would cause "undue financial and administrative burdens"); *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19, 26 (1st Cir. 1991).

<sup>196</sup> In Part V, I will argue that the law school has a responsibility to take a proactive

the law school requires or suggests additional accommodations, such as participation in an academic support program, the school must make sure that the program is sufficiently tailored to the student's needs to assure that the student's time and effort will be rewarded.

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approach to accommodations, that is, to suggest accommodations and other actions to the disabled student. This responsibility arises because legal educators and law school administrators have a greater understanding of the law school experience, legal pedagogy, job hunting, the bar examination, and the practice of law; therefore, they are in a better position at times to understand the full range of accommodations that the student will need in order to maximize her law school experience and become a competent attorney. Although this smacks of paternalism based on stereotyped notions of the capabilities of disabled students, it is a difficult balance to strike. The student knows her situation better than any legal educator or legal administrator can ever hope to. The legal educator or legal administrator knows more about the law school, the bar exam process, and the practice of law than a law student can possibly know while in law school. Part V outlines a method in which all interested parties can work together in an open-minded manner, based on sound professional input and input by the student, to develop a proactive approach to the student's educational process. And, of course, the law student cannot be forced to submit to any accommodation.

5. The negative impact of the accommodation on the educational opportunities afforded non-disabled or other disabled students is another concern.<sup>197</sup> A purely utilitarian view might make many accommodations unreasonable, thus defeating the purpose of the law. For example, spending \$20,000 for a signer may be an indispensable accommodation for a person who is hearing impaired. On the other hand, using funds for a signer may deprive other students of opportunities because, for example, it may mean that fewer adjuncts can be hired to teach specialized courses and fewer books can be purchased for the law library. Although the Rehabilitation Act and ADA permit the needs of the disabled student to have a limited negative impact on non-disabled students, the negative impact should not be open-ended.

6. Another critical factor in determining if an accommodation is reasonable is whether the requested accommodation is rationally related to the functional impairment which is the basis of the disability. Decisions which do not include this consideration waste resources, do not constitute an effective accommodation, and may lead to hard feelings on the part of non-disabled students who see the action as wasteful or even worse an unfair advantage. For example, consider the student with a panic disorder triggered by the stress of being called on in class. While a reasonable accommodation might be to exempt the student from class participation, double-time on exams would not be a reasonable accommodation because it has nothing to do with the panic disorder. On the other hand, if a student suffers from test anxiety, but not from the stress of being called on in class, double-time

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<sup>197</sup> See, e.g., *Maczaczj v. New York*, 956 F. Supp. 403, 409 (W.D.N.Y. 1997) (agreeing with the contention "that allowing an individual to participate over the phone would not only interfere with that individual's educational experience, it would also interfere with the educational experience of the students in the classroom.").

on exams would be a reasonable accommodation, while an exemption from class participation would not be reasonable. Addressing the specific needs resulting from a specific impairment is a necessary condition for an accommodation to be considered reasonable.

7. Similarly, the severity of the disability is also important. For example, consider two hearing-impaired students. One student has a mild hearing impairment, which is completely compensated for by the use of a hearing aid and being in proximity to the speaker, while the other student has a profound hearing impairment, which is not fully compensated for by the use of a hearing aid, regardless of her proximity to the speaker. A reasonable accommodation for both students might be being permitted to sit in the front row of the class.<sup>198</sup> Given the severity of her disability, it may also be a reasonable accommodation to provide the more profoundly hearing-impaired student with class notes to fill in the gaps of what she does not hear. A request for class notes by the other hearing-impaired student would not be reasonable because her hearing impairment is completely compensated for by the use of a hearing aid and being in the front row. Whether a requested accommodation is reasonable will rest in most instances on the severity of the disability.

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<sup>198</sup> The accommodation would be rationally related to the functional impairment which is the basis of the disability. Thus, the previous factor would be satisfied.

8. The possibility of harm to the disabled student must be taken into account in determining whether an accommodation is reasonable. A basic requirement of a "reasonable" accommodation is that the law school should treat each disability in a confidential, nonjudgmental manner which considers the disability as a medical, neurological, or biochemical condition, not as a matter of weak character or willpower. The potential for stigma and for unintentional harm to the student's ego must be considered. Discretion is particularly appropriate with respect to disabilities which historically, if inaccurately, have been linked to lack of intellectual ability (LDs, ADD, and ADHD) or to character flaws (emotional disabilities). For example, if a student is exempted from class participation due to a panic disorder, it is not "reasonable" for the professor to adopt a "work the way down the row" approach to calling on people and just skip over the disabled student.

It should be remembered that harm to the student cuts in both directions. The student may be academically harmed if the school does not provide reasonable accommodation to the student, such as extra time on an examination or note-taking service for a hearing-impaired student. On the other hand, because these accommodations (particularly those related to the time required to produce work product) may not be available in the real world, it does not seem unreasonable for the law school to work with the student, the student's diagnostician and therapist, and the university's office of student disability services, where appropriate and possible, to wean the student from or reduce the level of the accommodation. It does not truly assist the student if she receives accommodations so that she can complete the law school program, but cannot pass the bar examination or perform in law practice with the reduced level of accommodation she will be afforded

in the real world. Thus, because the legal educators and law school administrators are much more familiar with the legal world than the student, part of the consideration in whether an accommodation is reasonable should be a long-term program to assist the student in becoming as independent of accommodations as possible.

In conclusion, a wide range of accommodations currently are and should continue to be made available to disabled law students. Most accommodations involve little direct cost to the law school. Whether a particular accommodation is reasonable depends upon a case-by-case analysis in which the nature and severity of the disability must be weighed against essential law school functions, pedagogical goals, costs and benefits to both the school and the student, and the impacts which the accommodation will have on both the disabled student and her classmates.

#### V. A PROACTIVE AND HOLISTIC APPROACH TO DISABLED LAW STUDENTS.

In most disability matters, the law school reacts to a student's request for accommodation rather than acting proactively.<sup>199</sup> After self-identifying and documenting her disability, the student will request one or more of the accommodations previously discussed. The law school normally grants the request and that ends the matter. Few people would disagree with placing the responsibility on the student to initiate the process and to request a specific accommodation or set of accommodations. A student should not be forced to self-identify and thus disclose non-obvious impairments such as AIDS, an LD, or a mental illness. In addition, a student

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<sup>199</sup> The law school should act proactively in providing accessibility and facilities required by various federal and state laws; however, in matters relating to the provision of accommodations to disabled students, the law school does not typically initiate the process.

with an obvious disability or who has self-identified and documented a disability should not be forced to submit to "accommodations," particularly if the accommodations are based on paternalistic and stereotyped ideas concerning the abilities and needs of disabled individuals. The law protects both the disabled student's right to equal opportunity (by permitting the student to self-identify and request accommodations) and her right to privacy and self-determination (by permitting her to not self-identify or to not have "accommodations" forced upon her by the law school).

But can and should law schools do more than they are currently doing to accommodate disabled law students? Even if not required by the Rehabilitation Act or the ADA, does the status as an educational institution place a moral obligation upon the law school to take a more proactive position with respect to disabled students? This article espouses the proactive position and proposes a model program for assisting disabled law students. But before the model program is discussed, it is important to discuss the principles which should govern a law school's approach to disability issues.

A. *Principles Governing Disability Issues.*

Disability law is built on the foundation of ambiguous concepts, such as "physical or mental impairment," "substantially limits," and "major life activity." Because most disability-related issues are resolved informally, without the involvement of courts or administrative agencies, the principles which animate the decision-making process are of paramount importance. This section sets forth three general and nine specific principles which should result in fair, workable disability-related decisions.

Law school administrators and legal educators cannot hope to instill in their students a proper respect for law and ethical behavior if they do not abide by the law. Therefore, the fundamental principle for a law school's disability policy, procedures, and actions should be a good faith, affirmative undertaking to comply fully with all applicable disability-related laws and regulations, whether federal, state, or local. Law school administrators and legal educators must educate themselves concerning the requirements of the Rehabilitation Act, the ADA, and all other relevant laws and regulations.

Law school administrators and legal educators not only must respect the letter of the law, but they also must respect the spirit which animates the law. The Rehabilitation Act and the ADA are intended to promote equal opportunity for individuals with physical and mental impairments. In the educational context, Congress intended to permit qualified individuals with disabilities to fulfill their personal aspirations and potentials by using their talents for the betterment of society.<sup>200</sup> This policy of inclusiveness, coupled with the

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<sup>200</sup> Although not listed in the statement of purposes in either the Rehabilitation Act or the ADA, there are several sound policy reasons for promoting the inclusion of disabled individuals in the law school population and, one hopes, the bar. These reasons are similar to the reasons for promoting the diversity of any law school student body. First, disabled students who complete their course of study will serve as role models for other disabled individuals who might otherwise not go to law school or other higher education. Second, by becoming part of the bar, the bench, and the legislative and executive branches (which have a high percentage of lawyers in policy-making positions), disabled law students will be able to bring their unique experiences and insights to the adjudicatory and policy-making processes. Finally, in some types of cases, the person who has had the same experience as her client is best able to represent her. Thus, having disabled attorneys in the bar will increase the quality of representation for disabled clients in situations in which the client's disability is relevant.

indeterminate definition of "disability," should result in law schools engaging in an expansive application of the term. If a student self-identifies and provides appropriate documentation of a physical or mental impairment which reasonably could have a negative impact on her education, law school administrators should err on the side of considering the student to be disabled. Further, law school administrators and legal educators must respect the individual who the law is intended to protect and assist. Students who are disabled must be treated with respect and dignity.<sup>201</sup> Despite society's emphasis on autonomy and self-reliance, the act of seeking reasonable accommodation should not be viewed as a sign of weakness or of an inability to practice law.<sup>202</sup> For example, law school administrators and legal educators should take no action which indicates that a learning disability is a manifestation of laziness, a general lack of intellectual ability, or that mental illness reflects a lack of character or will power. Most importantly, a disability should not be viewed as a student's defining characteristic. Instead, the student should be viewed as a person with

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<sup>201</sup> See, e.g., Paula Lustbader, *From Dreams to Reality: The Emerging Role of Law School Academic Support Programs*, 31 U.S.F. L. REV. 839, 856 (1997) ("Law students are adult learners. As such, they learn best when they are treated as adults. A significant aspect of adult learning methodology is that adult learners should be treated with the respect that is often missing from traditional law school teaching practices.") (footnotes omitted).

<sup>202</sup> See, e.g., Martha M. Peters, Essay, *Bridging Troubled Waters: Academic Support's Role in Teaching and Modeling "Helping" in Legal Education*, 31 U.S.F. L. REV. 861, 873 (1997)

Academic support programs undermine the view that students who are not tough enough to handle the stress of law school on their own cannot make it as lawyers, a myth that tremendously threatens healthy people during times when they need help. This myth communicates that to seek help from other professions is inappropriate and suggests that to need help demonstrates weakness. This negative attitude about receiving help also undoubtedly influences ways lawyers view clients who need help, while stripping those lawyers of appropriate support mechanisms for themselves.

*Id.*

a disability.<sup>203</sup>

The principles of respect for the letter and spirit of disability law and for the disabled student must be supplemented by other, more specific principles:

1. Law school administrators should act proactively to ensure students are aware of their rights under disability-related federal, state, and local laws, as well as under university and law school regulations and procedures. An appropriate description of these rights, as well as university and law school procedures and programs for students who are disabled or who believe they may qualify for disability status, should also be made evident to all students. This information should be included in admissions materials, orientation materials, the student handbook, posters placed on bulletin boards, and in other prominent places in the law school. Because these materials may not be read, this information should also be included in letters placed in all student mailboxes at the beginning of each semester and whenever there are relevant changes in laws or university or law school policies, programs, and procedures.

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<sup>203</sup> In many respects, how we name or define a person influences our whole relationship with her. The phrases "a disabled person" and "a person with a disability" carry two completely different connotations. The former defines the disability as the equivalent of the person. The disability is the individual's most significant characteristic. The latter phrase recognizes that the individual is a person, a being with many different aspects, talents, and deficiencies. The disability is one of the many attributes the individual possesses. It does not define the person.

This article has violated this advice about word choice on many occasions, choosing to adopt the less cumbersome and shorter "disabled student" for "a student with a disability," however, the latter phrase is intended.

2. Law school administrators should act proactively to ensure that legal educators are aware of students' rights under relevant disability laws.<sup>204</sup> Law school administrators must keep themselves informed about the ever-changing rights of disabled law students, as well as the attendant responsibilities which legal educators have to assist in providing reasonable accommodations to disabled students. Legal administrators should work with legal educators to ensure that the latter are kept informed about these rights and responsibilities and have the periodic opportunity to become informed about any special pedagogical techniques required for maximizing learning by disabled law students. Law school administrators can in several ways assist legal educators. First, administrators should ensure that copies of the disability-related materials which are distributed to students are sent to faculty members. Second, administrators should conduct periodically a presentation on disability-related issues, rights, and responsibilities for legal educators. Further, administrators can arrange periodic meetings with appropriate university resource persons or faculty from the education department to discuss the effects of disabilities on learning and how pedagogically appropriate methods can be incorporated into law classes, and how students with undiagnosed learning disabilities can be identified.

3. Each disabled student presents a unique set of physical and mental impairments with a unique set of education-related problems. Therefore, every disabled student should have both an individualized assessment and an individualized accommodation

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<sup>204</sup> As a practical matter, a written policy would prevent the law school from looking as if it was not taking seriously its responsibilities under the Rehabilitation Act and the ADA. It also would educate the faculty, and by doing so, would increase the likelihood that individuals with undiagnosed disabilities would be discovered.

program.<sup>205</sup>

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<sup>205</sup> See generally Wangerin, *Programs*, *supra* note 55, at 778 (discussing research which indicated that “different students get into academic difficulty for different reasons,” “that all successful academic counseling programs at the undergraduate level began with an individualized assessment of what caused individual students to get into academic trouble,” and “after such assessment, the programs provided individualized support.”). Wangerin’s discussion of the reasons why law students end up in academic difficulty is particularly illuminating. *Id.* at 779-81 (noting that different students get into academic trouble “simply because they lack the intellectual ability to do the work required of them at a particular school,” because they “lack good reading or writing skills . . . [and as a result] cannot efficiently internalize information that they read or communicate their ideas on paper quickly and coherently,” or because of “laziness [‘lack motivation for studying simply because they do not care enough about school’], conflicting priorities [such as family and financial responsibilities], . . . feelings of inadequacy [and . . . negative images of themselves and of their intellectual abilities.]”). Wangerin makes the often overlooked point that “[g]eneral academic support programs probably should provide only minimal help for students who read or write poorly because such problems are best addressed by reading and writing specialists. Thus, unless academic support programs have such experts on their staffs, support counselors should serve simply as a referral to such experts and as a source of confidence for students reluctant to seek help for reading and writing problems.” *Id.* at 779-80.

4. Accommodation programs must be based on the principle that students learn in a variety of ways. For example, disabled students, particularly learning disabled students, may have deficits which will make the standard "Socratic Method" of learning difficult for them. Legal educators should assist disabled students in becoming aware of their strengths and weaknesses as learners in order to develop methods or strategies to capitalize on their strengths and to minimize their weaknesses.<sup>206</sup> Disabled students must realize that all learning is not the same. They must develop different methods of learning for different situations. The goal for every student should be to develop her capacity to be an independent learner. After all, each student will have to be an independent learner when she is thrust into a work environment in which there will be no legal educators to structure the learning experience.<sup>207</sup>

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<sup>206</sup> See, e.g., Teree Foster, *The College of Law's Academic Support Program*, 9-JAN W. VA. LAW. 6 (1996) (discussing the purposes of the academic support program at the author's law school: "(1) to demystify the process of learning the law; (2) to assist students in identifying and capitalizing on their strengths in learning and skill areas; and (3) to assist students in identifying and remedying specific learning and skill deficiencies."); Ruta K. Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 LOY. U. CHI. L.J. 449, 485 (1996) (discussing the need for academic support programs to assist students find and develop their individualized learning techniques and discussing methods to accomplish these goals); Wangerin, *Programs*, *supra* note 55 (discussing individualized learning and the need for development of individualized learning skills in the context of academic support programs).

<sup>207</sup> See Lustbader, *supra* note 201, at 854-56 (discussing the need to create independent learners and the difficulties involved in doing so); Wangerin, *Programs*, *supra* note 55, at 786-87 (discussing "the problem of dependency" of academic support participants and the need to assist them in becoming independent learners).

5. Disabilities frequently have financial, emotional, social, family, and career repercussions.<sup>208</sup> Law school administrators and legal educators should consider a disability's impact on the student's entire life and the resulting impact on the student's education and career opportunities.<sup>209</sup> The law school's disability-related program should provide the

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<sup>208</sup> See generally Part I.

<sup>209</sup> See KAVALE & FORNESS, *supra* note 31 (suggesting programs, including counseling, to assist learning disabled students, particularly at the undergraduate level, in dealing with academic problems, the social impact of their disability, employment-related matters, and post-graduation follow-up assistance with employment.); Lustbader, *supra* note 201, at 857 n.60 (stating that it is "essential to provide students with assistance or referrals for a variety of other 'non-academic' problems (financial, familial, housing, medical, etc.) that can interfere with their ability to focus on their studies."); Peters, *supra* note 202, at 872. Peters states:

This dimension of academic support challenges the traditional mentality which argues that students either should not have academic adjustment or personal problems, or they should work them out on their own. Law students are adults and, as all adults, have complex lives. Recognizing this, academic support programs are uniquely positioned in American legal education to go beyond teaching study skills and processes. They have the potential to assist the whole person. Often blocks to learning, concentrating, and maximizing law school educational experiences stem from factors other than lack of study skills or the ability to write exam answers effectively. Internal personal struggles, difficult events in students' lives, and the emotional impact of assigned cases and issues often imperil law school success.

*Id.*; Roach, *supra* note 29 (observing that isolation, anxiety, and stress adversely affect law school achievement, particularly for non-traditional students and that law school methodology can promote isolation, anxiety, and stress); Jacquelyn H. Slotkin, *An Institutional Commitment to Minorities and Diversity: The Evolution of a Law School Academic Support Program*, 12 T.M. COOLEY L. REV. 559, 565-66 (1995) (discussing the general anxiety, poor self-image, and sense of isolation which is caused by law school and legal education techniques and noting that "[s]tudents with already existing poor self-images when they enter law school tend to do poorly in school. . . ."); Wangerin, *Programs*, *supra* note 55, at 780 n.43 (noting that "some students get into academic difficulty because of emotional problems. Grades then plummet. Students affected by these emotional problems do not need academic counseling per se. Rather, they need psychological counseling. For most of these students, therefore, academic counseling programs should serve principally as sources of referral."); Wangerin, *Assistance*, *supra* note 48, at 189-90 (discussing "incongruence and isolation" as reasons for contributing factors in student attrition, even for non-disabled individuals).

disabled student with a range of *optional* services and programs which address non-academic matters.

6. To the extent permitted by the nature of the student's disability, law school administrators and legal educators should assist the student in integrating into the full law school experience: participation in classes, law review, moot court, writing competitions, study groups, and extracurricular and social activities. The need for integration into academic experiences is obvious. The need for integration into study groups and extracurricular and social groups is based upon the salutary effects of the informal teaching, information sharing, and networking which occurs in such groups, and the sense of belonging and self-esteem that inclusion fosters.<sup>210</sup>

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<sup>210</sup> See, e.g., West et al., *supra* note 13, at 462 (noting a "barrier identified by a large number of students with disabilities centered on the social isolation, ostracism, or scorn they felt from their instructors and fellow students, either because of their disabilities or because they requested accommodations to which other students were not entitled.").

7. High standards and expectations for disabled students must be maintained in every aspect of the educational program, such as class preparation and participation, examination performance, and admission to law review and moot court board.<sup>211</sup> Reasonable accommodations should be granted, but should not turn into coddling. A graduating disabled student must be able to say with pride that she *earned* her degree, just as her classmates did. Her future clients should have confidence that she earned her degree and that it was not merely awarded to her. Although some disabled, as well as non-disabled, students will not be able to meet the challenge, students with disabilities should be given the same opportunity to try--and to fail--as are non-disabled students.<sup>212</sup>

8. Law school administrators and legal educators should work to promote and maintain an environment which promotes learning. All members of the law

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<sup>211</sup> See, e.g., Lustbader, *supra* note 201, at 856 (footnotes omitted). Lustbader states that:

[a] particular concern to ASPs is the issue of stigma and its negative impact on learning. This occurs when programs are remedial rather than based on an excellence model. Students who participate in ASPs need to feel that they are as competent as their counterparts. They need to view the program as supplemental, not remedial. One way ASP teachers accomplish this is that from the first contact with students, teachers regularly communicate to the students who participate in their program that they are expected to perform at high levels.

*Id.*

<sup>212</sup> See, e.g., Stanley D. Klein & Maxwell J. Schleifer, *The Americans with Disabilities Act: Dreams for the Future*, EXCEPTIONAL PARENT, March, 1992, at 12. Klein and Mazwell note:

Reality is changing because people with disabilities, their parents and concerned professionals and advocates have stopped accepting the prejudicial limitations that others have tried to impose. As barriers began to disappear, children and adults with disabilities began to have more opportunities to demonstrate their abilities and test out their dreams. Limited expectations were gradually replaced by new, optimistic expectations that, given real opportunities, children and adults with disabilities and their families could prosper.

*Id.*

school community should attempt to provide "a humane and supportive educational environment" and "an educational program that attempts to develop [a successful] self-concept, resources with which to cope with failure, and feelings of success and ability. . . . There is a need to provide methodologies, techniques, and skills to help these law students develop feelings of self-worth, of successful participation, and of belonging."<sup>213</sup>

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<sup>213</sup> Slotkin, *supra* note 209, at 565-66 (quoting the mission statement of the California Western School of Law).

9. Legal administrators should attempt to promote diversity through the recruitment of qualified disabled individuals.<sup>214</sup> Because the overwhelming percentage of disabilities are not physically apparent, it may not be possible to aggressively promote diversity in the same manner as can be done with respect to minorities and women. Law school administrators and legal educators can and should take steps to promote diversity by informing prospective and current students of their rights under disability-related law, by creating a disability-friendly environment, and by proactively working to assist disabled students.

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<sup>214</sup> Many law schools believe that part of their mission is to assist in creating diversity and inclusiveness within the bar. The literature which debates the role of law schools in promoting diversity is extensive. Two quotations from the literature which speak strongly to me follow. The first concerns the mission statement of the California Western School of Law, which states: "In December of 1990, CWSL's faculty adopted a Mission Statement which expressed the institution's commitment 'to using the law to solve human and societal problems. Our mission is to train ethical, competent and compassionate lawyers, representative of our diverse society. . . ." *Id.* at 563. The second quotation is from Russell L. Jones, *The Legal Profession: Can Minorities Succeed?*, 12 T. MARSHALL L. REV. 347, 354 (1987) ("An increase of minorities in the legal profession will advance the ultimate goal of the profession: providing justice. This can be achieved if our pluralistic society is represented by a more diverse field of advocates to competently represent all interests.")

The need to assure the involvement of disabled individuals in the practice and study of law can be approached from two directions. First, the same arguments can be made as are made for diversity through the inclusion of minorities and women. These are groups which historically have been discriminated against, and promoting diversity is simply compensating for that fact. It is important for disabled individuals to have role models so that young disabled individuals will see that they, too, can be attorneys. Disabled people are needed in the legal profession because they are uniquely qualified to understand the cultural and contextual backgrounds of other disabled people and, thus, they are uniquely qualified to help other disabled individuals achieve the rights and lives to which they are entitled. Disabled law students will represent the unique interests of disabled individuals in the bar, bench, and professional organizations, and their presence in the community will dispel myths about the disabled and will demonstrate to the community that the disabled have a useful and productive role to play in society. Second, one can simply assert that these are valuable people who can make a general contribution to the profession without regard to their disability. See Charles R. Lawrence III, *Each Other's Harvest: Diversity's Deeper Meaning*, 31 U.S.F. L. REV. 757 (1997).

Although diversity is a reasonable and laudable goal, students admitted with an identified disability should have a reasonable opportunity to succeed, both in terms of fulfilling academic requirements and in terms of having the ability to maximize their potential. The Rehabilitation Act and the ADA are not intended to create, nor should they be construed as creating, quota or open-enrollment programs. Students with identified disabilities in the admissions process should be treated like similarly situated non-disabled students. If their qualifications do not warrant admission, they should not be admitted.

*B. A Model Program for Working with Students with Disabilities.*<sup>215</sup>

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<sup>215</sup> Many of the aspects of this model program were generated in reading comments by disabled students and former students who participated in various studies. For surveys of disabled students in Virginia colleges and universities in the early 1990's which describe experiences, attitudes, and perceptions concerning a wide variety of disability-related issues, see W. D. Bursick et al., *Nationwide Survey of Postsecondary Education Services for Students With Learning Disabilities*, EXCEPTIONAL CHILDREN (1989), at 236; West et al., *supra* note 13.

Based on the foregoing principles, this article will now outline a model program for working with disabled law students. The nucleus of the program is a written Individualized Accommodation Plan (IAP)<sup>216</sup> for each disabled law student.<sup>217</sup> An IAP is the culmination of an individualized assessment

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<sup>216</sup> The use of "Individual Accommodation Plan" was influenced by articles written by KAVALE & FORNESS, *supra* note 31 (discussing the "Individual Written Rehabilitation Plan" used in conjunction with assistance given under the Vocational Rehabilitation Act) and by Nelson & Lignugaris-Kraft, *supra* note 31.; *see also* Jane H. Aiken et al., *The Learning Contract in Legal Education*, 44 MD. L. REV. 1047 (1985) (describing learning contracts at the Georgetown University Law Center).

A written plan, signed by the student, after consultations with all relevant individuals may have the desirable effect of reducing the tendency to over-accommodate disabled students in order to avoid lawsuits. *See* Ketchum, *supra* note 7, at 219 ("Because law schools are anxious to avoid litigation costs, however, there is a risk that administrators will over-accommodate disabled individuals. This risk of over-accommodation is a serious issue concerning non-handicapped applicants and students who fear that they will receive unequal treatment under the ADA.").

A list of suggested actions, even if declined by the student, would serve to both alert the student to, and remind the student of, available accommodations or training. In addition, it would protect the law school against the litigious student. If the student fails to follow a suggested program of reasonable and pedagogically and medically sound actions which would remediate, ameliorate or control the disability, the law school should be deemed as a matter of law to have attempted to accommodate the student.

In addition, the school should make it clear in the IAP that it does not constitute a contract. The student's compliance with the terms of the IAP does not guarantee continued admission to the law school. The law school also should include a standard disclaimer regarding its right to eliminate or alter the nature of programs such as the academic support program. The IAP should indicate that both the student and the law school reserve the right to provide or require the submission of additional documentation, re-evaluate the nature and severity of the impairment, and alter the types and levels of accommodations.

<sup>217</sup> The law school should consider involving disabled students in policy-making decisions concerning procedures, accommodations, support groups, academic support programs, and other services provided to disabled students. Although the students' comments may not reflect budgetary or administrative realities or knowledge of what is required for the practice of law, they may nonetheless offer invaluable insights into the experience of being disabled and what the disabled population believes it needs. *See, e.g.*, West et al., *supra* note 13, at 466 (recommending that "schools should make efforts to include students with disabilities in formulating programs and services and establishing disability-related policies as required by law, through board and committee membership, liaison with support and advocacy groups, and focus groups or student surveys.").

created by a team of interested parties. The IAP takes into consideration the nature and severity of the student's physical and mental disabilities, as well as the disabilities' educational, psychological, social, career, family, logistical, and financial implications. The purpose of the model program and use of an IAP is not merely to provide disabled law students with reasonable accommodations which they request, but to serve all the needs of disabled law students. The program's success rests firmly on inclusion, an understanding of disability issues, accommodation options, support, and high standards applied to all students.

No program can be effective if its intended participants are unaware of its existence and attributes. Many disabled students may be unaware of their rights under federal, state, and local laws, as well as under law school and university regulations, policies, and procedures.<sup>218</sup> In addition, disabled law students are unaware of the types of accommodations which are routinely granted to law students with common disabilities.<sup>219</sup> This information should be conspicuously included in admissions materials, orientation materials and presentations, the student handbook, and posters placed on bulletin boards and in other prominent places in the law school. This information should also be included in letters placed in all student mailboxes at the beginning of each semester and whenever there are relevant changes in changed laws

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<sup>218</sup> See, e.g., West et al., *supra* note 13, at 461 ("many students wrote that they were unaware of the services to which they were entitled or which were available . . .").

<sup>219</sup> Although this article deals mainly with admitted students, the law school and university should make this known in general materials sent to prospective students and in admissions materials sent to students planning to apply for admission. See Runyan & Smith, *supra* note 7, at 333 n.99 (citing Rothstein, *supra* note 4, at 307) ("The AALS Special Committee on Disabilities recommends that students, when they are admitted to law school, 'should be invited and encouraged to identify any accommodations or special needs they might have as a result of a disability.'").

or university policies, programs, and procedures.<sup>220</sup>

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<sup>220</sup> The information concerning disability-related programs and examples of accommodations routinely given for particular types of disabilities should be disseminated in such a manner that it does not generate a contractual obligation which locks the law school into a particular level or plan of accommodation. The information should make it clear that documentation will be required, the a student's request for accommodation will be reviewed on case-by-case basis, and that periodic reassessments of a student's disabled status and attendant accommodations will occur. *See Guckenberger v. Boston Univ.*, 957 F. Supp. 306, 317 (D. Mass. 1997) (opining that plaintiffs' allegations that brochures, catalogues, and other materials detailing the existence and nature of services and accommodations provided by the university were, if true, sufficient to support a claim for breach of contract).

No program will be effective if the individuals who are touched by its methods and contribute to it are not involved. A law school program for disabled students that does not involve law school administrators and legal educators is doomed either to failure or diminished effectiveness. Unfortunately, many university law school administrators and legal educators are not involved in the determination of whether a student is disabled or which accommodations are reasonable. These determinations frequently are made by the staff of an office of student disability services which acts for the entire university. Such a distribution of authority may appear to make administrative sense because it concentrates the university's expertise concerning disabilities issues in a single office. In addition, for some physical and medical conditions, such as quadriplegia or total blindness, there can be little or no disagreement regarding the existence of a disability or the nature of needed accommodations. However, when dealing with mental and physical impairments such as learning disorders, ADD, ADHD, or mental illness, the determination of whether the impairment constitutes a disability, the scope of reasonable accommodations, and whether the individual can fulfill the law school's essential eligibility requirements, even with the accommodations, can be made only if the decision maker fully understands the unique demands of law school pedagogy and the general law school experience. Unfortunately, the professionals who work in a disability office which serves the entire university may not be aware of these requirements.

A better practice would be to have initial, direct law school involvement in all disability-related decisions, from the determination of the existence of a disability to the establishment of reasonable accommodations. Not only would law school involvement result in better decision making for the

disabled law student, but it might also ameliorate some of the understandable frustration which law school administrators and legal educators have with the decisions and "recommendations"<sup>221</sup> of those who are unfamiliar with law school pedagogy.

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<sup>221</sup> Typically, due to a university requirement, an unwillingness to provoke an intra-university confrontation, or an unwillingness to invite a law suit by challenging the "expert's" "recommendation," the law school frequently will simply implement the "recommended" accommodations.

Inclusion brings with it responsibility and any individual who works to serve the needs of disabled law students must be knowledgeable about disability-related matters. This is especially true of those individuals who have the most contact with and the greatest influence on the student during the law school years: the law school faculty. Law school administrators should work to inform all legal educators about the existence, nature, and impacts of disabilities, particularly unseen disabilities such as mental illness, LDs, ADD, and ADHD. This will help in the identification of students with undiagnosed disabilities. Further, an increased understanding of disabilities should reduce the extent to which legal educators stigmatize disabled students who have sought accommodation.<sup>222</sup>

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<sup>222</sup> See, e.g., West et al., *supra* note 13, at 462. West et al. note that a student made the following observation, which was quoted as representative of a pervasive pattern of responses:

The major barriers that I have encountered here are sadly very similar to the ones in secondary education--the lack of education on the faculty's part as well as the public on disabilities. I have constantly run up against misunderstanding and the unwillingness to accept LD as a disability. The typical response I get from a faculty member is that everyone has trouble with learning.

*Id.* West et al. also offer the following comments: "A frequent barrier reported by respondents was that instructors and professors were unaware of or insensitive to the service needs and rights of students with disabilities." *Id.* at 465.

Participation in a proactive, holistic program which will create and work from an IAP in order to meet the needs of disabled students must not be limited to the student, legal administrators, legal educators,<sup>223</sup> and members of the university's office of student disability services. Little will be accomplished without the expertise and learned consultation of individuals familiar with and well schooled in the individual student's physical and mental impairments, their impact on the student's educational processes, and possible ameliorating accommodations. The IAP team should also include the student's current medical or other disability-related professional diagnostician, caregivers, and therapists; professionals familiar with education research and the practical aspects of designing accommodation programs for individuals with specific types of disabilities; and, if

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<sup>223</sup> The involvement of professors could be handled in a number of ways depending upon the disability. Sometimes the professor could be involved directly in discussions with the student and her disability-related professional. For example, I had a hearing impaired student who attended class with a signer. I talked at some length with the signer about the appropriate manner of addressing the student (looking at him rather than the signer), the speed at which I should talk to ensure the signer could keep up with me, and when diagrams on the board would aid the student in understanding concepts which could not easily or quickly be signed. I also have worked with students with panic disorders in one-on-one sessions in which we discussed class material in a Socratic-type fashion.

However, the professor need not know the identity of the student. For example, if a student has a learning disability which results in her having difficulty processing information presented in class, as opposed to written material, the professor might be told there is such a student in the class and might agree to include more handouts and more diagrams on the board. See, e.g., Diamond, *supra* note 31, at 82.

[A law student] was not diagnosed as dyslexic until she was a junior in college. In 1990, Mary was in her third year of law school, and she was experiencing serious problems common to many dyslexic students: She processed information and understood it immediately when it was presented orally, particularly if pictures or charts were used, but reading from a written text had always been slow and difficult. Her eye was often unable to recognize familiar words and she was forced to guess at the meaning of entire passages. Frequently, her gaze would jump from one line to another and back again.

*Id.*

necessary, a psychologist, psychiatrist, or counselor familiar with the student or with the psychological impact of disabilities.<sup>224</sup> Where the student's disability raises career counseling, financial aid, or similar issues, relevant university and law school personnel should also be included. At the student's option, the assessment might also involve the state board of bar examiners (which may have a policy of not recognizing certain conditions as disabilities or of granting a lower level of accommodation on bar exams than the law school does on law school exams)<sup>225</sup> and prospective employers.<sup>226</sup>

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<sup>224</sup> Including relevant experts in medicine, psychology or psychiatry, education, and therapy may give the law school administrator and the member of the university's office of student disability services insight into the latest research regarding such matters as how much extra time is required for a given type of disability and for a different type of testing style (e.g., essay, multiple-choice, short-answer, etc.). For an example of the impact of such literature on the bar exam, see Michael K. McKinney, *The Impact of the Americans with Disabilities Act on the Bar Examination Process: The Applicability of Title II and III to the Learning Disabled*, 26 CUMB. L. REV. 669 (1995-96).

<sup>225</sup> In this situation, it may be in the student's best interest to attempt a program in which accommodations such as extra time on exams are slowly reduced over her three years in law school. This might assist the student in adjusting to the conditions under which she will be required to take the bar exam, while ensuring she is permitted to compete on law school exams.

<sup>226</sup> Disabilities and employment present a wide variety of thorny issues. In some circumstances, however, it may be desirable to include a prospective employer in disability-related consultations. Assume, for example, a second-year student has rheumatoid arthritis which makes it difficult for her to take notes or to type. She receives an offer for a summer clerkship at which she performs well enough to receive an offer for permanent employment. After accepting the offer, she may wish to disclose her condition to the firm, so she can begin to make arrangements for employment accommodations, such as a voice transcription program.

Contributions made by each team member will supplement those made by other team members, resulting in a stronger, more individualized, and more sophisticated IAP, as well as a stronger, more comprehensive program. For example, through her discussions with the student's current medical or other disability-related professionals, the law school administrator will obtain a better insight into the student's condition and its impact on the study of law, the availability, effectiveness, and side-effects of treatment or ameliorative strategies, and the psychological or other impacts of the disability. In return, the law school administrator will be able to supply the other IAP team members with a better understanding of the general nature and specific requirements of law school pedagogy, the law school experience, and the practice of law. Overall, this dialogue should result in better decision making regarding whether the student is disabled for law school purposes and what accommodations are reasonable under the circumstances.<sup>227</sup>

The involvement of the law school faculty is invaluable when working to determine what reasonable accommodations will best meet a student's needs.<sup>228</sup> Knowledge of pedagogy in a particular course should

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<sup>227</sup> See *supra* note 226 and accompanying text.

<sup>228</sup> The nature of faculty involvement must be handled, as will the creation of the IAP, on a case-by-case basis. Some disabilities are obvious, and there should be little objection in informing the professor of the student's identity and being fully involved in the creation of the IAP, including discussing the matter of accommodations directly with the student. Some disabilities, such as arthritis or carpal tunnel syndrome, are not obvious, but normally have little stigma attached to them. However, in situations involving HIV/AIDS, LDs, ADD, ADHD, or emotional disabilities, the student may not want her identity disclosed to the faculty member. Thus, the faculty member's involvement in the IAP will have to be handled in a manner so as to convey the relevant information without revealing the student's identity. Ultimately, without regard to the disability, the student's request for anonymity must be respected to the extent possible.

provide more focused and appropriate suggestions regarding accommodations. For example, a professor in a tax course who uses complicated hypotheticals may suggest that she provide a student suffering from arthritis or a student with a profound hearing impairment with class notes or handouts on which lengthy or complicated hypotheticals, but not the answers, are written. In addition, discussions may result in suggestions by other participants.

Creating an IAP requires the input of a team of individuals, each contributing to and benefiting from the involvement with the team in different ways. An IAP's effectiveness will relate directly to how well--both accurately and comprehensively--the student's unique combination of impairments, functional limitations, psychological profile, and life situation is viewed. The IAP's validity and utility will rest upon the concert of contributing voices which fully, directly, and vigorously represent the student's interests.<sup>229</sup> Although all the participants in the IAP process should work to further the student's best interests, the direct involvement of the non-law school participants should compensate for any hesitation a law student might have to dispute or to question the decisions of a law school administrator or a member of the law school faculty.

Specifically, the IAP assessment should take into account (a) the nature and severity of the student's physical and mental disabilities; (b) the student's current ability to read (including speed and comprehension) and write (including grammar, mechanics, and organization); (c) the student's

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<sup>229</sup> Depending upon the nature of the student's disability, the student's best interests may include being weaned from reliance on accommodations. It is important to remember that vigorously representing the student's best interests means taking a long-term approach and assisting the student in becoming an independent learner and worker.

current ability to think abstractly, reason by analogy, think sequentially, and use basic logic (such as a standard syllogism); (d) the student's current learning styles and study habits; (e) the student's emotional state and her basic personality characteristics;<sup>230</sup> (f) the student's current family and social situation; and (g) the impairments' educational, psychological, social, career, family, logistical, and financial implications.<sup>231</sup>

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<sup>230</sup> See Greenbaum et al., *supra* note 47, at 468 (citing with approval literature which suggests that more successful students have a higher level of knowledge about their disability, which in turn, increases "acceptance and self-awareness of the impact of a learning disability [which] may help one recognize strengths, accurately assess limitations, and make appropriate accommodations to achieve personal goals.").

<sup>231</sup> Where the disabled student is a woman, a member of a minority group, or an older student, the implications, if any, of these factors also should be explored.

The resulting written IAP should include a synopsis of the information obtained during the assessment process; the accommodations requested by the student which the law school agrees to make; any additional accommodations or program modifications offered by the law school or university to which the student agrees;<sup>232</sup> any actions which the student agrees to take in order to ameliorate, eliminate, or compensate for the disability; a list of any accommodations or actions suggested by the law school which the student declines to take;<sup>233</sup> a list of actions suggested by

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<sup>232</sup> Any accommodations offered to the student by the law school or university must be made after an individualized determination of all the relevant factors involved in the individual student's case. The law school should not simply make assumptions regarding the impact of the disability and the student's needs. *See, e.g., Coleman v. Zatechka*, 824 F. Supp. 1360, 1369 (D. Neb. 1993) (declining to accept a university's contention that student using a wheelchair should room alone because the student would require more than one-half the space in the dorm room, the court indicated that an individualized assessment of the situation needed to be made).

When offering any additional accommodation or program, the law school subject to Title III should be cognizant of the statutory injunctive:

It 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.

42 U.S.C. § 12182(b)(1)(A)(iii) (1995). As Edwards notes:

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.

Edwards, *supra* note 31, at 237-38 (citing 28 C.F.R. pt. 36, app. B, at 593 (1992)).

<sup>233</sup> In general, a disabled student may not be required to accept any accommodation or to participate in any program on the basis of her disability. *See* 42 U.S.C. § 12182(b)(1)(C) (1998) ("Notwithstanding the existence of separate or different programs

the student's medical or other disability-related professional; and a list of programs or services which the law school or university makes available to all disabled students.<sup>234</sup>

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or activities, . . . an individual with a disability shall not be denied the opportunity in such programs or activities that are not separate or different.”);

<sup>234</sup> As I already have indicated, the individualized plans can contain both accommodations which the student has requested or that the school has offered to supply (e.g., tape recording classes, note takers, extended time for examinations, tape recorded books, typing the final exam) and remedial steps which are recommended based on the overall assessment by the involved parties (e.g. training, etc.). For a discussion of a similar approach at the undergraduate level, see Nelson & Lignugaris-Kraft, *supra* note 31.

Earlier sections of this article reviewed by group much of the information which logically would be included in an IAP, including details of specific disabilities and the effects of those disabilities on the educational process, a range of reasonable accommodations commonly provided in law schools, and certain steps, such as medication or training, which can improve, remove, or help compensate for disabilities. A list of support services and an overview of the basic standards of operation vital to the success of a program for disabled law students, each a discrete part of the IAP, will be discussed in the following sections.

Armed with a written IAP created by a team of concerned and qualified individuals possessing a comprehensive understanding of disability issues, legal educators should be able to activate the support services necessary to meet the needs of disabled law students. These services include continued and new screening for disabilities, initial and on-going assessment, specialized counseling, school-related financial counseling, academic support, career counseling, and assistance with post-graduation concerns such as the bar exam.

Screening for law students with physical and mental disabilities must be an on-going process. The law school should maintain a formal, but non-intrusive screening program for students with undiagnosed learning disabilities. Most disabled law students, particularly those with obvious disabilities and profound learning disabilities will have been identified by the time they reach law school. If they choose to do so, they may self-identify and seek accommodations.<sup>235</sup> However, the student body may

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<sup>235</sup> They may decide not to self-identify if they have been successful at the undergraduate or graduate level. Many first-year law students do not fully appreciate the difference between law school and undergraduate or other graduate programs until they receive their grades after the first semester.

contain individuals with undiagnosed learning disabilities. An active part of the law school's disability program will be to screen for these students. Identifying a learning disability in the first semester of law school may prevent the student from ending up in academic difficulty.

Four groups of students may be considered strongly for initial and on-going screening and diagnosis. Legal educators who teach legal research and writing probably will have the first opportunity to screen for individuals with learning disorders.<sup>236</sup> Students with profound organizational and writing problems can be identified after the first one or two assignments.<sup>237</sup> In addition, individuals who are

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<sup>236</sup> See, e.g., Adams, *supra* note 35, at 190. Adams writes:

[t]he demands made on law students with learning disabilities, even during the first semester of a legal writing class, could spell disaster for those who have a specific disability bearing on writing skills. Rigorous legal writing programs demand that students achieve a professional standard of writing that is consistently error-free, sophisticated, and reader-sensitive. Such a high standard puts a premium on reliable self-correction. The task of analyzing and organizing increasingly complex bodies of information that require the deft incorporation of doctrinal, factual, and policy considerations--in addition to careful attention to the persuasive or objective purpose of the document--is a scene from the weak writer's nightmare. And for the learning disabled writer, this combination of demands is potentially fatal to professional aspirations.

*Id.* at 190; see also *id.* at 206-08 (suggesting that all first-year law students be tested in legal writing to uncover writing-related learning disabilities); Wangerin, *Programs, supra* note 55, at 779 n.37 ("Standardized tests can be used to determine if students have substantial problems with English composition or reading comprehension.").

<sup>237</sup> See e.g., Adams, *supra* note 35, at 189-90.

[w]hen an apparently bright, conscientious, and orally articulate student [because she has a learning disability] commits a seemingly infinite variety of mechanical and grammatical errors on different occasions, cannot consistently generate a fully developed argument, produces simplistic and graceless sentences, and often seems to find self-correction impossible. Such weaknesses are especially problematic in essay examinations when the student's ability to convey information rapidly, succinctly, thoroughly, and readably has a direct bearing on success in law school.

*Id.*

The relevant law school administrators also should consider whether certain

chronically late with assignments should be screened because this may indicate difficulty with writing and an inability to organize ideas. Beginning after the first semester, students who are on academic probation or believe they performed poorly relative to their effort on the LSAT or did well on one type of exam format but poorly on another<sup>238</sup> also should be screened. Finally, students who regularly perform poorly in class discussion should be screened to determine whether they have a panic disorder, aphasia, or other disability which prevents them from following class discussion or speaking in front of the class. These groups are not meant to be exhaustive. Thus, all faculty and staff within the law school community should be diligent in considering whether a student's behavior warrants screening for a non-obvious disability.

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individuals' admissions materials suggest the possibility of a learning disability. For example, if a student does exceptionally well on the multiple-choice portion of the LSAT, but does exceptionally poorly on the written portion of the LSAT, this might indicate some type of writing disorder. The law school administrator should consider investigating further the student's situation.

<sup>238</sup> For example, a student who did well on multiple choice portion of exams, but poorly on essays, may have dysgraphia.

In addition, an on-going screening process will allow legal educators to identify and consider options available to non-disabled students who suffer temporary impairments. Temporary disruptions in a student's life may impair a student's ability to function just as profoundly as a disability.<sup>239</sup> Pregnancy, illnesses, depression, broken bones, and divorces frequently occur in the student population. Although these events probably do not constitute disabilities under the relevant legal framework; as a matter of policy, the law school community should treat as a disability a temporary impairment which has the same functional impact on a major life activity as would an analogous disability. Students who experience and document<sup>240</sup> such life events should be given the same level of accommodation as is given to the disabled student.<sup>241</sup> Inasmuch as these temporary impediments are unlikely to require costly accommodations, this student-friendly policy should not cost the law school a significant amount of money.<sup>242</sup> An open,

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<sup>239</sup> An example will illustrate this point. Consider the situation of two non-insulin-dependent diabetics. One student's diabetes is caused by her age and weight. The other student's diabetes is the short-term diabetes which sometimes occurs during pregnancy. Both individuals have to take medication and suffer the same symptoms. In addition, both students must eat and rest at particular times. It makes no sense for the law school to afford the reasonable accommodation of a rest and lunch break during exams for the student suffering from age-related and weight-related diabetes, but not for the student suffering from pregnancy-related diabetes.

<sup>240</sup> Due to the potential for abuse of this policy, such a policy should be written, require documentation, and be applied with sound judgment. The student body would quickly learn that it could not abuse the policy; the "word on the street" would be that only legitimate cases would receive dispensation.

<sup>241</sup> See Rothstein, *supra* note 94, at 36 (noting that the legal framework of disability law "does not mean that accommodations cannot be provided for noncovered conditions such as pregnancy or broken legs, if a law school . . . wishes to do so, only that the federal disability discrimination law does not require it.").

<sup>242</sup> A written IAP document is probably not required for non-disabled students. In addition, the documentation, particularly of depression or other highly personal circumstances such as a divorce, should be kept separate from the student's general file (as

on-going screening process makes this approach feasible.<sup>243</sup>

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should records relating to a disabled student's IAP). It would be prudent to record any accommodation in a written memo signed by the student so there would be no question at a later date of the nature of the accommodations offered by the law school administrator and accepted by the student.

<sup>243</sup> If the student's condition is controlled by medication and without side effects, the best view is that the individual should still be deemed disabled. See 29 C.F.R. pt. 1630, app. § 1630.2(j) (1998) (implementing Title I, which states that "a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication."). For the opposite perspective, see the cases discussed in Deborah Landon Spranger, Comment, *Are Bar Examiners Crazy?: The Legality of Mental Health Questions on Bar Applications under the Americans with Disabilities Act*, 65 U. CIN. L. REV. 255, 266-67 & 267 n.95 (1996), in which individuals in Title I situations were deemed not to be substantially limited in their ability to work because their conditions were controlled by medication. The student may not require any accommodations under such circumstances, but status as disabled and the provision of accommodations are separate legal and administrative issues. Also, considering the student to still be disabled will reduce the number of steps required in the event the student's condition changes and accommodations are required on short notice. Consider a student whose depression is controlled by medication, but where the depression is exacerbated by the stress of exams. If the student were considered to be disabled due to the existence of the underlying condition, then the only issue faced by the law school administrator would be what, if any, accommodations to grant her for exams.

As with all aspects of a law school's program to address the needs of its disabled and non-disabled student, the screening process must rely on skilled individuals who serve as sources of information. They should help law school administrators and legal educators understand the nature, severity, and impact of the impairments with which their students must contend. In particular, the screening process must be conducted in conjunction with a specialist in learning disabilities. This may require the law school to work in conjunction with the education department of the university with which it is affiliated or for free-standing law schools to retain a learning disability specialist. In addition, there should be someone in the law school who is at least passingly familiar with the range of LDs, ADD, ADHD, and EDs and can serve to refer the student to the appropriate university or outside resource person.<sup>244</sup>

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<sup>244</sup> For a similar proposal, see Runyan & Smith, *supra* note 7, at 323.

With both self-identification and a formal screening process in place, assessment, including the creation of an IAP, is the natural first step. The program would be insufficient, however, if the assessment process did not include both the initial assessment, IAP, and on-going assessment as a follow-up to the original IAP. The initial assessment should occur and the initial IAP should be drafted at the beginning of the student's first semester as soon as the student self-identifies or is discovered to have a disability, whichever occurs first. Unless the condition is a static chronic condition, additional assessments should occur and the IAP should be updated at the beginning of each succeeding semester.<sup>245</sup> In addition, whenever the student or her medical or other disability-related professional believes there has been a relevant change in her condition, a new assessment should be conducted, and if required an updated IAP should be prepared. The law school should also be permitted to request a reassessment of the student's condition and the IAP if the student's disability-related behavior or performance becomes disruptive or a threat to the student or others in the law school community. This is most likely to occur when the student has an emotional disability. The on-going assessment will rely not only on the original members of the IAP team, but also, as required, on the many individuals who work in positions of support to law students. For example, faculty members in new courses the student takes each semester, education and disability-related education specialists, mental health specialists, social workers, financial

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<sup>245</sup> An argument could be made that the IAP should be updated after each semester in light of the impact of, and need for, accommodations in the previous semester. For example, if students routinely are granted double time and take only time-and-a-half, then the accommodation should be lowered. Unless this is a psychological case, it should have no impact on the ability to take the test, but will serve as a bench mark for bar examiners, will help ameliorate any concern on the part of non-disabled students, and will give the disabled student a better sense of her capabilities.

aid counselors, and career counselors should be involved.

Guided by the understanding that a disability may have psychological effects, specialized counseling should be available to the student throughout her law school career. Attending law school, especially during the first year, is challenging and stressful. Counseling for the primary and secondary emotional aspects of a disability, which may be exacerbated by the stress of law school, should be offered beginning with the initial assessment and IAP.<sup>246</sup> Counseling may help to develop and maintain the motivation necessary to overcome the obstacles imposed by the disability. This should help develop "[a] strong sense of determination and the belief in one's power to overcome adversity [which numerous studies have shown] has . . . played an important role in the success of adults with disabilities."<sup>247</sup> As another source of support, the disabled student should be offered a student mentor to assist with the transition to law school.

Law school is difficult enough in the absence of a disability. With the additional challenge of a disability, law school may be overwhelming. An informal support group comprising spouses, significant others, family members, close friends, faculty members, law school administrators, counselors, and student or professional mentors may

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<sup>246</sup> For discussions of counseling and law students, see Faith Dickerson, *Psychological Counseling for Law Students: One Law School's Experience*, 37 J. LEGAL EDUC. 82 (1987); *Developments--Counseling Services for Law Students, A National Survey*, 34 J. LEGAL EDUC. 534 (1984); Phyllis W. Beck & David Burns, *Anxiety and Depression in Law Students: Cognitive Intervention*, 30 J. LEGAL EDUC. 270 (1979-80).

<sup>247</sup> Greenbaum et al., *supra* note 47, at 468 (citing their own study as well as general literature indicating that "[d]etermination and perseverance were contributing factors in the success of a number of the participants. More than a third of them indicated that it was their own 'motivation' and 'tenacity' that helped most.").

help the disabled student maintain the sense of self-worth, confidence, and motivation needed to complete the law school program. In order to build an effective support group, spouses, significant others, family members, close friends, and counselors will have to be educated concerning law school pedagogy and law school life, just as faculty members, law school administrators, and mentors will have to be educated about disability issues. In any event, a wide-ranging support group should assist the disabled student both in and out of law school.

All students, disabled and non-disabled, feel the pressure of paying for law school. Disabled students may not have had the same opportunities for outside employment as non-disabled law students. In addition, the existence of a disability may carry with it significant financial burdens. Therefore, counseling concerning financial aid and medical insurance must be a part of the support package made available to disabled law students.

Specialized support counseling should not be limited to such practical matters as paying bills or to such laudable goals as assisting the disabled student to maintain a sense of balance and perspective. Academic support is equally--if not more important. Most law schools already operate an academic support program (ASP).<sup>248</sup> Though legal educators must be careful not to create the double

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<sup>248</sup> For a history of academic support programs, indicating they arose in the context of providing assistance to minority and other historically disadvantaged students, see Wangerin, *Programs*, *supra* note 55. For overviews of academic support programs serving individuals with disabilities, see Wangerin, *Assistance*, *supra* note 48; Allen W. Parks et al., *A Survey of Programs and Services for Learning Disabled Students in Graduate and Professional Schools*, 20 J. LEARNING DISABILITIES 181 (1987). There are any number of excellent articles concerning general academic support programs in law schools. For a particularly good recent article, see Kristine S. Knaplund & Richard H. Sander, *The Art and Science of Academic Support*, 45 J. LEGAL EDUC. 157 (1995).

stigma of disability and participation in an ASP,<sup>249</sup> the school's ASP should be made available to students with relevant disabilities. The ASP's administrator, in conjunction with on-campus learning-disability specialists,<sup>250</sup> should modify the ASP curriculum to fit the needs of disabled students, particularly those with LDs, ADD, and ADHD.

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<sup>249</sup> See Darlene C. Goring, *Silent Beneficiaries: Affirmative Action and Gender in Law School Academic Support Programs*, 84 KY. L.J. 941 (1996) (discussing, inter alia, stigma felt by women in an academic support program).

<sup>250</sup> Unless the academic support program uses the services of a learning disability expert, it will have to either refer the student to such an expert or rely on a detailed description of accommodations set forth in the IAP. Although the individualized assessment and IAP should help ameliorate the psychological problems involved with using a learning specialist, those involved in the academic support program will still need to proceed with tact. See, e.g., Wangerin, *Programs, supra* note 55, at 780 n.39 ("Referral to reading and writing specialists may be difficult. Experience indicates that many college and law students strongly resent the suggestion that they need remedial help in reading and writing, perhaps because they believe that lack of skills in these areas equates with stupidity.").

An expanded ASP can serve several purposes. First, it can provide a means for learning disabled students to learn compensatory strategies. Second, it can provide a social group to help integrate the student into law school society. Third, it can serve the function of a study group in which outlines are prepared and members prepare for finals. Fourth, it may serve as an emotional support group for individuals with learning or other disabilities,<sup>251</sup> supplementing the extensive support group mentioned previously.

Some of the best support offered disabled students during their academic careers will come from involvement in academic programs designed for all students. All members of the law school community should work aggressively to bring disabled students into the full range of law school programs: internships, externships, judicial clerkship programs, law review, moot court competitions and board, mock trial competitions, writing competitions, and law-related clubs and fraternities. A special effort should be made by faculty members, law school administrators, and student leaders to identify disabled students who might make good candidates and to suggest that they compete for appropriate positions. Experience in these activities will help develop skills, integrate the disabled student into the mainstream of law school activity, build friendships and networks, bolster resumes, and enhance employment opportunities.

Although career concerns may not seem pressing to the disabled law student who is focused on simply making it through the semester and the remainder of

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<sup>251</sup> See West et al., *supra* note 13, at 466 (indicating that “[s]upport groups and clubs for students with disabilities were often described as a high priority need. Schools that do not have support groups should make efforts to encourage and assist students to organize them and provide technical and facility support.”).

her program, counseling aimed at providing the disabled student with the best post-graduation options must be offered. Beginning in the first semester or as soon as a disability is brought to the attention of the relevant law school administrator, counseling must be provided concerning career options.<sup>252</sup> Without precluding any career option, the career counselor should work with the disabled student to consider legal careers in keeping with her physical, intellectual, and emotional strengths. For example, the career officer might explore whether tax is appropriate for a student with dyscalculia or whether litigation is appropriate for a student with a panic disorder.<sup>253</sup>

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<sup>252</sup> See, e.g., Nelson & Lignugaris-Kraft, *supra* note 31, at 261 (“A variety of career-counseling services are recommended for learning disabled students [including] . . . career-awareness workshops (i.e., self-assessment, job exploration, and job assessment), job-search-strategy workshops (i.e., preparing a resume, writing cover letters, and interviewing techniques), and job-maintenance-skills workshops (i.e., goal setting, responding to employer feedback, interacting with fellow employees, and employee responsibilities).” (citations omitted)).

<sup>253</sup> Runyan and Smith, *supra* note 7, at 333-34 and 333-34 n.101.

Law school administrators, particularly placement directors, should be aware that institutions providing placement services have a duty to determine whether employers using their placement services meet the standards set forth in Section 504 regulations. [“A recipient that assists any agency, organization, or person in providing employment opportunities to any of its students shall assure itself that such employment opportunities, as a whole, are made available in a manner that would not violate Subpart B if they were provided by the recipient.” 34 C.F.R. § 104.46(b) (1988)]. At a minimum, law schools should not allow prospective employers known to discriminate against the handicapped to use their placement services. Placement directors should be knowledgeable about learning disabilities and should help educate potential employers as to the nature of learning disabilities. Placement directors should, however, respect a learning disabled student’s wish that the disability not be disclosed to prospective employers.

*Id.* (footnotes omitted).

For a discussion of issues relating to questions asked by prospective employers, see EEOC Enforcement Guidance on Pre-Employment Inquiries Under the Americans with Disabilities Act, 96 BNA Daily Labor Report (May 20, 1994).

The career counselor should also work with disabled students concerning such issues as preparing resumes which explain elongated courses of study, absences from law school, and other disability-related situations. Students with non-obvious disabilities also should be counseled about the legal standards governing disclosure of their disability to prospective employers. Students with obvious disabilities should be encouraged to work with the career officer to develop interview strategies which will help to demonstrate or highlight their capabilities-not their disabilities.

Helping the disabled student make decisions about post-graduation work can extend beyond discussions to encouraging practical experience. Another aspect of career counseling should be facilitating contact with individuals making up the legal domain: attorneys, judges, and clients. One way to assist the disabled student may be to establish a mentor or clerking program with similarly disabled lawyers and judges. This will assist the student in seeing that they, too, can practice law. It also will give them the opportunity to pattern some of their learning and work habits after individuals who have been successful despite their impairment.<sup>254</sup> This may be particularly appropriate for students with learning disabilities, ADD, or ADHD.

Mentors need not be disabled, however. The law school should work to develop mentor and clerkship relationships with non-disabled lawyers and judges. By demonstrating their ability to clerk for a lawyer or judge, the disabled student will build her skills, confidence, resume, references, and contacts.

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<sup>254</sup> See Slotkin, *supra* note 209 (discussing the mentoring program at California Western School of Law and the school's commitment to students who may be at greater risk because of various characteristics such as ethnicity; age; cultural, social, economic, and educational disadvantage; disabilities; career change; and law school index (GPA and LSAT)).

The law school's legal clinic offers an opportunity for contact with clinical attorneys and clients. Access and experience with these individuals should be encouraged for disabled students for four reasons. First, working in the legal clinic offers invaluable, "real-world" experience to all students, regardless of their functional abilities. Second, working in the legal clinic offers the disabled student the opportunity to determine if, and how, her disability affects her workplace performance. Students with disabilities might find the clinic experience particularly helpful in determining whether functional limitations experienced in the academic environment translate to the real-world practice experience. Third, the disabled student will have the ability to work with the law school's clinical educators to design compensatory strategies which will be useful in both law school and in practice. Finally, by demonstrating her ability to work on real cases with real clients, the disabled student will build her skills, confidence, resume, references, and contacts.

Keeping the bar exam in mind, the student should be counselled at the earliest opportunity concerning the impact of the disability on taking the bar examination, and mainly for emotional disabilities fulfilling the state's character and fitness requirements.<sup>255</sup> The bar in the state in which the

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<sup>255</sup> For an examination of mental health questions on bar applications and mental illnesses as impacting an individual's qualification to be an attorney, see Laura F. Rothstein, *Bar Admissions and the Americans with Disabilities Act*, 32-OCT. HOUS. LAW 34 (1994). (discussing general issues of accommodating a variety of disabilities in the bar examination process); Phyllis Coleman & Ronald A. Shellow, *Ask About Conduct, Not Mental Illness: A Proposal for Bar Examiners and Medical Boards to Comply with the ADA and Constitution*, 20 J. LEGIS. 147 (1994); Spranger, *supra* note 243; McKinney, *supra* note 224; American Bar Association, *Bar Admissions Resolution and Report: Narrow Limits Recommended for Questions Related to the Mental Health and Treatment of Bar Applicants*, 18 MENTAL & PHYSICAL DISABILITY L. REP. 597 (1994).

student seeks to practice may have a different policy concerning accommodation than that of the law school.<sup>256</sup> The law school should advise the student to investigate the policy and begin at an early time to seek appropriate accommodations. The law school should also assist the student in obtaining accommodations and in transitioning to the level of accommodation which will be provided, especially if that level is less than the level of accommodation provided by the law school.<sup>257</sup>

The transition from law school to law practice can be difficult under the best of circumstances due to the stress and feelings of inadequacy felt by all but the most confident young attorney. As a final service to the disabled law student, the support program's career counselors should take a proactive role in continuing contact with disabled students, both as a means of emotional support, counseling, and as a resource concerning job-related disability problems and issues. Although undoubtedly not required by law, this may be particularly helpful in situations in which a non-obvious disability has not been disclosed to the employer.

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<sup>256</sup> Because most entities responsible for conducting the bar examination and for admitting individuals to the bar of a particular state do not receive federal funds, they are not subject to the provisions of the Rehabilitation Act of 1973. The ADA, however, does cover such entities. For a discussion of the impact of the ADA on such entities, see Rothstein, *supra* note 255 (discussing general issues of accommodating a variety of disabilities in the bar examination process); Sarah O'Neill Sparboe, *Must Bar Examiners Accommodate the Disabled in the Administration of Bar Exams?* 30 WAKE FOREST L. REV. 391 (1995); McKinney, *supra* note 224.

<sup>257</sup> For similar suggestions, see Runyan & Smith, *supra* note 7, at 334.

Serving the needs of disabled law students serves the law school, the legal community, and the community at large. Assisting the disabled student to develop her potential through a program which identifies and supplies reasonable accommodations and support is the responsibility of all law school administrators and legal educators-and should be supported by the bench and bar. Reasonable accommodations requested by the student should serve as a floor, not a ceiling, for the range of support which should be made available. In addition, the assessment and accommodation-granting process should be fluid, not static. Focusing on the goals of assisting the disabled student, maintaining confidentiality, and maintaining academic standards, law school administrators and legal educators involved in the disability support program should generate, suggest, and discuss with the student and other members of the team the full range of reasonable accommodations<sup>258</sup> to ameliorate, eliminate, or compensate for her disability.<sup>259</sup> A

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<sup>258</sup> As a matter of policy, the law school should be required to make such suggestions due to its responsibility to assist students in developing their full potential.

<sup>259</sup> There is a distinction between remediation and accommodation. Adams, *supra* note 35, at 190 n.2. Adams writes:

*Remediation* refers to developing effective ways to teach writing concepts so that LD students will internalize the principles and reproduce them automatically in their writing. *Compensation* refers to strategies that LD students develop to capitalize on strengths in order to bolster their weaknesses. For example, an aural learner who has difficulty listening to a lecture and taking notes simultaneously will tape lectures. *Accommodation* refers to measures provided by institutions to alter the writing circumstances in such a way that the students' skills can be put on an equal footing with nondisabled students. For example, accommodation might include permission to use word processors to write examinations if the student has poor handwriting or spelling deficits, or the provision of extra time for essay exams if writing production is slow and organization is a problem. The term *accommodation* is the one used by federal statutory provisions that mandate special arrangements for those who can demonstrate specific learning disabilities.

Although there is a difference for purposes of education, the legal concept of accommodating a student with a diagnosed learning disability should be broad enough to

proactive position by the law school is particularly appropriate when the student's condition is a recently diagnosed learning disability and the student has not undergone appropriate therapy or remedial training, or the student suffers from a mental disorder which has demonstrated the potential to be disruptive or harmful to herself or others.

It is not discriminatory or unjust to *suggest* to a student that she take reasonable pedagogically or medically appropriate steps to ameliorate, diminish, or compensate for a self-identified functional limitation. Bar examiners,<sup>260</sup> prospective employers, future clients, judges, and others with whom the student will deal may not provide the same level of accommodation as the law school, so it behooves the student to work on strategies to (if possible) reduce the level of required accommodations. Also, the student may not self-identify for professional reasons to the bar admissions organization or a potential employer, and as a result would not receive any accommodation. When the course of action is reasonable, pedagogically sound, and medically appropriate, the law school is assisting the student. However, the law school must remain sensitive to issues of stigma and the extra time and effort which such a course of treatment may require.

A course of action which includes working with educational specialists is particularly appropriate. Many students with low admissions scores, educational or cultural deprivations, or writing problems are required or strongly encouraged

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include proactive steps taken by the law school and its parent institution to provide remediation and to assist with compensation.

<sup>260</sup> See, e.g., *Argen v. New York State Bd. of Law Exam'rs*, 860 F. Supp. 84 (W.D.N.Y. 1994) (denying Argen's request for double time on the bar examination, a request which had been granted on the LSAT and on law school exams).

to participate in academic support programs or work with tutors and writing specialists. Suggesting essentially the same course of action to a student with a LD, ADD, ADHD, or an emotional problem which directly interferes with the educational process seems no different, as long as it is the result of individualized assessment and not the result of paternalistic or stereotyped notions of disabled students and the student is permitted to decline.

This article disagrees with any objection that it is somehow discriminatory to create an IAP which would involve the disabled student taking actions not required of non-disabled students. Although a student who seeks disability status and reasonable accommodation must self-identify, neither the university nor the law school should force this self-identification. The disabled student self-identifies because *she* perceives that she possesses a physical or mental impairment which results in a relevant and material functional limitation not possessed by non-disabled students. Although a medical or other specialist may assist the student in identifying and confirming the existence of the disability, it is ultimately, the student who has concluded that the functional impairment exists and is relevant to the educational process. In the end, it is the student who chooses to reveal the disability and to seek a reasonable accommodation. Therefore, it is neither unjust nor descriptively inaccurate to conclude that the disabled law school student is different in some relevant and material way from non-disabled law school students.

#### V. CONCLUSION

A disabled law student may have educational, psychological, social, career counseling, and other needs which are different from non-disabled students

such that it is neither unjust nor discriminatory for the law school to suggest that a disabled law student take reasonable, rational, and professionally sound actions which are not required of non-disabled law students. Nor is it unjust or discriminatory for the law school to make certain relevant services and opportunities available to disabled law students which are not made available to non-disabled students. Indeed, as a normative and pedagogical matter, the educational institution would be remiss if it did not take the totality of the student's situation into account. I believe that the measure of whether the law school has reasonably accommodated a student should not be based simply on whether the student has requested and the law school has granted an accommodation. Rather, the policy underlying reasonable accommodation will be fulfilled only where the law school acts proactively to assist the student in constructing an individualized, comprehensive accommodation program which takes into account the student's long-term educational, personal, and professional *best interests*.<sup>261</sup>

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<sup>261</sup> For a discussion of the need for tailor-made approaches, see Kavale & Forness, *supra* note 62.