

Legal Briefings

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I. Introduction

The Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (the Rehab Act) provide far-reaching protections for students with disabilities. Colleges and universities, as well as many other institutions that provide students with a postsecondary education, are generally covered by both the ADA and the Rehab Act.

Individuals applying to or enrolled in institutions of higher education may encounter a variety of disability-related issues such as: admissions-related issues, including the required disclosure of medical information on applications; accommodation-related issues, such as whether a requested academic adjustment is reasonable and whether course materials must be accessible to students with sensory disabilities; housing-related issues, including questions about service animals and emotional support animals; architectural-access issues, including whether a campus needs to comply with standards for architectural accessibility; and discipline-issues, including suspension or expulsion due to the effects of a disability.

This legal brief discusses these issues and others by examining the text of the ADA and the Rehab Act, the relevant federal regulations, enforcement actions from federal administrative agencies, and recent developments in the case law.

II. Overview of Laws Related to Disability Discrimination in Higher

Titles II and III of the ADA and Section 504 of the Rehab Act prohibit discrimination against those with disabilities in many areas of life including higher education.² Though all three prohibit discrimination because of a disability, each set of laws and its corresponding regulations have specific, generally slight differences, including different

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requirements for compliance and different potential litigation outcomes. Which law applies depends on whether the college or university is a private institution or a public one, and whether it receives federal funding.

Title III of the ADA applies to private colleges and universities. It states that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”³ Title III’s definition of places of public accommodation explicitly includes undergraduate and postgraduate private schools, as well as “other place[s] of education.”⁴ Disability discrimination under Title III may include denying a person the opportunity to participate because she has a disability, providing those with disabilities unequal or separate benefits, and using “eligibility criteria that screens out” or “tends to screen out” those with disabilities.⁵

Title III does contain an exemption for “religious organizations or entities controlled by religious organizations, including places of worship,” and this exemption can apply to institutions of higher learning such as seminaries.⁶ However, as noted below, the Rehab Act does not contain a similar exemption so if a college or university receives federal funds, it is prohibited from discriminating against those with disabilities.

Title III requires a college or university to make reasonable modifications to policies, practices, or programs, which can include providing auxiliary aids and services such as note takers or screen reader software,⁷ to prevent discrimination against those with disabilities. A reasonable modification is one that is neither an undue burden on the college or university, nor a fundamental alteration of the policy, practice, or program. An undue burden is a “significant difficulty or expense,” and relevant factors for deciding if a modification is an undue burden include the modification’s cost to implement, the financial resources of the college or university, as well as any “parent entity,” and the size of the college or university.⁸ Whether a modification is a fundamental alteration is determined on a case-by-case basis.⁹ Some factors courts have considered are whether the modification threatens the viability of a program,¹⁰ or whether it requires massive changes to a program or jeopardizes the program’s effectiveness.¹¹

Title II of the ADA applies to public colleges and universities. Here, public means that the college or university is either operated directly by state or local government, or it is an instrumentality of state or local government.¹² Title II states that “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.”¹³ As with Title III of the ADA, Title II requires a college or university to make modifications to its policies, practices, and programs if the modification is not an undue burden or a fundamental alteration. Title II, though, has additional requirements: a college or university must

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appoint an ADA Coordinator and create an internal grievance procedure if it employs more than fifty people; perform a self-evaluation of the accessibility of its programs and facilities; and create a transition plan to implement necessary modifications, and provide notice of accessibility and the rights guaranteed by the ADA.¹⁴

One additional difference between Titles II and III is the legal requirement regarding architectural access. Under Title III, all new construction and alterations are subject to specific technical standards.¹⁵ For buildings that pre-date the ADA, covered entities, including places of public accommodation, are required to engage in readily achievable barrier removal.¹⁶ Title II, like Title III, requires all new construction and alterations to comply with the ADA's specific technical requirements.¹⁷ For buildings that pre-date the ADA, however, state and local government entities are not limited to the "readily achievable standard." Instead, they must provide program access to individuals with disabilities.¹⁸

The Rehab Act applies to any college or university, whether public or private, that accepts federal funds.¹⁹ This includes religious institutions, so long as they receive federal funds.²⁰ The Rehab Act states 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 program or activity receiving Federal financial assistance . . ."²¹

As a general rule, what is prohibited by Titles II or III of the ADA is also prohibited by the Rehab Act, but there are differences. One is that the Department of Education, rather than the Department of Justice, promulgates regulations implementing and interpreting the Rehab Act, and such regulations apply specifically to institutions providing a postsecondary education.²² And there are differences in these regulations. For instance, under the Rehab Act, only a recipient of federal funds that employs fifteen or more people must provide notice of the rights guaranteed by Section 504 and that the recipient does not discriminate against those with disabilities.²³ A similar notice requirement under Title II of the ADA applies to a public entity regardless of the number of its employees.²⁴ Another difference is that under the Rehab Act, a plaintiff may receive compensatory damages if he shows discriminatory intent because the college or university waived the defense of sovereign immunity when it accepted the federal funds.²⁵ In contrast, under Title III of the ADA, a plaintiff may not receive compensatory damages, as such remedy is not afforded by statute. With respect to Title II entities, while compensatory damages are statutorily permitted, the law is currently unsettled as to whether Congress appropriately abrogated sovereign immunity under Title II for claims regarding higher education.²⁶ A final difference in these two laws is that courts may judge causation in claims under the ADA differently than those under the Rehab Act.²⁷ This difference lies in the language used in the Rehab Act to prohibit discrimination—"solely by reason of her or his disability"²⁸—versus that used in the ADA—"by reason of such disability."²⁹ Despite its differences

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the Rehab Act, like the ADA, requires colleges and universities to make reasonable modifications to policies, practices, and programs to prevent discrimination against those with disabilities, and courts apply the same standards as it does under the ADA when it determines whether a modification is an undue burden or a fundamental alteration.³⁰

III. Admissions

The ADA and Rehab Act prohibit colleges and universities from discriminating against those with disabilities in the admission process. A college or university that receives federal funds generally cannot ask an applicant whether he has a disability.³¹ An exception to this rule permits a college or university to ask an applicant to voluntarily disclose his disability when it seeks to correct past discrimination.³² In addition to requiring the disclosure to be voluntary, the college or university must also make clear to the applicant that the information is solely for correcting past discrimination, that it will keep the information confidential, and that refusal to disclose such information will not have an adverse effect on the applicant.³³ Nor can colleges and universities limit the number of people with disabilities they accept.³⁴ Colleges and universities cannot have eligibility requirements that explicitly screen out those with disabilities, whether physical or mental, or have requirements that “tend to screen out” those with disabilities, unless it can prove the admission requirement is necessary.³⁵ An admission requirement might be necessary because it is a proven indicator of future academic success and no alternative measure exists,³⁶ and though an eligibility requirement can also reflect potential safety risks, these requirements must reflect actual risks, not those based on stereotypes or generalizations.

One potential legal issue under the ADA and the Rehab Act is when colleges and universities deny admission to a student based on concerns that his or her disability poses a direct threat. It is well-settled that there is a strict standard and a high burden for colleges and universities to meet: the risk must be immediate and real, provable by scientific facts and current knowledge, and not based on stereotypes, outmoded thought, or overly broad generalizations. In *United States v. The University of Medicine & Dentistry of New Jersey*,³⁷ the Department of Justice (DOJ) alleged that two medical schools in the university system violated Title II of the ADA by excluding applicants with the Hepatitis B Virus (HBV). The DOJ’s allegation relied largely on two facts: (1) students in the medical schools were not required to perform invasive surgical procedures; and (2) the Centers for Disease Control had found no reported case of transmission of HBV from a health care worker or student to a patient and updated its recommendations for the virus accordingly.³⁸ The parties reached a settlement requiring the University to update its disability policy regarding HBV, provide ADA training to their employees, and admit the applicants to medical school, as well as give them \$75,000 in tuition credits and other compensation.³⁹ Here, the University was not allowed to bar applicants because of a safety-based eligibility requirement that relied on outdated facts or unfounded assumptions about HBV.

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Similarly, in *United States v. Compass Career Management*, the DOJ alleged that a vocational school, which offered a licensed practical nursing program, violated the ADA when it refused to admit an applicant with HIV.⁴⁰ A consent decree filed the same day required the vocational school to revise its policies concerning HIV, stop questioning applicants about their HIV status, and train college administrators and instructors on ADA requirements, as well as pay \$30,000 in compensatory damages to the student and a \$5,000 civil penalty to the United States.⁴¹ Again, the ADA prohibited the school from having eligibility requirements based on unwarranted fears and stereotypes about HIV.

Nothing in the ADA or the Rehab Act requires a college or university to lower its academic standards for an applicant with a disability,⁴² and in the past courts have deferred to the college or university with respect to its academic standards.⁴³ An often-discussed older case regarding this principle is *Gent v. Radford University*.⁴⁴ In *Gent*, an applicant alleged he was denied admission to a graduate program in social work because of his disability. The school required a grade point average of 2.7 for admission and the applicant's undergraduate grade point average was 2.26. Because he failed to allege that other applicants with grade point averages lower than 2.7 were accepted to the program, or that the grade point average requirement had a disparate impact on those with disabilities, the applicant failed to make out a claim against the defendant-university.

It is important to remember that courts' deference to colleges and universities is not without limits, and a court might require an individualized assessment of an applicant with a disability, even with respect to concrete, seemingly objective measures such as a grade point average. For instance, in another older case, *Ganden v. National Collegiate Athletic Ass'n*, a student-athlete alleged that a rule requiring a minimum grade point average to participate in athletics at the university discriminated against him because of his learning disability.⁴⁵ This grade point average was the average of grades received in specific "core classes."⁴⁶ Though it denied the student-athlete's request for a preliminary injunction, the court stated that "Title III requires the NCAA to consider a students' progress in his or her [high school Individualized Education Plan] and overall high school career."⁴⁷ The court then went on to determine whether the student-athlete's suggested alternative was a reasonable modification to the grade point average requirement.

While the court ultimately concluded that the student-athlete's request to lower the required grade point average was a fundamental alteration of the requirement, and that substituting other classes that the student-athlete suggested for the core classes that composed the average was not reasonable, the court emphasized that the NCAA needed to conduct an individualized assessment of the student's application when he had a disability that might affect his ability to meet a grade point average requirement. It could not simply rely on a grade point average in denying an applicant admission

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without a closer examination, but instead had to treat this as it would any other request for a modification to a policy and determine whether alternative means of measuring a student's academic ability existed.

Another legal issue related to the post-secondary admissions process is that of standardized testing as an eligibility requirement. In the past, certain companies administering these tests “flag” the scores of tests taken by those with disabilities who received accommodations. Because standardized tests are nearly universal among eligibility requirements, the college or university can then roughly judge if the applicant has a disability when the applicant submits a flagged test score.

The most recent and significant case on this issue is *Department of Fair Employment & Housing v. Law School Admission Council Inc.*,⁴⁸ a case in which the plaintiffs alleged, among other things, that (1) “flagging score reports of individuals receiving additional time failed to ensure that the LSAT measured aptitude, rather than disability”; and (2) the flagging policy “unlawfully coerced and discouraged potential applicants from seeking reasonable accommodations or punished those who received accommodations.”⁴⁹ With respect to the first count, the court stated that “the test provider ha[d] the burden of proving it best ensured that the test equally measured abilities of disabled and non-disabled test takers.”⁵⁰ The test provider could not simply grant an accommodation, flag the test score, and leave it to the institution to decide what the test score represented. Instead, the test provider had a responsibility to ensure the test score of a test taker who received an accommodation was equivalent to one who did not. With respect to the second count, the test provider's practice of flagging scores, the court held that this clearly “announces” to college or university an individual's disability.⁵¹ For both counts, the court denied the test provider's motion to dismiss, and the parties resolved the case through a consent decree in which the test provider agreed to stop flagging test scores.⁵²

Beyond eligibility requirements like minimum grade point averages or scores on standardized tests, all aspects of the admission process—from recruitment and informational sessions, to campus tours and interviews—can potentially fall under the ADA and the Rehab Act's prohibitions against disability-related discrimination. For instance, in *Wolff v. Beauty Basics, Inc.*, the court permitted a case to proceed where the plaintiff alleged, among other things, the cosmetology school refused to provide a sign language interpreter during a mandatory tour for applicants.⁵³ And a request for a modification from an applicant with a disability in one of these areas of admissions should receive due consideration to determine whether it is reasonable—whether the request places an undue burden on the college or university, or works a fundamental alteration of the policy or program.

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IV. Academic Adjustments

Under the ADA and Rehab Act, failing to provide a requested academic adjustment may be discrimination. The process for determining whether the college or university must make an adjustment begins when a student with a disability requests a change in a policy or rule—whether a positive change such as providing him with a note-taker, or a negative change such as not applying an attendance policy to a student with a disability—because without the change the student’s disability would prevent her from having meaningful access to a benefit the college or university offers. The student’s request need not be a formal, written request. It can be as informal as a verbal request made to a professor during a class or a school administrator during a test. But colleges and universities are advised to put in place procedures to create a uniform, structured system for how a student makes a request and to publish the process, as well as the criteria, the college or university uses to evaluate the request.

In fact, in a number of recent resolution agreements between the Department of Education’s Office of Civil Rights (OCR) and various postsecondary institutions, OCR has included language requiring these institutions to establish such policies. As one example, in its agreement with the University of Notre Dame, there is a requirement that a request procedure will have specific features, such as timeframes and specifying when a student’s instructor is involved in determining whether a requested modification is reasonable.⁵⁴

Accommodations made to academic requirements in educational institutions are often called academic adjustments.⁵⁵ Designed to ensure equal opportunities for students with disabilities, academic adjustments are generally: (1) provision of auxiliary aids and services; (2) modifications to nonessential academic requirements; and (3) reasonable changes to policies, procedures, or practices.

When evaluating a request for an accommodation, colleges and universities must go through an interactive process.⁵⁶ This process requires an individualized examination of factors such as the essential function of the program or policy to be modified, the cost of the proposed modification, and the student’s specific disability.⁵⁷ A college or university can deny a requested academic adjustment and offer an alternative; this informal negotiation between the student and college or university to arrive at a compromise accommodation is an important part of the interactive process. Denying a student’s request for a modification is not discriminatory *if* the college or university can show that the proposed modification is either not necessary to provide meaningful access to an educational opportunity, a fundamental alteration of the program or policy, or an undue burden on the college or university.

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A. An Individualized Interactive Process

A college or university is not required to modify academic requirements that are essential to the curriculum or to maintaining academic standards,⁵⁸ and courts often defer to the college or university about which academic requirements are essential and when a reasonable accommodation to an academic standard is not available.⁵⁹ But courts do examine the process, as a whole, that leads to a decision to deny an accommodation, often terming this the “interactive process.”

In examining the interactive process, courts seek to ensure that the process required a close consideration of the academic requirement or policy and that it was individualized to the student, not just a rote judgment or a decision based on stereotypes.⁶⁰ In *Wynne v. Tufts University School of Medicine*, one of the most influential cases regarding this issue, the court explained it as follows: “Were the simple conclusory averment of the head of an institution to suffice, there would be no way of ascertaining whether the institution had made a professional effort to evaluate possible ways of accommodating a handicapped student or had simply embraced what was most convenient for faculty and administration. We say this . . . to underscore the need for a procedure that can permit the necessary minimum judicial review.” Courts generally do not defer to an institution unless they can “determine that the school ‘has fulfilled this obligation [of making an individualized determination].’”⁶¹

In *Palmer College of Chiropractic v. Davenport Civil Rights Commission*, a student with a vision impairment requested accommodations to a chiropractic school’s curriculum and classes that would enable him to attend.⁶² The school rejected all of the accommodations the student proposed (sighted reader, modifications of certain practical examinations), and it did not offer any alternative accommodations, nor detail its concerns sufficiently for the student to present his own alternatives. Emphasizing the need to submit a factual record to prove that it had investigated possible accommodations, the Iowa Supreme Court held that a college or university must engage in “an individualized and extensive inquiry” before it can decide that an accommodation is impossible.⁶³ In this case, the school had made a “strict, generalized invocation of [the school’s] technical standard” and that rote invocation fell “far short . . . of the conscientious, interactive, student-specific inquiry required by the case law.”⁶⁴

The burden for showing that the college or university went through an individualized process before rejecting the request falls on it, not the student, once the student has established a prima facie case for discrimination. In *Dean v. University at Buffalo School of Medicine and Biomedical Sciences*, a medical student with depression and anxiety requested time off to adjust to new medications, in addition to the time off from classes given to all those preparing for the licensing exam.⁶⁵ Though it gave the student some additional time, the university did not grant him all of the time he had requested. The Second Circuit Court of Appeals declined to defer to the university’s discretion to establish academic standards. Instead, it focused on the lack of evidence about the process that led to the decision, stating that “[t]o do otherwise, might allow

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academic decisions to disguise truly discriminatory requirements.”⁶⁶ Once a student establishes that he requested a plausible accommodation, the college or university bears the burden of showing that the requested accommodation was unreasonable, and having a detailed, written procedure that sets out how to make a request and how a request is approved might help carry this burden.

While the case law offers few details about what level of process colleges and universities must provide, courts have emphasized that the process must involve an individualized consideration of both the policy and the student’s disability,⁶⁷ and that there can be a question about the legitimacy of the process when one faculty member or administration has sole discretion for a decision.⁶⁸ Beyond this, courts frequently look to employment law to fill in the gaps when a plaintiff has challenged the adequacy of the interactive process the college or university provided him.

For instance, as with an employee who makes a request of an employer, a student must give a college or university a reasonable amount of time to consider the student’s request. In *Schneider v. Shah*, the student requested accommodations after failing two classes.⁶⁹ For twenty-two days, the student and university discussed the student’s disabilities and what could be done to accommodate him before he ended the process by filing a lawsuit. The student argued that the twenty-two day delay was evidence that the university had failed to engage in an interactive process. The court disagreed and dismissed the student’s claim. It held that twenty-two days was not an unreasonable amount of time to negotiate a reasonable accommodation, which included permitting the student to re-take a test with accommodations.

Similarly, in *Edmunds v. Board of Control of Eastern Michigan University*, a student filed a complaint alleging that the university had failed to engage in the interactive process with him in good faith.⁷⁰ He had requested an accommodation that would provide him with off-campus placement for a clinical class. He made his request in November, informed the university of his disability in January of the following year, and in April of that same year, after discussing alternatives to off-campus placement with the student, the university granted his request. Granting the accommodation in April permitted the student to take advantage of this request in time for the Spring/Summer semester. In light of this, the court found that the university had engaged in the interactive process in good faith because three months was a reasonable amount of time and, ultimately, the amount of time required had not prevented the student from benefitting from the accommodation. In both of these cases, the courts looked to employment law to determine the factors they used to judge whether the time the interactive process took was reasonable, and courts may look to employment law in similar situations when the case law fails to directly address an issue about the interactive process.

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B. Academic Adjustments

The law about academic adjustments generally falls into one of three categories: (1) provision of auxiliary aids and services; (2) modifications to nonessential academic requirements; and (3) reasonable changes to policies, procedures, and practices. Broadly, the provision of auxiliary aids and services is often about the accessibility of lectures and course materials and making the benefits of educational opportunities offered to all students available to those students with disabilities. Case law about modifications to nonessential academic requirements tends to focus on whether a modification fundamentally alters or lowers a college's or university's academic standards or curriculum. And reasonable changes to policies, procedures, and practices typically concern the costs of implementing a requested modification.

1. Auxiliary Aids & Services

Both the ADA and Rehab Act require colleges and universities to take steps “to ensure that no [disabled] student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.”⁷¹ Regulations promulgated under the Rehab Act provide that educational auxiliary aids might include “taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions”⁷² while regulations under the ADA include a separate extensive list of possible auxiliary aids and services.⁷³ In other words, a college or university must take reasonable steps to provide students with disabilities with assistance, technological or otherwise, that provides them with the same level of meaningful access to educational opportunities that students without disabilities have.

This idea of providing meaningful access is the standard colleges and universities should apply when deciding whether a requested accommodation is necessary. In *Argenyi v. Creighton University*, a medical student who is deaf requested accommodations including Communication Access Real-Time Transcription (CART) and cued speech interpreters.⁷⁴ The university denied most of his requested accommodations, the accommodations the university did provide failed to meet the student's needs, and in the end, the student paid for CART and interpreters himself. When he was required to take clinical courses, though, the university prohibited him from using interpreters, even those he paid for himself. The Eighth Circuit Court of Appeals held that, to determine if a request for an accommodation is necessary, the proper standard was “meaningful access” and that, though the ADA and Rehab Act did not require that aids and services “produce identical result[s] or identical achievement

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[s]” for those with disabilities, they must provide “equal opportunity to gain the same benefit.”⁷⁵

Here, the university had not “effectively excluded” the student by denying him his requested accommodations.⁷⁶ He could still attend classes and he had managed to pass those classes, despite the lack of accommodations. Thus, under this incorrect interpretation of the ADA’s and Rehab Act’s requirements, the student’s requested accommodations may not have been necessary because he was not effectively excluded. However, by denying the student’s requested accommodations, the university might have failed to provide him with meaningful access to all of the educational opportunities it offered, and when judged against this, the correct standard, the university may have discriminated against the student. And indeed, when this case was remanded and tried before a jury, the jury concluded that the university had failed to provide the student with meaningful access.⁷⁷

Auxiliary aids and services are not only necessary to make the traditional classroom accessible. They also might be necessary beyond the classroom to provide students with disabilities meaningful access to other benefits and educational opportunities the college or university offers. The ADA and Rehab Act require colleges and universities to provide accommodations so students with disabilities can have meaningful access to all the benefits they offer. These benefits can include online materials such as lectures and courses, and it falls to the university to make such materials accessible to individuals who are blind or have low vision by making them compatible with screen reading technology.

This is an area of the law that has seen a significant amount of cases and settlement agreements in the last couple of years. Berkley University reached a settlement agreement with Disability Rights Advocates and three individuals with disabilities who are unable to read traditional printed text.⁷⁸ Pursuant to this settlement, Berkley adopted various policies to ensure equal access to written materials that are part of a university education to students with disabilities. To highlight certain provisions of the settlement, students with disabilities who request course materials in alternate formats can now expect to receive them in a timely basis—10 business days for conversions from textbooks and 17 business days in conversions from course readers. Similarly, Berkley created a Library Print Conversion System so that students can request that a specific library book or journal be converted in an accessible digital format in a timely basis—5 business days. These time frames are particularly important given the lag time many students across the country experience when requesting materials in alternate formats.

Federal agencies have also been active players in ensuring the accessibility both of course materials and of college and university websites. As one example, OCR engaged in a compliance review of South Carolina Technical System cited barriers to

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accessibility for students with disabilities on its website, including missing “[PDF] tagging, alternative text for graphics, identification on column headers, specified reading order, and tags on critical information such as watermarks and headings.”⁷⁹ OCR also cited “videos . . . without proper labeling, keyboard control, or captioning,” “alternative attributes [that] were insufficient or missing,” “fields which required filling out [that] were missing labels to enable a screen reader user to fill them in,” “tables [that] were missing headings for a screen reader to fully access them,” and “areas where a keyboard-only user would not be to access information or use drop down menus.”⁸⁰ The South Carolina Technical System agreed to resolve these violations by ensuring that the websites of all the colleges within its system are accessible, to develop a resource guidance to provide information about web accessibility requirements standards with links to reference materials, and to review and monitor the colleges’ websites for compliance. See *also* Settlement Agreement between the United States and Louisiana Tech University (describing a settlement agreement to make “learning technology, web pages and course content” accessible to those with disabilities that concluded litigation on behalf of a blind student who could not use an online learning product required for one of his classes).⁸¹

In addition to focusing on specific schools, DOJ has also tried to address the problem of inaccessible course material by targeting companies that contract with institutions of higher learning. In 2015, DOJ reached an agreement with EdX, Inc., a company that contracts with over 60 institutions of higher learning and provides massive open online courses.⁸² Per the terms of this agreement, EdX agreed to become compliant with the Web Content Accessibility Guidelines (WCAG) 2.0 within 18 months, require content providers to certify that provided courses meet certain accessibility requirements, retain a website accessibility consultant, and designate a website accessibility coordinator.

Notably, the responsibility to make online materials available to those with disabilities may go beyond making those materials available to a college’s or university’s students. The United States Department of Justice has filed statements of interests in two recent lawsuits, *National Association of the Deaf v. Harvard University*⁸³ and *National Association of the Deaf v. Massachusetts Institute of Technology*.⁸⁴ Complaints in both cases allege that the universities failed to accommodate all people with disabilities, both students and others, by failing to provide closed captioning for online materials the universities provide free to the public. These materials include Massive Open Online Courses, recordings of speeches given by public figures such as Bill Gates and President Obama, and other educational resources. Both universities argued, among other things, that Title III of the ADA does not apply to the accessibility of online content, only to physical and architectural barriers. Both have also argued that closed captioning is a fundamental alteration of the online content, essentially creating a new service for those with disabilities. In its statements of interest, the United States disagreed with both defenses, stating that its position is that Title III of the ADA applies

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to online content offered to the public and that colleges and universities must treat a request for closed captioning on websites as they would any other request for an auxiliary aid or service: giving it due consideration and deciding whether it is reasonable.⁸⁵ The magistrate judge issued a report and recommendation in both cases recommending that universities' motions to dismiss be denied, and as of the date of this legal brief, the parties are briefing these motions before the district court judge.

Colleges and universities generally "need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature."⁸⁶ However, if colleges and universities provide tutoring services to other students, these services must also, of course, be offered and accessible to students with disabilities. In *Sellers v. University of Rio Grande*, a student with ADHD, anxiety and depression argued that the university had discriminated against her by failing to provide her with tutoring services.⁸⁷ The university vehemently defended itself saying that it was not required to provide tutoring services, but the court agreed with the student and granted her request for a temporary restraining order, requiring that the university provide the requested tutoring services. The court explained that where, as here, a university offers tutoring to its students, it must also offer tutoring to students with disabilities.

2. Modifications to Nonessential Academic Requirements

Colleges and universities are required to modify certain academic requirements, such as "[m]odifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted."⁸⁸ Such modifications are not required, however, if the college or university can prove the specific requirements are "essential to the instruction being pursued . . . or to any directly related licensing requirement."⁸⁹

Academic requirements that courts have found to be essential are a requirement to pass a licensing exam before continuing school;⁹⁰ medical clerkship rotations, clinical hours, and the rigorous schedule required of medical students;⁹¹ a requirement to repeat coursework due to poor grades;⁹² requiring a student to re-take an exam rather than attend summer program;⁹³ and a requirement to offer a test in a specific format because to do otherwise would lower academic standards.⁹⁴

Before a college or university can expect judicial deference, it needs to demonstrate that it engaged in a true analysis about whether a particular accommodation would eliminate an essential academic requirement. A landmark case regarding this is *Guckenberger v. Boston University*, where the plaintiffs were students with learning disabilities who challenged the university's "blanket prohibition against course substitutions for mathematics and foreign language."⁹⁵ The students pointed to this

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“draconian accommodations policy,” among other things, as evidence of a hostile learning environment and intentional infliction of emotional distress.⁹⁶ The procedural posture of this case is complicated, but the court concluded that Boston University had failed to “undertake a diligent assessment of the available options” and ordered the university to propose a “deliberative procedure for considering whether modification of its degree requirement in foreign language would fundamentally alter the nature of its liberal art program.”⁹⁷ The court ordered that the procedure include a faculty committee and its determination would be subject to the approval of the president. The court approved the use of an existing committee that had 11 faculty members in a range of academic fields and ordered it to take notes at its meetings. Ultimately, following this deliberative process, the court upheld the university’s conclusion that removing a foreign language requirement would be a fundamental alteration to the program.

A more recent example is *Shurb v. University of Texas Health Science Center at Houston-School of Medicine*.⁹⁸ Here, the student argued that, because of his mental health disabilities, he was a visual learner and asked a professor to provide him with PowerPoint lecture presentations as an accommodation. The professor denied his request, though did offer certain alternatives. The student asserted that his request was minor and that every other professor had granted his request, but this did not sway the court to find that this was discrimination under the ADA, and the court deferred to the university’s judgment. The court held that though a student with a disability has a right to a reasonable accommodation, he does not have a right to his preferred accommodation. A university can decide that a requested accommodation might jeopardize its academic standards and, instead, offer a reasonable alternative. As long as the university had engaged in an interactive process with the student and provided alternatives where available, the court would defer to the university’s judgment about which academic requirements were essential.

But a college or university should rely only on one administrator when deciding when an academic standard is essential, and giving the discretion to grant or deny accommodation requests to a single person without providing relevant standards might call into question whether an academic requirement is truly essential. In *Peters v. University of Cincinnati College of Medicine*, a medical student’s academic performance improved after she started a new treatment regimen for Attention Deficit Disorder and depression.⁹⁹ Requesting an accommodation, she asked to be allowed to retake an exam she had failed before starting her new regimen. The university’s process for approving requests ultimately delegated sole discretion to a single dean, and that dean adopted the appeal board’s recommendation, denying her request to retake the exam. The court held that this was potentially discrimination. Despite the university’s procedures for approving requests, the dean was the ultimate decision maker, not bound by any established policies or written standards. In the past, the dean had made decisions about students contrary to recommendations from the appeal board, and nothing on the record showed the dean had engaged in an

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interactive process. In light of these facts, the court was not willing to defer to the university's judgment.

3. Reasonable Changes to Policies, Procedures, and Practices

Beyond changes to academic requirements, colleges and universities may be required to make reasonable changes to any other policy, procedure, or practice to ensure that a student with a disability has the same opportunity to succeed as those students without disabilities. This may require a college or university to make exceptions to rules prohibiting tape recorders in class, to allow service animals in campus buildings, or to change any other policy that has "the effect of limiting the participation of [students with disabilities] in the recipient [of federal funds]'s education program or activity."¹⁰⁰

Other policies that have come under scrutiny include attendance policies. The United States recently entered into a settlement agreement with Southern Illinois University.¹⁰¹ The complainant, a law student with chronic fatigue syndrome, alleged that SIU failed to modify its attendance policy to accommodate his disability. In its investigation, the United States determined that SIU had an inconsistently applied attendance policy, and that it would have been a reasonable modification to modify its attendance policy for the student.

Also, with respect to policies for administering exams, the college or university must provide methods for evaluating students that will "best ensure" that the evaluation "represents the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills."¹⁰² In the decades since the passage of first the Rehab Act and later the ADA, extra time to complete an exam or a separate distraction-free room in which to take an exam have become widely accepted modifications to policies for administering exams when necessary to accommodate a student's disability.

Though potentially the cost of implementing an accommodation might present an undue burden to a college or university, courts have rarely addressed concerns about costs in an academic setting. In *Argenyi v. Creighton University*, discussed above, the court's analysis never addressed the cost of providing CART and cued-speech interpreters.¹⁰³ It only asked whether those accommodations were necessary to give the student meaningful access to the educational opportunities the university offered. When the case was tried before a jury, the jury found that the cost of providing these auxiliary aids and services would not have posed an undue burden on Creighton University.¹⁰⁴

Another example of a court's skepticism of a university's claim that an accommodation is an undue burden because of its cost is *Innes v. Board of Regents of the University System of Maryland*.¹⁰⁵ In that case, sports fans who were deaf or hard of hearing

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requested accommodations at the university's sporting events and on the university's website. Concerning one of the accommodations, the court held that "the purchase and installation of the captioning boards cost a total of \$3.75 million does not establish undue burden as a matter of law."¹⁰⁶

V. Architectural Access & Housing

Central to providing students with disabilities full and equal access to educational opportunities at colleges and universities is ensuring that they have that same level of access to physical facilities such as classrooms, dormitories, dining halls, and student unions. Accessibility issues in these areas can range from wider doorways and ramps, to wheelchair-accessible bus systems operated by the school and meal plans that accommodate those with allergy-related dietary restrictions.

A. Architectural Access

For new construction, colleges and universities are required to make buildings accessible to those with disabilities.¹⁰⁷ Also, existing buildings must be made as accessible as possible if they are altered after the passage of the Rehab Act or ADA.¹⁰⁸ Colleges and universities must ensure that these buildings, whether newly constructed or undergoing alterations, meet the 2010 ADA Standards.¹⁰⁹ Depending on whether a college or university is a Title II or Title III entity, it also has an obligation to engage in barrier removal or program access, as discussed above.

With respect to architectural access, claims against colleges and universities have rarely reached courts. *Covington v. McNeese State University* may illustrate why this is true. Here, a student who used a wheelchair was humiliated, as well as injured, when she attempted to use a non-ADA compliant bathroom stall.¹¹⁰ The bathroom stall was located in the student union, where none of the bathrooms were ADA compliant, though the building was central to student life. The court described the judgment and opinion awarding her damages for discrimination by the university as "a published, written opinion [that would] forever memorialize [the university's] discrimination against this country's disabled citizens."¹¹¹

The university later entered a settlement agreement with the DOJ, which initiated its investigation when "the state attorney general's office took the position—in private litigation against the campus—that it was not required to have an accessible toilet room in its primary student union building."¹¹² Requiring extensive changes to all parts of the university's operations, not just its existing facilities and new construction, the settlement required the university to, among other things, bring all buildings constructed since 1992 into compliance with the ADA, develop and implement a plan to bring all buildings into compliance with the ADA, publish information about

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accessibility and emergency evacuation and shelter on its website, and designate an ADA coordinator.

The DOJ continues to pursue litigation to bring physical facilities at colleges and universities into compliance, and taking steps to ensure accessibility when a college or university renovates or otherwise alters a building will likely prevent costs in the future if it is required to make its facilities ADA compliant. For example, it entered into a settlement agreement with the University of Alabama at Birmingham in February 2016 to resolve complaints regarding inaccessible buildings on campus.¹¹³ Per the settlement, the university will complete an architectural review of its facilities identified by the DOJ, and will provide the DOJ with a written report of its findings. Then within one month of receiving a response from the DOJ, the University will start remediating the deficiencies identified to comply with the 2010 ADA Standards (unless the facilities were in compliance with earlier standards at the time, in which case it must report that to the DOJ).

B. Housing

Though a college and university does not have to make every dormitory or residential hall accessible to those with disabilities, it must provide a variety of housing options and allow those with disabilities to reside in the most integrated setting possible.¹¹⁴ In addition to the architectural accessibility of the buildings where students reside, the ADA and Rehab Act also apply to housing services such as meal plans that colleges and universities offer to their students and the policies and rules those residing in student housing must follow. Further, a third set of statutes, the Fair Housing Act¹¹⁵ (FHA), also applies to colleges and universities that offer housing. Two areas in recent litigation in housing have concerned meal plans for students with food allergies and the presence of service animals, as well as assistance animals, in university housing.

1. Meal Plans

The DOJ has taken the position that students with food allergies may have disabilities under the ADA and that meal plans offered to students, like any other benefit a college or university offers, must make reasonable accommodations for students with such allergies.¹¹⁶ In the settlement agreement concluding the DOJ's investigation of a complaint against Lesley University, the university agreed to make several changes to its dining services.¹¹⁷ In addition to educational and procedural requirements, the university agreed to post notice in its dining halls and "food eatery facilities" of the use of potential allergens—specifically, "egg, milk, wheat, shellfish, fish, soy, peanut, [and] tree nut products"—in its cafes and kitchens.¹¹⁸ The agreement also required the university to allow students with food allergies to pre-order their meals. With twenty-four-hour notice, a student with a food allergy can email a meal choice to food services, allowing the student to receive meals when the menu for the next day offered

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options the student was allergic to. Finally, the student with allergies can then have this meal delivered, providing a way to avoid entering a dining hall filled with allergens; this is in addition to having a separate area to store and prepare foods and a dedicated space in a dining hall.

2. Service Animals

Under Titles II and III of the ADA, a service animal is “any dog . . . individually trained to do work or perform tasks for the benefit of an individual with a disability.”¹¹⁹ Examples of “work” and “tasks” are that the service animal might assist with are navigation, retrieve items, pull a wheelchair, assist with balance and stability, carry items, alert the owner to sounds or the presence of allergens, alert the owner to an oncoming seizure, remind the owner to take medication, and prevent or interrupt impulsive behavior.¹²⁰ Generally, colleges and universities are required to admit service animals to any place where a student goes during a day-to-day routine including a classroom or a dormitory.¹²¹ A college or university can only exclude a service animal when “[t]he animal is out of control and the animal's handler does not take effective action to control it” or “[t]he animal is not housebroken.”¹²² However, even when a college or university legitimately excludes a service animal, it must give “the individual with a disability the opportunity to participate in the service, program, or activity without having the service animal on the premises.”¹²³

A separate regulatory provision, added in 2010, provided clarification that the ADA also permits reasonable modifications for miniature horses.¹²⁴ A miniature horse is typically between 24 and 34 inches tall, measured to the shoulder, and weighs between 70 and 100 pounds.¹²⁵ A college or university must modify its policies and procedures to accommodate students who have a miniature horse as a service animal. Factors it may consider when deciding how to best accommodate a student’s miniature horse are whether the facility can accommodate its size and weight, whether the handler has sufficient control, whether it is housebroken, and whether it “compromises legitimate safety requirements that are necessary for safe operation.”¹²⁶

Assistance animals are a different category of animal that colleges and universities may have to accommodate when ensuring accessibility for students with disability. Like the ADA and the Rehab Act, the FHA requires housing providers to make reasonable accommodations for those with disabilities.¹²⁷ The FHA applies to colleges and universities when they provide housing to students. In *United States v. University of Nebraska at Kearney*, a university a student’s request to live in student housing because she required an accommodation to the university’s no-pets policy for her therapy dog.¹²⁸ The university disputed whether the FHA applied to it, claiming that the housing it offered was “transient,” that students maintained a permanent address elsewhere, and that the housing served “pedagogical ends.”¹²⁹ The court rejected these arguments, citing cases that held that the FHA applied to temporary housing,

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migrant farm workers, and even halfway houses, as well as Department of Housing and Urban Development (HUD) regulations applying the FHA to dorm rooms.

Because the FHA applies to colleges and universities when they act as housing providers, they may have to accommodate assistance animals in addition to service animals. Assistance animals are animals that provide support, assistance, or service to a person with a disability.¹³⁰ It can be any animal, trained or untrained, so an assistance animal might be cat, bird, guinea pig, parrot, miniature horse, or capuchin monkey and they include emotional support and therapy animals. According to HUD guidance, a housing provider must allow a person with a disability to keep an assistance animal if it is a reasonable accommodation. Changing a no-pets policy is reasonable unless the specific animal is either an undue financial or administrative burden or a fundamental alteration of the housing provider's services—both of which are very high standards—or if the animal presents a direct threat to the safety of others or would cause substantial property damage. This inquiry requires an individualized inquiry, considering the actual conduct of the specific animal, and the denial of the accommodation cannot be based on stereotypes about the animal. Finally, though the housing provider can require confirmation of the person's disability, it cannot require a fee, deposit, insurance, hold harmless agreement, extra inspections, "pet rules," veterinary certificates, or special conditions.

With respect to the status of assistance animals under the Rehab Act, at least one court has applied the standard for assistance animals under the FHA, rather than the more strict definition of service animal under the ADA. In *Velzen v. Grand Valley State University*, a student residing in "apartment-style" student housing had a guinea pig as a prescribed emotional support animal.¹³¹ The university denied her request to waive its no-pets policy, claiming that only the ADA applied, and though it eventually granted her request, it denied the Rehab Act applied in the subsequent litigation over damages. The court here held that because HUD, not the DOJ, interpreted the Rehab Act, the ADA's definition of service animal did not necessarily extend to the Rehab Act, and guidance from HUD indicated that emotional support animals were treated under the Rehab Act as they were under the FHA.

Ultimately, in contexts when a college or university acts as a housing provider, multiple sets of laws might apply to a request for an accommodation due to a service or assistance animal. In these situations, HUD recommends looking at the accommodation under the ADA first. If the ADA applies—in other words, if the request concerns a service animal, which is either a dog or miniature horse trained to perform work or a task—then further analysis is unnecessary and the FHA also applies (as does, presumably, the Rehab Act). If the ADA does not apply, then a college or university should consider the request under the FHA and HUD's guidance on assistance animals.

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VI. Disability & Dismissals

Issues arise when a student, though qualified to participate safely in school activities, is dismissed from a college or university because of a disability. Due to concerns about liability, schools have implemented codes of conduct that prohibit violence or dangerous behavior or that require leaves of absence when a student exhibits violent behavior, or threats of violent behavior, including harm to self, and they have put in place housing policies that prohibit acts of violence, including self-injurious behaviors. These sorts of policies can fall more harshly on students with mental health disabilities. For instance, colleges and universities often take disciplinary action, as directed to do so under these policies, when the student is still receiving treatment after engaging in self-injurious behavior. Also, sometimes students are subjected to adverse actions simply for expressing mental health needs or seeking mental health treatment. These sorts of policies may have negative effects. They can discourage students from getting help out of fear of negative consequences, serve to isolate students from friends and support when it is needed most, and send a message that students have done something wrong.

The only legitimate reasons under the ADA for suspending or expelling a student for reasons related to a disability are that the student is unqualified from the program or service and no reasonable accommodation would allow the student to become qualified; that the student's attendance fundamentally alters the program or service; that the accommodation necessary for the student to become qualified poses an undue burden to the college or university; or that the student poses a direct threat to the health or safety of others that cannot be eliminated or reduced by providing a reasonable accommodation. The ADA provides a framework for analyzing whether a student poses a "direct threat" to the safety of others. The college or university must conduct an individualized assessment that considers (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.¹³² Additionally, the college or university must show that reasonable accommodation will help alleviate or eliminate the direct threat.¹³³ It is worth emphasizing that in cases involving suicide attempts, there is no defense for threat-to-self—*i.e.*, a student cannot be a direct threat to himself—described in the regulations or statutory language under Titles II and III of the ADA, a fact recognized by most courts addressing this issue.

A. Dismissals Based on Mental Health

An effective policy for addressing mental health issues, such as the model policy published by the Bazelon Center for Mental Health Law,¹³⁴ is based on these six concepts: (1) acknowledge but do not stigmatize mental health problems; (2) make suicide prevention a priority; (3) encourage students to seek help or treatment that they

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may need; (4) ensure that personal information is kept confidential; (5) allow students to continue their education as normally as possible; and (6) refrain from discriminating against student with mental illnesses, including taking punitive actions toward those in crisis. Additional suggestions to use as guiding principles when working with a student with mental illness are to avoid using disciplinary rules to address mental health issues by addressing these issues through medical policies and procedures; do not implement blanket policies requiring withdrawal following mental illness disclosure or treatment; maintain and protect confidentiality; and to conduct an individualized assessment in each situation.

Doing the above will help a college or university avoid situations like the one that arose at Quinnipiac University when the university placed a student on mandatory leave after she was diagnosed with depression.¹³⁵ She was placed on leave after she sought mental health counseling and the university refused to refund her tuition. The DOJ investigation found this to be discrimination because the university failed to consider modifications to its mandatory leave policy. In addition to paying over \$32,000 in damages, the university agreed to modify its policy to consider reasonable accommodations other than mandatory leave when students were seeking treatment for a mental illness. As stated in the DOJ's press release, "universities like Quinnipiac cannot apply blanket policies that result in unnecessary exclusion of students with disabilities if reasonable modifications would permit continued participation."¹³⁶

Another example that illustrates the need for an individualized consideration of a student's situation is the OCR's investigation of the practice at St. Joseph's College in New York to require the suspension of a student exhibiting symptoms of mental illness.¹³⁷ A student engaged in inappropriate conduct toward another student by trying to kiss him, refusing to let him go, insisting that they were married, and requiring removal by a security guard. She was had to be physically removed by a security guard. Although she returned to the College after receiving clearance from her psychiatrist, the incident happened again. This time, she was suspended with no opportunity to appeal. This process was different from the process for students suspended for reasons not related to mental health. In the resolution agreement concluding the OCR's investigation, the university agreed to not apply a separate suspension process in situations seemingly related to mental health issues.¹³⁸

B. Dismissals Based on Other Disabilities

Dismissals for other disabilities, not related to mental health, raise similar issues, and just as with students with mental illness, a college or university must give the circumstances facing a student with a disability individualized consideration before dismissing the student because of that disability. For instance, in a recent lawsuit against Cox College of Nursing, the college dismissed a deaf student, claiming that her disability posed a direct threat to potential patients.¹³⁹ The jury found in favor of the

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nursing student, after she won an appeal to the appellate court that found that “[t]he reasonable inference from these undisputed facts is that her past success proves her ability to utilize the (nursing) program in its current form with reasonable accommodation.”¹⁴⁰ Another example is Gwinnet College’s ban on a student with HIV from participating in their medical assistant program.¹⁴¹ The DOJ found that the college’s claim that the student was a safety risk to patients was not credible and based on unfounded fears about HIV. As these two cases illustrate, any dismissal based on a disability, whether mental health related or otherwise, requires the college or university to make a carefully considered decision, in which it has investigated both proven facts about a student’s disability and the individualized circumstances of the dismissal.

VII. Conclusion

Higher education offers students a step toward independence, economic self-sufficiency, and the potential to meet their professional goals. Ensuring that higher education is accessible to students with disabilities is critical to the advancement of people with disabilities. The ADA, Rehab Act and FHA also offer important protections for students with disabilities, while ensuring that colleges and universities maintain their academic standards. Students with disabilities are encouraged to understand their rights under these federal laws when pursuing their post-secondary to ensure that they are receiving equal access to their education.

Notes

1. This legal brief was written by Barry C. Taylor, Vice President of Systemic Litigation and Civil Rights, Rachel M. Weisberg, Staff Attorney, and Allen Thomas, Pro Bono Attorney with Equip for Equality, the Illinois Protection and Advocacy Agency (P&A). Equip for Equality is providing this information under a subcontract with Great Lakes ADA Center.
2. 42 U.S.C. §§ 12131–12134 (2016) (Title II of the ADA); 42 U.S.C. §§ 12181–12189 (2016) (Title III of the ADA); 29 U.S.C. § 794 (2016) (Section 504 of the Rehabilitation Act).
3. 42 U.S.C. § 12182(a) (2016).
4. *Id.* at § 12181(7)(J).
5. *Id.* at § 12182(b)(2)(a).
6. *Id.* at § 12187; see also *White v. Denver Seminary*, 157 F. Supp. 2d 1171, 1174 (D. Colo. 2001) (holding that a seminary is “exempt from the provisions of Title III of the ADA”); 28 C.F.R. § Pt. 36, App. C (“The ADA’s exemption of religious

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organizations and religious entities controlled by religious organizations is very broad [I]f a church itself operates a day care center, a nursing home, a private school, or a diocesan school system, the operations of the center, home, school, or schools would not be subject to the requirements of the ADA”).

7. 28 C.F.R. § 36.303(b) (2015).
8. *Id.* at § 36.104.
9. *Id.* at § Pt. 36, App. C.
10. *See, e.g., New Mexico Ass’n for Retarded Citizens v. State of N.M.*, 678 F.2d 847, 855 (10th Cir. 1982).
11. *See, e.g., Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 410 (1979).
12. 28 C.F.R. § 35.104 (2015).
13. 42 U.S.C. § 12132 (2016).
14. 28 C.F.R. § 35.105-107 (2015).
15. 42 U.S.C. § 12183; 28 C.F.R. § 36.401.
16. 42 U.S.C. § 12182(b)(2)(iv); 28 C.F.R. § 36.304.
17. 28 C.F.R. § 35.151.
18. *Id.* at § 35.150.
19. 29 U.S.C. § 794 (2016). The application of the Rehab Act is not limited by the purpose of the federal funds the college or university receives. *Id.* (“For the purposes of this section, the term ‘program or activity’ means 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.”).
20. *See, e.g., Letter from OCR, Dep’t of Educ., to Western Seminary-Portland Campus, OCR Reference No. 10132035 (Apr. 25, 2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/10132035-a.pdf>.*
21. 29 U.S.C. § 794(a) (2016).
22. 34 C.F.R. §§ 104.1 to .61 (2015). Sections 104.41 to 104.47 contains regulations that apply specifically to institutions providing a postsecondary education.
23. 34 C.F.R. § 104.8 (2015).
24. 28 C.F.R. § 35.106 (2015).
25. 29 U.S.C. § 794; 42 U.S.C. § 2000d-7 (2016); *see also, e.g., Haybarger v. Lawrence Cty. Adult Prob. & Parole*, 551 F.3d 193, 199 (3d Cir. 2008); *Pace v.*

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Bogalusa City Sch. Bd., 403 F.3d 272, 289 (5th Cir. 2005); *Garrett v. Univ. of Alabama at Birmingham Bd. of Trustees*, 344 F.3d 1288, 1293 (11th Cir. 2003).

26. Whether Congress has validly abrogated sovereign immunity in issues related to higher education under Title II of the ADA is less clear. See *Tennessee v. Lane*, 541 U.S. 509 (2004) (concluding that Congress lawfully abrogated state sovereign immunity for denial to courtroom access because it is a fundamental right). Compare *Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524, 556 (3d Cir. 2007) (holding that Congress validly abrogated state sovereign immunity when it enacted Title II of the ADA); *Association for Disabled Americans v. Florida International University*, 405 F.3d 954 (11th Cir. 2005) (finding that *Lane*'s holding should extend to claims regarding higher education); *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 490 (4th Cir. 2005); *with Doe v. Univ. of Ill.*, 429 F.Supp.2d 930, (N.D. Ill. 2006); *Johnson v. Southern Connecticut State University*, 2004 WL 2377225 (D. Conn. Sept. 20, 2004) (education not fundamental like access to courts) *with Dean v. Univ. at Buffalo Sch. of Med. & Biomedical Scis.*, 804 F.3d 178, 195 (2d Cir. 2015) (“We express no position as to the question of whether Congress has validly abrogated sovereign immunity in the context of discrimination in access to public education on the basis of disability.”).
27. Compare, e.g., *Falcone v. Univ. of Minn.*, 388 F.3d 656, 659 (8th Cir. 2004) (dismissing the plaintiff’s claim because “no rational factfinder could conclude that Falcone was dismissed *solely* because of his learning disabilities”), *with, e.g., McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1078 (11th Cir. 1996) (holding that the ADA “requires only a finding of ‘but-for’ causation”). See generally *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 468–70 (4th Cir. 1999) (discussing the difference between the causation standards under the Rehab Act and under the ADA).
28. 29 U.S.C. § 794(a) (2016) (emphasis added).
29. 42 U.S.C. § 12132 (2016).
30. E.g., *Castle v. Eurofresh, Inc.*, 731 F.3d 901, 908 (9th Cir. 2013).
31. 34 C.F.R. § 104.42 (2015).
32. *Id.*
33. *Id.*
34. 34 C.F.R. § 104.42(b)(1) (2015).
35. From the regulations implementing Title II of the ADA, “A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.” 28 C.F.R. § 35.130 (b)(8) (2015). From those implementing the Rehab Act, colleges

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and universities “[m]ay not make use of any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons or any class of handicapped persons unless (i) the test or criterion, as used by the recipient, has been validated as a predictor of success in the education program or activity in question and (ii) alternate tests or criteria that have a less disproportionate, adverse effect are not shown by the Assistant Secretary to be available.” 34 C.F.R. § 104.42 (b)(2) (2015). Finally, Title III prohibits “eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered.” 42 U.S.C. § 12182 (2016).

36. 34 C.F.R. § 104.42(b)(2) (2015)
37. Settlement Agreement, *United States v. Univ. of Medicine & Dentistry of N.J.*, available at http://www.ada.gov/umdnj_sa.htm.
38. Press Release, U.S. Dep’t of Justice, Justice Department Settles with the University of Medicine and Dentistry of New Jersey over Discrimination Against People with Hepatitis B (Mar. 5, 2013), available at <https://www.justice.gov/opa/pr/justice-department-settles-university-medicine-and-dentistry-new-jersey-over-discrimination>.
39. Settlement Agreement, *United States v. Univ. of Medicine & Dentistry of N.J.*, available at http://www.ada.gov/umdnj_sa.htm.
40. Complaint, *United States v. Compass Career Management, L.L.C.*, No. 2:15-cv-01347 (E.D. La. filed Apr. 27, 2015), available at http://www.ada.gov/compass_career_mgmt/compass_complaint.html.
41. Consent Decree, *United States v. Compass Career Management, L.L.C.*, No. 2:15-cv-01347 (E.D. La. filed Apr. 27, 2015); available at http://www.ada.gov/compass_career_mgmt/compass_cd.html; see also Press Release, U.S. Dep’t of Justice, Justice Department Settles with Private Career College for Discrimination Against Applicant with HIV (Apr. 27, 2015), available at <https://www.justice.gov/opa/pr/justice-department-settles-private-career-college-discrimination-against-applicant-hiv>.
42. *E.g., Anderson v. Univ. of Wisconsin*, 841 F.2d 737, 741 (7th Cir. 1988) (“The [Rehab] Act does not designate a jury, rather than the faculty of the Law School, as the body to decide whether a would-be student is up to snuff.”).
43. *E.g., Mallett v. Marquette Univ.*, 65 F.3d 170 (7th Cir. 1995) (“[W]e accord [the defendant-law school] significant discretion in establishing its admission standards

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and evaluating the academic credentials of applicants.”) (citing *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 225 (1985)).

44. *Gent v. Radford Univ.*, 976 F. Supp. 391 (W.D. Va. 1997).
45. *Ganden v. Nat’l Collegiate Athletic Ass’n*, No. 96 C 6953, 1996 WL 680000 (N.D. Ill. Nov. 21, 1996).
46. *Id.* at *2.
47. *Id.*
48. *Dep’t of Fair Employment & Hous. v. Law Sch. Admission Council Inc.*, 896 F. Supp. 2d 849 (N.D. Cal. 2012).
49. *Id.* at 854.
50. *Id.* at 869 (citing *Breimhorst v. Educ. Testing Serv.*, 2000 WL 34510621 (N.D. Cal.2000)).
51. *Id.* at 870 (internal quotation marks omitted).
52. Consent Decree, *Dep’t of Fair Employment & Hous. v. Law Sch. Admission Council Inc.*, No. CV 12-1830 (N.D. Cal. entered May 29, 2016), available at http://www.ada.gov/dfeh_v_lsac/lsac_consentdecree.htm.
53. *Wolff v. Beauty Basics, Inc.*, 887 F. Supp. 2d 74 (D.D.C. 2012).
54. Resolution Agreement between O.C.R., U.S. Dep’t of Educ., and Univ. of Notre Dame, No. 05-13-2495 (June 30, 2014) (requiring a request procedure have specifics features such as timeframes and specifying when a student’s instructor is involved in determining whether a requested modification is reasonable); See also Resolution Agreement between O.C.R., U.S. Dep’t of Educ., and Univ. of Nebraska, No. 07132236 (Dec. 12, 2013) (requiring “enhanced protocols for determining and providing academic adjustments and auxiliary aids to students”); Resolution Agreement between O.C.R., U.S. Dep’t of Educ., and Univ. of Montana, No. 10122118 (May 9, 2013) (requiring the university to establish a grievance procedure for issues concerning accessibility to electronic information technology as well as other procedures for requesting accommodations).
55. 34 C.F.R. § 104.44 (2015).
56. *E.g., Schneider v. Shah*, 507 F. App’x 132, 137 (3d Cir. 2012) (unpublished table decision) (discussing a university’s “obligation to engage in an interactive process” after a student has requested an accommodation).
57. *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19, 26 (1st Cir. 1991).

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58. If the institution submits undisputed facts demonstrating that the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring substantial program alteration, the court could rule as a matter of law that the institution had met its duty of seeking reasonable accommodation.
59. 42 U.S.C.A. § 12182(b)(1)(B) (2016); 34 C.F.R. § 104.44 (2015).
60. *E.g., Zukle v. Regents of Univ. of California*, 166 F.3d 1041, 1047 (9th Cir. 1999) (citing *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985), for the proposition that educational institutions are due deference with respect to academic standards).
61. *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19, 28 (1st Cir. 1991); see also *Wong v. Regents of Univ. of California*, 192 F.3d 807, 818 (9th Cir. 1999) (“We defer to the institution’s academic decisions only after we determine that the school ‘has fulfilled this obligation [of making an individualized determination].’”)
62. *Wong*, 192 F.3d at 818.
63. *Palmer Coll. of Chiropractic v. Davenport Civil Rights Comm’n*, 850 N.W.2d 326, 329–30 (Iowa 2014).
64. *Id.* at 337.
65. *Id.* at 340 (citing *Wong*, 192 F.3d at 807), and *D’Amico v. N.Y. State Bd. of Law Examiners*, 813 F. Supp. 217 (W.D.N.Y.1993)).
66. *Dean v. Univ. at Buffalo Sch. of Med. and Biomedical Scis.*, 804 F.3d 178, 182–83 (2d Cir. 2015).
67. *Id.* at 190–91.
68. *E.g., Wong*, 192 F.3d at 818; *Wynne*, 932 F.2d 19.
69. See *Peters v. University of Cincinnati College of Medicine*, No. 1:10-CV-906, 2012 WL 3878601, (S.D. Ohio Sept. 6, 2012).
70. *Schneider v. Shah*, 507 F. App’x 132, 134 (3d Cir. 2012) (unpublished table opinion).
71. *Edmunds v. Bd. of Control of E. Michigan Univ.*, No. 09-11648, 2009 WL 5171794, at *6 (E.D. Mich. Dec. 23, 2009).
72. 34 C.F.R. § 104.44(d)(1) (2015); see also 28 C.F.R. § 36.303(a) (2015).
73. 34 C.F.R. § 104.44(d)(2) (2015); see also 28 C.F.R. § 36.303(b) (2015).
74. 42 U.S.C. § 12103 (2016); 28 C.F.R. § 36.303(b) (2015); 28 C.F.R. § 35.104 (2015).

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75. *Argenyi v. Creighton Univ.*, 703 F.3d 441, 444 (8th Cir. 2013).
76. *Id.* at 448–49 (quoting *Loye v. County of Dakota*, 625 F.3d 494, 499 (8th Cir. 2010)).
77. *Id.* at 450.http://www.disabilityrightsnebraska.org/resources/michael_argenyi_case.html.
78. Settlement agreement, *available at* <http://dralegal.org/wp-content/uploads/files/casefiles/settlement-ucb.pdf>; Fact sheet, *available at* http://dralegal.org/wp-content/uploads/files/casefiles/factsheet_ucb.pdf ; General information, *available at* <http://dralegal.org/press/landmark-agreement-big-step-forward-for-students-with-print-disabilities>
79. Letter from OCR, Dep't of Educ., to South Carolina Technical College System at 5, OCR Complaint No. 11-11-6002 (Mar. 8, 2013) *available at* <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/11116002-a.doc>
80. *Id.*
81. *See also* Settlement Agreement Between United States and Louisiana Tech University at ¶ 13, DOJ Investigation No. 204-33-116 (signed July 22, 2013), *available at* <http://www.ada.gov/louisiana-tech.htm>.
82. Settlement Agreement, *United States v. EdX*, DJ No. 202-36-255 (April 2, 2015), *available at* http://www.ada.gov/edx_sa.htm.
83. Complaint, *Nat'l Assoc. of the Deaf v. Harvard Univ. (NAD v. Harvard)*, No. 3:15-cv-30023 (D. Mass. filed Feb. 12, 2015); *See also* Press Release, Nat'l Assoc. of the Deaf, NAD Sues Harvard and MIT for Discrimination in Public Online Content (Feb. 12, 2015), *available at* <https://nad.org/news/2015/2/nad-sues-harvard-and-mit-discrimination-public-online-content>.
84. Complaint, *Nat'l Assoc. of the Deaf v. Mass. Inst. of Tech. (NAD v. MIT)*, No. 3:15-cv-30024 (D. Mass. filed Feb. 12, 2015).
85. Statement of Interest of the United States of America at 18–21, *NAD v. Harvard*, No. 3:15-cv-30023 (D. Mass. filed June 25, 2015); Statement of Interest of the United States of America at 18–21, *NAD v. MIT*, No. 3:15-cv-30024 (D. Mass. filed June 25, 2015).
86. 34 C.F.R. § 104.44(d) (2015), *see also* *Bevington v. Wright State Univ.*, 23 F. App'x 444, 445 (6th Cir. 2001).
87. *Sellers v. Univ. of Rio Grande*, 838 F. Supp. 2d 677, 685 (S.D. Ohio 2012).

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88. 34 C.F.R. § 104.44(a) (2015).
89. *Id.*; see also 28 C.F.R. § 35.130(b)(7), (8) (2015).
90. *Powell v. Nat'l Bd. of Med. Exam'rs*, 364 F.3d 79, 85 (2d Cir.), *opinion corrected*, 511 F.3d 238 (2d Cir. 2004).
91. *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1049–51 (9th Cir. 1999).
92. *McGuinness v. Univ. of N.M. Sch. Of Med.*, 170 F.3d 974, 979 (10th Cir. 1998).
93. *Kaltenberger v. Ohio Coll. of Podiatric Med.*, 16 F.3d 432, 436–37 (6th Cir. 1998).
94. *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791, 794–95 (1st Cir. 1992).
95. *Guckenberger v. Boston University*, 957 F. Supp. 306, 314–15, 318–19 (1997).
96. *Id.* at 311.
97. *Guckenberger v. Boston University*, 8 F.Supp.2d 82, 85-86 (D. Mass. 1998).
98. *Shurb v. Univ. of Tex. Health Sci. Ctr at Hous.-Sch. of Med.*, 63 F. Supp. 3d 700, 703 (S.D. Tex. 2014).
99. *Peters*, 2012 WL 3878601, at *1.
100. 34 C.F.R. § 104.44(b) (2015).
101. Settlement Agreement Between United States and Southern Illinois University, DOJ No. 204-25-85 (Jan. 11, 2016), *available at* http://www.ada.gov/southern_illinois_sa.html. Here, the Justice Department and university entered into an agreement to modify an inconsistently applied attendance policy for a student with chronic fatigue syndrome. *Id.* at ¶¶ 7–8.
102. 34 C.F.R. § 104.44(c) (2015).
103. See *Argenyi v. Creighton Univ.*, 703 F.3d 441, 448–51 (8th Cir. 2013).
104. http://www.disabilityrightsnebraska.org/resources/michael_argenyi_case.html.
105. *Innes v. Board of Regents of the University System of Maryland*, 121 F. Supp. 3d 504 (D. Md. 2015).
106. *Id.* at 513.
107. 34 C.F.R. § 104.23(a) (2015).
108. *Id.* at § 104.23(b).
109. These are available at http://www.ada.gov/2010ADASTandards_index.htm.

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110. *Covington v. McNeese State University*, 996 So. 2d 667, 670 (La. App. 3 Cir. 2008).
111. *Id.* at 687–88.
112. Settlement Agreement between United States and McNeese State University, No. 204-33-109 (Sept. 9, 2010), *available at* <http://www.ada.gov/mcneese.htm>; *see also* Press Release, U.S. Dep’t of Justice, Justice Department and McNeese State University Reach Settlement To Ensure Compliance with the Americans with Disabilities Act (Sept. 9, 2010).
113. Settlement Agreement Between United States and University of Alabama at Birmingham, No. 204-1-75 (Feb 10, 2016), *available at* http://www.ada.gov/uab_sa.html
114. 42 U.S.C. § 12182(B) (2016) (“Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.”).
115. 42 U.S.C. §§ 3601–19 (2016); *see also* 24 C.F.R. § 100.1 to .500 (2015) (regulations implementing the FHA).
116. *Cf.* Settlement Agreement Between United States and Lesley University, DOJ No. 202-36-231 (Dec. 20, 2012); *see also* Press Release, U.S. Dep’t of Justice, Justice Department and Lesley University Sign Agreement To Ensure Meal Plan Is Inclusive of Students with Celiac Disease and Food Allergies (Dec. 20, 2012), *available at* <https://www.justice.gov/opa/pr/justice-department-and-lesley-university-sign-agreement-ensure-meal-plan-inclusive-students>. The DOJ has posted a website with questions and answers about the settlement at http://www.ada.gov/q&a_lesley_university.htm. And at least one court, in a claim against a public school district brought by a student with a food allergy, seems to agree with the idea that a food allergy might rise to the level of a disability, insofar as it substantially impairs the major life activity of eating. *See T.F. v. Fox Chapel Area Sch. Dist.*, 589 F. App’x 594, 599 (3d Cir. 2014) (stating that both parties agreed that the plaintiff’s severe food allergy was a disability).
117. Settlement Agreement Between United States and Lesley University, DOJ No. 202-36-231 (Dec. 20, 2012).
118. *Id.*
119. 28 C.F.R. § 35.104 (2015); *see also* 28 C.F.R. § 36.104 (2015) (Title III)
120. 28 C.F.R. § 35.104 (2015).
121. *Id.* at § 35.136 (2015) (“Individuals with disabilities shall be permitted to be accompanied by their service animals in all areas of a public entity’s facilities where

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members of the public, participants in services, programs or activities, or invitees, as relevant, are allowed to go.”); see also 28 C.F.R. § 36.302(c) (2015).

122. 28 C.F.R. § 35.136(b) (2015).

123. *Id.* at § 35.136(c).

124. *Id.* at § 35.136(i).

125. Press Release, U.S. Dep’t of Justice, Guidance on Service Animals (July 12, 2011), available at http://www.ada.gov/service_animals_2010.htm.

126. 28 C.F.R. § 35.136(i) (2015).

127. 42 U.S.C. § 3604 (2016); see also 24 C.F.R. § 100.204 (“It shall be unlawful for any person to refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling unit, including public and common use areas.”).

128. *United States v. Univ. of Neb. at Kearney*, 940 F. Supp. 2d 974, 975 (D. Neb. 2013).

129. *Id.* at 978.

130. Notice, U.S. Dep’t of Housing & Urban Development, Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs 2 (Apr. 25, 2013), available at https://portal.hud.gov/hudportal/documents/huddoc?id=servanimals_ntcfheo2013-01.pdf.

131. *Velzen v. Grand Valley State University*, 902 F. Supp. 2d 1038, 1040 (W.D. Mich. 2012).

132. 29 C.F.R. § 1630.2(r) (2015); see also *Schl. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273 (1987).

133. 29 C.F.R. § 1630.2(r) (2015).

134. Bazelon Ctr. for Mental Health Law, Supporting Students: A Model Policy for Colleges and Universities (2007), available at <http://www.bazelon.org/portals/0/education/SupportingStudentsCampusMHPolicy.pdf>.

135. Settlement Agreement Between United States and Quinnipiac University, DOJ No. (Dec. 29, 2014), available at http://www.ada.gov/quinnipiac_sa.htm; see also Press Release, U.S. Dep’t of Justice, Justice Department Settles Americans with Disabilities Act Case with Quinnipiac University (Jan. 12, 2015), available at <https://www.justice.gov/usao-ct/pr/justice-department-settles-americans-disabilities-act-case-quinnipiac-university>.

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136. Press Release, U.S. Dep't of Justice, Justice Department Settles Americans with Disabilities Act Case with Quinnipiac University (Jan. 12, 2015).
137. Letter from OCR, Dep't of Educ., to St. Joseph's College, OCR Reference No. 02-10-2171 (Jan. 24, 2011), *available at* <http://www.bazelon.org/LinkClick.aspx?fileticket=IV5EzSZQtDo%3d&tabid=313>.
138. Resolution Agreement Between OCR and St. Joseph's College, OCR Reference No. 02-10-2171 (Jan. 19, 2011), *available at* <http://www.bazelon.org/LinkClick.aspx?fileticket=IV5EzSZQtDo%3d&tabid=313>.
139. *Deaf Woman Wins Lawsuit Against Missouri Nursing School*, Kansas City Star (Aug. 18, 2013), *available at* <http://www.kansascity.com/news/local/article325508/Deaf-woman-wins-lawsuit-against-Missouri-nursing-school.html>.
140. *Id.*
141. Settlement Agreement Between United States and Gwinnet College (Apr. 25, 2014), *available at* <http://www.ada.gov/gwinnett-col-sa.htm>.