Articles

Building STEPs Down the Precipitous Cliff from University to Workplace: A Proposal to Modify Regulation of Higher Education Mental Disability Accommodations

Marianne DelPo Kulow and David Missirian*

I. INTRODUCTION: TOO MUCH SCAFFOLDING CREATES RISK OF FALL

Professor to his Department Chair:

> "I know that we are legally required to give this student double time on all tests, and of course I will do so, but how is this helping him to prepare for the 'real world?' After all, what employer is going to provide double time for written, analytical deliverables?"[1]

University faculty increasingly express this type of concern about the legally required accommodations that universities must grant to the growing[2] number of students with documented mental disabilities. Many faculty members question whether universities are doing these students a disservice by continuing to provide the same level of accommodation that a student had in elementary and secondary school.[3] As illustrated above, the concern stems from a sense of obligation to prepare students, upon graduation, to enter and to succeed in a non-academic career.[4] Professors fear that, in the corporate workplace, students are very unlikely to receive the same degree of accommodation that they have had throughout their academic careers.[5] These concerns are not without merit.

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* Marianne DelPo Kulow, B.A. Harvard University, M.A. University of Liverpool, J.D. Boston University; Gregory H. Adamian Professor of Law, Department of Law, Taxation and Financial Planning, Bentley University, Waltham, MA. and David Missirian, B.A. Brandeis University, J.D. University of Tulsa; Assistant Professor of Law and Tax, Department of Law, Taxation and Financial Planning, Bentley University, Waltham, MA. The authors wish to thank Amanda Pine and Christina Zandri for their research assistance and Bentley University for the research support.

[1] Based on real dialogue between author Kulow, during her years as Department Chair, and a junior colleague.

[2] A National Longitudinal Transition Study demonstrated that between 1990 and 2005 the rate of postsecondary education enrollment for young adults with learning disabilities increased significantly. NATIONAL CENTER FOR LEARNING DISABILITIES, THE STATE OF LEARNING DISABILITIES 29 (3d ed. 2014), https://www.ncld.org/wp-content/uploads/2014/11/2014-State-of-LD.pdf [https://perma.cc/6NNJ-UK9Y] ("The rate of postsecondary education enrollment increased significantly over [1990–2005].").

[3] *See* Gail A. Hornstein, *Why I Dread the Accommodations Talk*, CHRON. OF HIGHER EDUC. (Mar. 26, 2017), https://www.chronicle.com/article/Why-I-Dread-the-Accommodations/239571 [https://perma.cc/PA6T-C9RN] ("Our challenge as faculty members is to respond in ways that: (1) support our students' fundamental educational goals, (2) find ways to help them when they need it, and (3) encourage thoughtful coping skills and resilience so that, when it's possible, they can learn to manage on their own.").

[4] *See id.* ("We want to prepare students for life in the world of adult work.").

[5] *See, e.g.*, Ari Trachtenberg, *Extra Time on an Exam: Suitable Accommodation or Legal Cheating?*, CHRON. HIGHER EDUC. (Sept. 18, 2016), https://www.chronicle.com/article/Extra-Time-on-an-Exam-/237787 [https://perma.cc/7X2E-T947] ("Ultimately, I believe that time extensions revictimize some of my students with disabilities by setting them up for failure on high-pressure tech interviews and subsequent jobs that do not, and cannot, honor time extensions for deadline-driven work."); Hornstein, *supra* note 3 ("We as faculty members need to respond appropriately and help students to learn what's a crisis (and what's not), and to understand *when it is reasonable* to ask for the course structure to be changed or for expectations to be modified *(and when it's best to try to cope on one's own). Those are crucial life lessons of adulthood, and we aren't helping students who already have problems to succeed in their lives after college by treating them in a standardized manner or by overprotecting them.*" (emphasis added)).

The intersection of disability laws covering pre-university education with disability laws relevant to higher education has already been shown to create a steep cliff off which many students with disabilities fall as they transition from secondary school to university.[6] As discussed below in Section III.A., after high school, students with disabilities lose their Individualized Education Programs.[7] Instead, often for the first time without parental representation, students with disabilities must affirmatively seek and prove their need for support services and accommodations.[8] Thus, at a time of great transition for all young adults, students with disabilities beginning university programs are burdened with additional tasks of self-advocacy. If they successfully surmount these challenges, the subset of these students with *mental* disabilities then encounter a second and perhaps steeper cliff when they graduate from university and transition to the workplace.

The latter cliff is an unintended result of a discordance between disability education law and disability workplace law. Federal education laws require universities to do just about everything that they can to make their programs accessible to students with disabilities.[9] In contrast,

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[6] *See, e.g.*, Samuel R. Bagenstos, *The Disability Cliff*, DEMOCRACY J., Winter 2015, at 55 ("[O]nce they age out of special education—usually at 22—many young adults with developmental disabilities find a reality that is very different from the one they had gotten used to. When they lose their federal entitlement to special education, they are thrown into an underfunded and uncoordinated system in which few services are available as a matter of right."); *The State of Learning Disabilities: Transitioning to Life After High School*, NAT'L CTR. FOR LEARNING DISABILITIES, https://www.ncld.org/transitioning-to-life-after-high-school (last visited Apr. 24, 2019) [https://perma.cc/5LU6-N6HL] ("After 12th grade, individuals with learning and attention issues will only receive accommodations in college or the workplace if they disclose their disabilities."); David Perry, *No Longer 'Falling off the Cliff,'* CHRON. HIGHER EDUC. (Nov. 10, 2014), https://www.chronicle.com/article/No-Longer-Falling-Off-the/149917 [https://perma.cc/KB8T-UV6D] ("When a child is diagnosed with a disability, all kinds of government-support structures kick in to provide education, services, transportation, and health care . . . [b]ut at age 22 . . . someone with a disability loses that infrastructure, and 'falls off the cliff' into a much less organized world."); Christina A. Samuels, *Students Face Uncertain Paths After Special Education: Many Students with Disabilities Feel Unready for the Choices They Face*, EDUC. WEEK (May 29, 2015), https://www.edweek.org/ew/articles/2015/06/04/students-face-uncertain-paths-after-special-education.html [https://perma.cc/CVU3-DS3J] ("[M]any families and young adults experience the transition to life after graduation not as a launching pad, but as a cliff."); *Transition of Students with Disabilities to Postsecondary Education: A Guide for High School Educators*, U.S. DEP'T OF EDUC. (Mar. 2011), https://www2.ed.gov/about/offices/list/ocr/transitionguide.html [https://perma.cc/VMM3-ANLF] ("Private postsecondary institutions that do not receive federal financial assistance are not subject to Section 504 or Title II.").

[7] *See Students with Disabilities Preparing for Postsecondary Education: Know your Rights and Responsibilities*, U.S. DEP'T OF EDUC. (Sept. 2011), https://www2.ed.gov/about/offices/list/ocr/transition.html [https://perma.cc/MQ6F-DPYJ] ("An individualized education program (IEP) or Section 504 plan . . . may help identify services that have been effective for you. This is generally not sufficient documentation, however, because of the differences between postsecondary education and high school education.").

[8] Patricia H. Latham, *Learning Disabilities and The Law: After High School: An Overview for Students*, LEARNING DISABILITIES ASS'N OF AM. (Sept. 18, 2013), https://ldaamerica.org/learning-disabilities-and-the-law-after-high-school-an-overview-for-students-2/ [https://perma.cc/AZM4-KDHF] (stating that a student with a learning disability needs to disclose the disability to the college, request specific accommodations, and supply supporting professional documentation, in contrast to public elementary and high school, where "the school has a duty to identify students with disabilities. However, this is not so in college. The student has the responsibility to disclose the disability and to request accommodations").

[9] *See* 34 C.F.R. § 104.44(a) (2017) ("A recipient to which this subpart applies shall make such

federal laws have created rules that measure the reasonableness of a *workplace* disability accommodation almost solely by evaluating its cost to the accommodation provider and/or its impact on third parties, such as managers, other employees, or customers.[10] When applying these rules to mental disabilities, these disparate legal measurements of a worthy accommodation combine to yield graduates with mental disabilities who are inadequately prepared to succeed in the workplace. This occurs as a direct result of requiring as part of an accommodation for a student with a mental disability that the student merely receive immediate "access" to a school program, rather than also requiring that the student receive training in adaptive skills. Such an accommodation inadequately serves the student with a mental disability because it disregards the "reasonableness" of that school accommodation in serving the long-term employability interests of the student with a mental disability. By ignoring the need for adaptive skills, these laws often create a situation where, as correctly anticipated in this paper's opening quotation, an accommodation that is legally required in a school setting may not be required in a workplace, due to differences in cost and impact between the two environments. Without adaptive skills, the graduate with a mental disability is then poised for failure, rather than success.

This unfortunate situation is particularly compelling because federal education laws, by focusing so much on program accessibility, serve students with physical disabilities better than they do students with mental disabilities. This is because workplace accommodations for those with physical disabilities will continue to be primarily about physical access. Physical access accommodations are likely to be required, whether they are measured by their benefit to the individual with the disability or by their cost to the employer. In contrast, a typical accommodation for a student with a mental disability—while passing the student "access" test—may nonetheless fail the workplace test that essentially amounts to sufficiently minimum impact to the employer.

This paper will document the growing disconnect between "appropriate academic adjustments" for mental disabilities in schools and "reasonable accommodations" for the same disabilities in the workplace. The

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modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. . . . Modifications 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.").

[10] *See Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, U.S. EEOC (Oct. 22, 2002), https://www.eeoc.gov/policy/docs/accommodation.html [https://perma.cc/D44D-Q6T7] ("The only statutory limitation on an employer's obligation to provide 'reasonable accommodation' is that no such change or modification is required if it would cause 'undue hardship' to the employer. 'Undue hardship' means significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation. Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business.").

paper will examine recent school and workplace cases, as well as compare current guidelines promulgated by the Office of Civil Rights (OCR) for school settings and the Equal Employment Opportunity Commission (EEOC) for workplaces. After illustrating the growing problem, the authors make the case that universities would better serve the needs of students with mental disabilities by more adequately preparing these students for the reasonable expectations of the workplaces they will eventually enter.

To this end, the paper culminates with a proposal for a regulatory modification that would permit universities to create, coupled with adaptive skill workshops or coaching, a series of steps from the scaffolding provided to secondary school students to the much more limited support that they are likely to receive in the workplace. The newly worded OCR regulation would protect universities from liability for good faith attempts to wean students with mental disabilities off their need for accommodations received in secondary school. The proposed regulation would achieve this by enhancing the current assessment of an educational adjustment's "appropriateness" beyond mere immediate program access to include a requirement for consideration of the accommodation's long-term impact on the individual with a disability.[11] This additional requirement is consistent with the stated goals of the relevant statutes and would not only permit but actually encourage a tiered approach to educational adjustments that would move toward teaching university students with mental disabilities how to more effectively adapt to a workplace environment. The proposal seeks to better prepare students with mental disabilities for the workplace by eliminating (or reducing) their need for accommodations likely to be burdensome in the workplace. While a subset of graduates with mental disabilities will still require some level of accommodation to successfully join the workforce, the proposed approach would minimize their needs for accommodations, thereby rendering even these graduates more likely to be hired and to succeed in a wider variety of jobs.

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[11] To be clear, the authors' proposal would not change the fundamental EEOC regulation that bars an employee from insisting on a particular accommodation. Instead, the authors propose a negotiated accommodation in the higher education classroom much like that already required by the interactive process in place for arriving at reasonable accommodation in the workplace. In this way, the higher-education model enforced by the OCR would more closely track the EEOC's workplace process model and therefore dovetail with more ease into the inevitable negotiation that the individual with a disability will need to have with their prospective employer upon graduation from university. *See EEOC Procedures For Providing Reasonable Accommodation For Individuals With Disabilities*, U.S. EEOC, https://www.eeoc.gov/eeoc/internal/reasonable_accommodation.cfm#_Toc531079192 [https://perma.cc/S23Y-PHYP] (last visited Apr. 30, 2019) (see section IV. Reasonable Accommodation Procedures subsection C. The Interactive Process).

II. CONFLUENCE OF WELL-INTENDED ANTI-DISCRIMINATION LAWS CREATES UNINTENDED CLIFF

The Americans with Disabilities Act (ADA) and its 2008 Amendments (the ADA Amendments Act of 2008 (ADAAA)) seek to eradicate discrimination against individuals with disabilities in a variety of arenas.[12] These include, among others, higher education (both public and private) and the workplace.[13] The ADA and other federal statutes extend the same protections to students in public elementary and secondary schools as to students in private schools receiving federal funding.[14] The various provisions of these federal laws boil down to a simple concept: individuals with disabilities should be accommodated wherever it is reasonable to do so.[15] In this way, individuals with disabilities can more fully participate in public life and can become more fully contributing members of society.[16] Covered disabilities include a broad range of both

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[12] *See* 42 U.S.C. § 12101 (2018) ("[D]iscrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.").

[13] *Id.* § 12111 (relating to workplace accommodations); *id.* § 12112 ("No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."); *id.* § 12131 (discussing public accommodations); *id.* § 12132 (2018) (same); *id.* § 12181(7) (2018) (same); *id.* § 12182 (2018) (same); 28 C.F.R. § 35.190 (2017) (discussing the federal agencies that enforce "Nondiscrimination on the Basis of Disability in State and Local Government Services"); *id.* § 36.102 ("Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities.").

[14] Subchapter II of the ADA covers public elementary and high schools. *See* 42 U.S.C. § 12131 (2018) ("'[P]ublic entity' means . . . any department, agency, special purpose district, or other instrumentality of a State or States or local government."). The Rehabilitation Act of 1973 covers all schools receiving federal funding. *See generally* Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, 355–94 (1973) (stating that individuals with disabilities cannot "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"). The Individuals with Disabilities Education Improvement Act (IDEA) covers K-12 schools, both public schools and private receiving federal funding. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647, 2647–2808 (2004) (codified at 20 U.S.C. §§ 1400–99 (2004)) (guaranteeing a "free appropriate public education" at "public expense" in "elementary school[] or secondary school").

[15] *See* 42 U.S.C. § 12111(9) (2018) (defining a "reasonable accommodation" in the workplace); 20 U.S.C. § 1400(d) (2018) (providing a "a free appropriate public education that emphasizes special education and related services"); 20 U.S.C. § 1401(14) (2018) (creating "individualized education program[s]" for students with disabilities).

[16] The purposes of the Individuals with Disabilities Education Act, codified at 20 U.S.C. § 1400(d) (2018), include "ensur[ing] that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for *further education, employment, and independent living*[.]" 20 U.S.C. § 1400(d) (2018) (emphasis added). The purposes of the Americans with Disabilities Act include "to provide a clear and comprehensive national mandate for the *elimination of discrimination against individuals with disabilities*[.] " *Id.* § 12101(b) (emphasis added). The purposes of the Rehabilitation Act of 1973, as originally published, include "develop[ing] and implement[ing] comprehensive and continuing State plans for meeting the current and future needs for providing vocational rehabilitation services to handicapped individuals and to provide such services for the benefit of such individuals . . . *so that they may prepare for and engage in gainful employment* . . . promot[ing] and expand[ing] *employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment.*" Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. at 357 (1973) (emphasis added).

physical and mental disabilities.[17] This paper focuses on mental disabilities, which are not limited to mental illnesses but instead include any "mental impairments" that "substantially limit" a "major life activity."[18] These mental impairments include most learning disabilities and a variety of increasingly commonly diagnosed neurological impairments such as Attention Deficit Disorder (ADD), Attention Deficit and Hyperactivity Disorder (ADHD), and Autism Spectrum Disorder (ASD).[19]

In elementary and secondary schools, students with disabilities who are intellectually capable of grade-level work must be accommodated unless doing so will cause an unacceptably high financial (or other) burden or impact on teachers, administrators, or other students.[20] There is little difference between this standard for lower level schools and that for universities.[21] However, as noted above and detailed below in section III.A., there is not an uninterrupted carryover of accommodations or support services from secondary school to university, and the absence of a uniform process in accessing these accommodations can create a burdensome adjustment for many students.[22] Nonetheless, once university students navigate this difficult process, they often receive the same academic accommodations that they received in secondary school.[23] Significantly, once in place, there is typically little change or diminution in these accommodations over the course of a four-year undergraduate pro-

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[17] *See* 20 U.S.C. § 1401(3) (2018) (defining "child with a disability"); *id.* § 1401(30) (defining "specific learning disability"); Rehabilitation Act of 1973, 29 U.S.C. § 701 (2014) (defining "disability" as any physical or mental impairment that "substantially limits one or more major life activities"); 28 C.F.R. § 35.108 (2017) ("*Physical or mental impairment* includes, but is not limited to, contagious and noncontagious diseases and conditions such as the following: orthopedic, visual, speech, and hearing impairments, and cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, emotional illness, dyslexia and other specific learning disabilities, Attention Deficit Hyperactivity Disorder, Human Immuno-deficiency Virus infection (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism." (emphasis added)).

[18] 42 U.S.C. § 12102(1) (2018) (defining "disability"); *id.* § 12102(2) (defining "major life activities"); *id.* § 12102(4) (defining "substantially limits"); 20 U.S.C. § 1401(3) (defining "child with a disability"); *id.* § 1401(30) (defining "specific learning disability"). Rehabilitation Act of 1973, *supra* note 16, § 504 (defining "disability" as any physical or mental impairment that "substantially limits one or more major life activities").

[19] *See, e.g.*, 28 C.F.R. § 35.108 (2017).

[20] *See, e.g.*, 20 U.S.C. § 1401(14) (2018) (defining "individualized education program"); 34 C.F.R. § 104.44 (2017) (defining "academic adjustments").

[21] At the university level this ADA Title II "reasonable accommodation" is articulated by the OCR as an "appropriate academic adjustment," as discussed in depth in *infra* Section III.A., but the conceptual framework is virtually identical. *See, e.g.*, 34 C.F.R. § 104.44 (2017) ("A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary.").

[22] *See supra* note 6 and accompanying citations.

[23] *See 7 Things to Know about College Disability Services*, UNDERSTOOD, https://www.understood.org/en/school-learning/choosing-starting-school/leaving-high-school/7-things-to-know-about-college-disability-services (last visited Apr. 24, 2019) [https://perma.cc/ME79-RAGR] (stating that universities "don't have to give a student the same types of academic supports that he had in high school. But if a student can provide evidence that he needs a specific accommodation, he's eligible to get it in college"); U.S. DEP'T OF EDUC., *supra* note 7 ("An individualized education program (IEP) or Section 504 plan, if you have one, may help identify services that have been effective for you.").

gram.[24]

In the workplace, a similar accommodation rule applies, though often with a different result—at least for graduates with mental disabilities. An employer is obligated to accommodate "qualified" individuals with disabilities, much like schools are obligated to support students capable of doing grade-level work and universities are obligated to accommodate students who are admitted and able to pay tuition.[25] Under the ADA, a "qualified" worker is defined as one who is capable of doing the essential functions of the job, either because their disability does not impact their ability to do the job or because they only require a modest accommodation to do the job.[26] Similar to school and university accommodation obligations, an employer's obligation to accommodate a qualified worker is limited to those accommodations which will not create an "undue hardship"—either through disproportionate expense to the employer or unfair burden on coworkers, clients, or others.[27] Also similar to universities, the obligation to request a workplace accommodation falls on the individual with a disability.[28] Despite all of these parallels between university and workplace statutory standards, it is far less likely in the workplace than at university that a person with a *mental* disability will be legally entitled to the same accommodation that the person had received pre-university.

Although the federal disability-accommodation rules for school and workplace track each other and have similar goals, the application of the "undue hardship" standard can be quite different in a school than in a workplace. For example, the most common school accommodation for a documented mental disability is extra time to complete tests and other assessments.[29] Providing a student with extra time is, at most, an incon-

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[24] *See Disability Accommodations*, UNIV. OF CHI., https://studentmanual.uchicago.edu/disability [https://perma.cc/D2MZ-HYT3] (stating that accommodations can only be removed if they are "ineffective or if the student's condition changes.").

[25] 34 C.F.R. § 104.44 (2017) ("Modifications 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.").

[26] 42 U.S.C. § 12111(8) (2018) ("The term 'qualified individual' means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.").

[27] *Id.* at § 12111(10) (2018) (defining "undue hardship"); U.S. EEOC, *supra* note 10 ("Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business.").

[28] U.S. EEOC, *supra* note 10 ("When an individual decides to request accommodation, the individual or his/her representative must let the employer know that s/he needs an adjustment or change at work for a reason related to a medical condition.").

[29] *See* Benjamin J. Lovett, *Extended Time Testing Accommodations for Students with Disabilities: Answers to Five Fundamental Questions*, 80 REV. OF EDUC. RES. 611, 611 (2010) ("Extended time is one of the most common testing accommodations provided to students with disabilities."); Douglas Belkin, *Colleges Bend the Rules for More Students, Give Them Extra Help*, WALL ST. J. (May 24, 2018), https://www.wsj.com/articles/colleges-bend-the-rules-for-more-students-give-them-extra-help-1527154200 [https://perma.cc/5NYD-A726] ("The most common accommodations come during testing. Students who receive extended time may get twice as long as their classmates to take an exam. . . . The extra time allows students to use various strategies to reduce stress levels so they can overcome their disabilities.").

venience to the instructor and test administrator. In contrast, time is often of the essence in the workplace. Significant costs could easily ensue from late delivery of products or services: lost revenue, unhappy customers, and hampered coworkers who depend on the work product of the worker with a disability to proceed with their own tasks. These situations illustrate the "cliff" that many Americans with disabilities fall off when they reach the end of a highly scaffolded university life and must suddenly adjust to operating at full speed.[30] This unintended cliff presents a challenge of considerable importance both for U.S. educators seeking to better prepare students with disabilities to become fully engaged members of adult society and for U.S. employers seeking to hire workers with disabilities.

III. STUDENTS' RIGHTS VS. WORKERS' RIGHTS

The same federal disability law governs both university students and workers,[31] but different agencies apply this law in the two settings. The Office of Civil Rights (OCR) governs implementation of the ADA in higher education,[32] while the Equal Employment Opportunity Com-

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[30] In 2018, 21.8% of college graduates with disabilities were employed, compared to 69.7% of college graduates without disabilities. *Table 1. Employment Status of the Civilian Noninstitutional Population by Disability Status and Selected Characteristics, 2018 Annual Averages*, U.S. DEP'T OF LABOR BUREAU OF LABOR STATS. (Feb. 26, 2019), https://www.bls.gov/news.release/disabl.t01.htm [https://perma.cc/V6CD-QETN]; *see, e.g.*, John O'Neill, *Education and Employment Outcomes for People with Disabilities: Is the Glass Half Full or Half Empty?*, KESSLER FOUND. BLOG, https://kesslerfoundation.org/content/education-and-employment-outcomes-people-disabilities-glass-half-full-or-half-empty (last visited Apr. 24, 2019) [https://perma.cc/6VWP-U4JA] (stating that the employment rate of college graduates with disabilities is much lower than that of college graduates without disabilities and "[c]omparisons of employment rates by education show a steep gradient for individuals with disabilities, both overall and for specific types of disability"); *see also* Jackie Mader & Sarah Butrymowicz, *The Low Number of Students with Disabilities Graduating from College is a Crisis*, HUFFINGTON POST (Nov. 15, 2017), https://www.huffingtonpost.com/entry/students-with-disabilities-college_us_5a0602d7e4b05673aa592cb4 [https://perma.cc/RA95-C5D8] ("About a third of the students with disabilities who enroll in a four-year college or university graduate within eight years.").

[31] Section 504 of the Rehabilitation Act of 1973 also protects both university students with disabilities and workers with disabilities. *See* Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. at 394 (stating the purpose is "for coordination of all programs with respect to handicapped individuals within the department of health, education, and welfare."). However, the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) included a conforming amendment to the Rehabilitation Act that aligns the two statutes. Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, § 7, 122 Stat. 3553, 3558 (2008) ("Section 7 of the Rehabilitation Act of 1973 (29 U.S.C. 705) is amended."). Therefore, for the purposes of this paper, the focus is on the ADA, which, as amended, provides parallel protections to the Rehabilitation Act but to a greater range of individuals with disabilities by interpreting "disability" more broadly than the Rehabilitation Act. *Protecting Students with Disabilities*, U.S. DEP'T OF EDUC. (Sept. 25, 2018), https://www2.ed.gov/about/offices/list/ocr/504faq.html?exp [https://perma.cc/5MVQ-L8MK] ("The Amendments Act broadens the interpretation of disability.").

[32] The OCR is a component of the U.S. Department of Education. It enforces Section 504 of the Rehabilitation Act of 1973, a civil rights statute which prohibits discrimination against individuals with disabilities, as well as Title II of the ADA, which extends this prohibition against discrimination to the full range of state and local government services, programs, and activities (including public schools) regardless of whether they receive any federal financial assistance. Section 504 prohibits

mission (EEOC) plays this role in the workplace.[33] This distinction has resulted in a subtle but significant difference in the evaluation of the adequacy of disability accommodation efforts in the two environments. The OCR emphasizes "appropriate academic adjustments"[34] and the EEOC leans heavily on whether an accommodation is "reasonable" or creates an "undue hardship."[35] In the school setting, this means that accommodation efforts are evaluated through a lens of their effectiveness in providing program access for a student with a disability. Whereas, in the workplace, the decision to require an accommodation turns less on its effectiveness for the worker with a disability and more on its cost to, or impact on, the employer. Schools certainly can and do refuse costly or hugely inconvenient accommodation requests,[36] but, as the cases below illustrate, the OCR and courts lean heavily towards assisting the student wherever possible.

A. Student Cases: "Appropriate Academic Adjustments" Focus on Accessibility

The legal rules governing the provision of special services to students with disabilities varies by educational grade level. Forty-five years

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discrimination on the basis of disability in programs or activities that receive federal financial assistance from the U.S. Department of Education. Title II prohibits discrimination on the basis of disability by state and local governments. Hence, public universities are covered by both statutes and private universities are covered by the Rehabilitation Act. U.S. DEP'T OF EDUC., *supra* note 31 ("OCR also enforces Title II of the Americans with Disabilities Act of 1990 (Title II), which extends this prohibition against discrimination to the full range of state and local government services, programs, and activities (including public schools) regardless of whether they receive any Federal financial assistance.").

[33] *About EEOC*, U.S. EEOC, https://www.eeoc.gov/eeoc/ (last visited Apr. 24, 2019) [http://perma.cc/4WXZ-HNDU] ("The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's . . . disability.").

[34] 34 C.F.R. § 104.44 (2017) ("A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student.").

[35] 42 U.S.C. § 12111(9) (2018) (defining "reasonable accommodation"); *id.* § 12111(10) (defining "undue hardship"); U.S. EEOC, *supra* note 10 ("The only statutory limitation on an employer's obligation to provide 'reasonable accommodation' is that no such change or modification is required if it would cause 'undue hardship' to the employer.").

[36] *See, e.g.*, McGregor v. La. State Univ. Bd. of Supervisors 3 F.3d 850, 860 (5th Cir. 1993) ("Viewing the undisputed facts, we can conclude only that the Law Center reasonably accommodated McGregor's disability and that the additional accommodations, if granted, would constitute preferential treatment and go beyond the elimination of disadvantageous treatment mandated by § 504."); Maczaczyj v. New York 956 F. Supp. 403, 409 (WDNY 1997) ("Based on the record, the court finds that allowing plaintiff to participate in the residency program would be a substantial modification of the educational program."); Ohio Civil Rights Comm'n v. Case Western Reserve Univ., 76 Ohio St. 3d 168, 182 (1996) ("[T]he accommodations suggested by [the plaintiff] would (1) require fundamental alterations to the academic requirements essential to the program of instruction, and (2) impose an undue burden upon CWRU's faculty."). These three illustrative cases were each discussed in Stephen B Thomas, *College Students and Disability Law*, LD ONLINE, http://www.ldonline.org/article/6082/ [https://perma.cc/4A5R-3YX6].

ago, Section 504 of the Rehabilitation Act of 1973 established the general duty owed to qualified students with disabilities in elementary and secondary schools.[37] This duty came to be known, under the Individuals with Disabilities Education Act (IDEA), as a "free appropriate public education"[38] (FAPE), putting the focus on appropriateness, rather than the 1990 ADA focus on "reasonableness." The IDEA, in addition to defining FAPE, instituted the requirement of an Individualized Education Program (IEP), whereby students have a personally tailored set of accommodations to address their specific disability needs.[39] These IEPs, while often solidifying vital support services for children with disabilities, set the stage for the university-to-workplace cliff by myopically focusing on a student's immediate ability to participate in school. The U.S. Department of Education, in conjunction with its Office of Special Education and Rehabilitative Services (OSERS), issues regulations to implement the requirements of the IDEA.[40] Under these regulations, a FAPE consists of a free public education made "appropriate" for the student with a disability by "regular or special education and related aids and services *designed to meet the individual educational needs* of students with disabilities as adequately as the needs of students without disabilities are met."[41]

The "individual educational needs"[42] of students could be understood to include adaptive skills training to help students with mental disabilities access an education with minimal program modification. However, in practice, a FAPE has been understood to mean merely that those students with a disability—whether physical or mental—should have the same immediate access to a free public education as those students with-

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[37] *See* Rehabilitation Act of 1973, Pub. L. No. 93–112, § 304(c), 87 Stat. 355 (1973) ("This subsection shall be administered in coordination with other programs . . . including programs under Title I of the Elementary and Secondary Education Act of 1965."); *Free Appropriate Public Education for Students with Disabilities: Requirements Under Section 504 of The Rehabilitation Act of 1973*, U.S. DEP'T OF EDUC. (Aug. 2010), https://www2.ed.gov/about/offices/list/ocr/docs/edlite-FAPE504.html?exp=1 [https://perma.cc/TA42-AKEX] ("Public elementary and secondary schools must employ procedural safeguards regarding the identification, evaluation, or educational placement of persons who, because of disability, need or are believed to need special instruction or related services."); U.S. DEP'T OF EDUC., *supra* note 31 ("Section 504 is a federal law designed to protect the rights of individuals with disabilities in programs and activities that receive Federal financial assistance from the U.S. Department of Education.").

[38] *See* 20 U.S.C. § 1401(9) (2018) (defining "free appropriate public education").

[39] *See id.* The Individuals with Disabilities Education Act (IDEA) is the federal law that supports special education and related service programming for children and youth with disabilities. It was originally known as the Education of Handicapped Children Act, passed in 1975. In 1990, amendments to the law were passed, effectively changing the name to IDEA. In 1997, and again in 2004, additional amendments were passed to ensure equal access to education. *What is the Individuals with Disabilities Education Act?*, UNIV. WASH.: DISABILITIES, OPPORTUNITIES, INTERNETWORKING, & TECH. CTR. (June 28, 2017), https://www.washington.edu/doit/what-individuals-disabilities-education-act [https://perma.cc/SUJ6-9A8E] ("In 1990, amendments to the law were passed, effectively changing the name to IDEA. In 1997 and again in 2004, additional amendments were passed to ensure equal access to education.").

[40] U.S. DEP'T OF EDUC., *supra* note 31 ("The Office of Special Education and Rehabilitative Services, . . . a component of the U.S. Department of Education, administers the Individuals with Disabilities Education Act (IDEA).").

[41] *Id.* (emphasis added).

[42] *Id.*

out a disability.[43]

After high school, the rules change. Section 504, while protecting students with disabilities at all educational levels,[44] provides students with disabilities a right to a FAPE only through high school. After secondary school, students with disabilities are not entitled to a free education and they must meet academic admissions standards of individual universities.[45] In addition, the IDEA only protects students with disabilities through high school graduation or age twenty-one, whichever occurs first.[46] Therefore, unlike at lower-level schools, students cannot rely on universities to take the initiative in recognizing a student's mental disability and fashioning an IEP for that student.[47] Instead, post-secondary school students need to identify themselves as having a disability and request specific accommodations.[48] Students will likely be required to submit documentation of mental disabilities and possibly pay for updated testing.[49] Nonetheless, for students admitted to universities and able to document a mental disability, a continuation of special services is all but guaranteed.[50] This prevalent continuity occurs because, despite the evaporation of IDEA and FAPE rights at the end of high school, the OCR enforces Section 504 and Title II of the ADA both in pre-university schools and in post-secondary educational institutions, albeit with a slightly dif-

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[43] There is no explicit or presumed goal of built-in obsolescence in the required IEP, as the goal is merely to provide immediate access, not to build long-term adaptation skills. *See generally* 34 C.F.R. § 300.324 (2017) (discussing what each child's IEP team should consider).

[44] 29 U.S.C. § 794 (2018) (defining "program or activity" as "a college, university, or other postsecondary institution, or a public system of higher education").

[45] *See, e.g.*, Cheree Liebowitz, *College Admissions Tips for Students with Learning Disabilities*, INT'L COLL. COUNSELORS (Apr. 30, 2014), https://internationalcollegecounselors.com/college-admissions-tips-for-students-with-learning-disabilities/ [perma.cc/4WUV-QJCY] (explaining that while "a school cannot deny [students with disabilities] admission because of [their] condition," "[d]isabled or not, students must meet school standards for admission"); U.S. DEP'T OF EDUC., *supra* note 7 ("If you meet the essential requirements for admission, a postsecondary school may not deny your admission simply because you have a disability. . . . Unlike your high school, however, your postsecondary school is not required to provide FAPE.").

[46] 20 U.S.C. §§ 1400–99 (2004) (guaranteeing a "free appropriate public education" at "public expense" in "elementary school[] or secondary school"); *id.* § 1412(a)(1)(A) (2018) ("A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21[.]").

[47] *See* U.S. DEP'T OF EDUC., *supra* note 7 ("Unlike your school district, your postsecondary school is not required to identify you as having a disability or to assess your needs.").

[48] *See id.* ("Your school will probably require you to provide documentation showing that you have a current disability and need an academic adjustment.").

[49] *See id.* (explaining that "[s]chools may set reasonable standards for documentation" and require parents to "pay or find funding to pay an appropriate professional for an evaluation."); *cf. OCR Takes Issue with College's Documentation Standards for Accommodation Request*, DISABILITY COMPLIANCE FOR HIGHER EDUC., Feb. 2016, at 11 ("Though the court found the school's burdensome requirement of costly and extraordinary re-evaluation procedures for students previously diagnosed with disabilities to be both inappropriate and unreasonable, it did acknowledge that the school had a right to establish reasonable procedures and standards for documenting a disability."). Similarly, Guckenberger v. Boston Univ., 974 F.Supp. 106 (D. Mass., 1997) was an earlier class action suit against Boston University by students with ADHD, ADD, and learning disorders. 974 F.Supp at 114. The court found for the students and immediately ordered Boston University to cease and desist the implementation of an enhanced disability documentation procedure. *Id.* at 154. The court also acknowledged the university's right to require adequate documentation. *Id.* at 135.

[50] *See* U.S. DEP'T OF EDUC., *supra* note 7 ("You should expect your school to work with you in an interactive process to identify an appropriate academic adjustment.").

ferent standard of conduct for universities than that for elementary and secondary schools.

The post-secondary school legal standard for compliance with Section 504 and Title II of the ADA is to provide students with disabilities the "appropriate academic adjustments" that are "necessary to afford an individual with a disability an equal opportunity to *participate* in a school's program."[51] While the wording of the second phrase here differs from that defining the IDEA's required IEP, note that both the IDEA's IEP requirements for K-12 and the OCR's rules for universities emphasize facilitating access to and/or participation in academic programs.[52] In addition, the Department of Education emphasizes that an "appropriate academic adjustment" must be determined based on the needs of each individual with a disability.[53] These adjustments, like the services expected from lower schools, may include auxiliary aids and services, as well as modifications to academic requirements.[54] Other examples of adjustments include "arranging for priority registration; reducing a course load; substituting one course for another; providing note takers, recording devices, sign language interpreters, extended time for testing . . . ; and equipping school computers with screen-reading, voice recognition, or other adaptive software or hardware."[55]

As this list illustrates, once students with disabilities enter college, they are entitled to a wide range of individualized types of support, similar to those provided at lower-level schools.[56] Many university students with disabilities, after adequately identifying themselves as having disa-

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[51] U.S. DEP'T OF EDUC, *supra* note 31; *see also* 34 C.F.R. § 104.44 (2017) (emphasis added) (defining "academic adjustments").

[52] *See* 34 C.F.R. § 300.324 (2017) (directing IEP teams to consider "academic, developmental, and functional needs of the child"); *id.* § 104.44 ("A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student[.]"); *see also supra* notes 43 and 51 and accompanying text.

[53] *See* U.S. DEP'T OF EDUC., *supra* note 7 ("[Y]our postsecondary school is required to provide appropriate academic adjustments as necessary to ensure that it does not discriminate on the basis of disability.").

[54] U.S. DEP'T OF EDUC., *supra* note 31 (defining reasonable accommodation as "academic adjustments, reasonable modifications, and auxiliary aids and services in the postsecondary school context").

[55] U.S. DEP'T OF EDUC., *supra* note 7.

[56] It should be noted that the breadth and scope of what constitutes an "appropriate academic adjustment" encompasses not only classroom and course requirements but also the entire university experience. Federal law and accompanying regulations require that colleges and universities provide equal treatment to organizations for students with disabilities as that provided to all other students. For example, in 2016 the University of Missouri-Kansas City denied a group of students with disabilities the right to form the Disabled Student Counsel by refusing to provide the students with appropriate funding and office space similar to that enjoyed by other student organizations. The students filed a complaint with the OCR that resulted in a settlement agreement whereby the university acquiesced to the student demands for space and appropriate funding. *See* Letter from Maria L. North, Supervisory Attorney, U.S. Department of Education Office of Civil Rights to Leo Morton, Chancellor, University of Missouri-Kansas City (Dec. 11, 2014), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/07142232-a.pdf [perma.cc/4PQJ-2RRU] ("[T]he University has voluntarily submitted a Resolution Agreement . . . to resolve the allegations of these complaints.").

bilities, will satisfy the requirement of requesting specific accommodations by asking for the same accommodations as the ones that they had in high school. Indeed, these students, with the encouragement of the U.S. Department of Education, often submit their old IEP as support for their accommodation request.[57] In fact, the Department of Education's exemplary list of possible "appropriate academic adjustments" encourages similar accommodations by aligning with the same types of academic support that these students received before entering college and by failing to mention adaptive skill courses or coaching.

The legal differences between the rights of students with disabilities to special services pre-university and at university hence appears to be primarily in the processes necessary to initiate services, not in the actual services themselves. The cliff that students with disabilities must carefully descend from high school IDEA scaffolding to college ADA scaffolding consists of the initial efforts students must make to gain admission, to pay tuition, to identify themselves as having a disability, and to formally request specific services or accommodations. All of this is usually accomplished within the first few weeks of a student's first semester at university. From that point forward, subject to renewed paperwork each semester, the student is likely to be granted the same level of accommodation to which they were accustomed throughout their pre-university education.

University students have, by definition, entered a competitive environment to which only the most intelligent and capable are admitted. After their next graduation, these students will again compete, this time for jobs, to which not all are entitled. As the authors propose in detail in section IV below, this would seem an opportune moment not only to require that all students with disabilities shoulder more responsibility for seeking the support that they need to succeed but also to require that students with mental disabilities take steps to minimize their ongoing need for the types of support which will be predictably difficult to attain in the workplace. However, current federal laws and regulations, as illustrated above, do not support a winnowing of post-secondary school accommodations for any students with disabilities. Indeed, if anything, the type of support to which university students may be entitled seems to be expanding in response to improved technology and new types of assistive technology being offered to students in lower-level schools. For example, as new assistive technology has emerged for students with hearing disabilities, a recent case illustrates how these technologies are likely also now guaranteed to university students as "appropriate academic adjustments," despite a current high cost that would likely make the same technology accommodation an "undue hardship" in the workplace.

In the case of *National Association of the Deaf v. Massachusetts In-*

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[57] *See* U.S. DEP'T OF EDUC., *supra* note 7 ("An individualized education program (IEP) or Section 504 plan, if you have one, may help identify services that have been effective for you.").

stitute of Technology,[58] the court did not dismiss deaf online students' claims that they should be provided with closed-captioning services.[59] This case illustrates the emphasis of the higher education standard. The court took the disparate language of the relevant statutes and interpreted it collectively to mean that students with disabilities need to have "meaningful access" to services and classes.[60] The focus was very much on the student's immediate access needs, not the cost or impact to the university. Other cases have yielded similar results.[61] So, while a school is not required to lower or to substantially modify essential program requirements, it can be expected to incur significant expense in ensuring access to these requirements by a student with a disability.

Indeed, while a university is not required to change the substantive content of a test or to make adjustments that would fundamentally alter the nature of a service, program, or activity, some courts have explicitly stated that money alone will not be an impediment in the implementation of an appropriate accommodation.[62] For example, in the case of *Daniel-*

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[58] Nat'l Ass'n of the Deaf v. Mass. Inst. of Tech., CV 15-30024-MGM, 2016 WL 6652471 (D. Mass. Nov. 4, 2016).

[59] *Id.* at *1 (adopting the court's "recommendation in full" from Report and Recommendation Regarding Defendants' Motion to Stay or Dismiss, Nat'l Ass'n of the Deaf v. Harvard Univ., No. 3:15-CV-30023-MGM, 2016 U.S. Dist. LEXIS 152667 at *7 (D. Mass. Feb. 9, 2016), which says that "the general provisions of DOE's regulations . . . support Plaintiffs' theory of discrimination").

[60] Report and Recommendation Regarding Defendants' Motion to Stay or Dismiss, Nat'l Ass'n of the Deaf v. Harvard Univ., No. 3:15-CV-30023-MGM, 2016 U.S. Dist. LEXIS 152667 at *4 (D. Mass. Feb. 9, 2016) ("Finally, a plaintiff can pursue a third path, claiming that [the defendant] has refused to affirmatively accommodate his or her disability where such accommodation was needed to provide 'meaningful acces[.]'" (alteration in original)).

[61] *Id.* at *7 ("[T]he general provisions of DOE's regulations . . . support Plaintiffs' theory of discrimination."). Other physical disability cases illustrate that student access is of paramount importance, despite cost or inconvenience to the university. *See, e.g.*, Am. Council of the Blind v. Paulson, 525 F.3d 1256, 1268 (D.C. Cir. 2008) ("For instance . . . individuals lack meaningful access to . . . activities or programs without the provision of interpretive assistance."); United States v. Bd. of Tr. for Univ. of Ala., 908 F.2d 740, 748 (11th Cir. 1990) ("In the case of a deaf student, however, all access to the benefit of some courses is eliminated when no sign-language interpreter is present. In the context of a discussion class held on the third floor of a building without elevators, a deaf student with no interpreter is as effectively denied meaningful access to the class as is a wheelchair bound student."); *see also* Am. Council of the Blind v. Paulson, 525 F.3d 1256, 1268 (8th Cir. 2013) ("For instance, . . . deaf individuals lack meaningful access to . . . activities or programs without the provision of interpretive assistance."); Argenyi v. Creighton Univ., 703 F.3d 441, 451 (D.C. Cir. 2008) (finding a genuine issue of material fact as to whether the defendant denied a hearing-impaired student meaningful access when it refused to provide real-time transcription for lectures and a cued speech interpreter for labs).

[62] But note that the law does recognize that schools do not have to take measures that would result in "undue financial or administrative burden." *See, e.g.*, Ohio Civil Rights Commission v. Case Western Reserve University (1996) (wherein the Supreme Court of Ohio reviewed a case filed by a blind student who claimed that reasonable accommodations would have enabled her to qualify for admission to a medical school, which had denied her application purporting that she was not qualified because she would not be able: a) to "observe" or "perform in a reasonably independent manner" as was required by the Association of American Medical Colleges; b) to exercise independent judgment when reading EKGs or Xrays; c) to start an I.V. or draw blood; d) to participate in the surgery clerkship, to react to emergency situations, or to take night call; concluding that no identified accommodation would enable the plaintiff to meet basic core requirements that were expected of all students and that her participation in the program could prove unsafe to clients, the court upheld the denial of the plaintiff's admission); Maczaczyj v. New York 956 F. Supp. 403 (WDNY 1997) (detailing one of the more extreme requests for accommodation where an applicant (and former drug addict and alcoholic) who suffered from an anxiety disorder, social phobia, emotional trauma, and panic attacks (which occurred when he was forced to interact with others) and who resisted taking

Rivera v. Everglades College,[63] after being admitted to Everglade College's radiologic technology program, Ms. Daniel-Rivera provided the school with an audiologist's report which documented that she was deaf and would therefore need multiple sign-language interpreters.[64] After receiving the request, the school rescinded her admission stating that to provide the services she requested would be "inordinately expensive and extremely difficult to maintain."[65] Ms. Daniel-Rivera filed suit in Florida and the court, rejecting the university's burdensome-cost defense, returned a verdict in her favor of $75,000.[66] This lack of sympathy for university cost and inconvenience is very different, as illustrated below in section II.B, from EEOC analysis of the reasonableness of workplace accommodations. This is particularly problematic for students with *mental* disabilities because the cost and impact of their university accommodations are generally higher in the workplace than at university.

Equally importantly for students with mental disabilities, the OCR's evaluation of what is an "appropriate academic adjustment" focuses on the immediate needs of the student, rather than on any long-term developmental or adaptive skill acquisition needs. *Griesinger v. University of Cincinnati*[67] illustrates how this short-sighted approach can backfire once students begin to venture out beyond traditional classrooms into workplace internships.[68] Julie Griesinger was a student in the

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medications that could have made social interaction less stressful, requested that the master's program in liberal studies be made available to him through distance learning, as his undergraduate course of study had been; noting that the delivery of the program through telecommunications was feasible, the University refused the applicant's request because it required a deliberate design and pedagogy distinctly different from the current program and would have to be developed and approved by the state education department prior to implementation; the court, in denying the plaintiff a preliminary injunction, noted that the university had offered the student a number of accommodations and held that the student had failed to show that his requested accommodation was reasonable); McGregor v. Louisiana State University Board of Supervisors 3 F.3d 850 (5d Cir. 1993) (in a decision dealing with retention, the Fifth Circuit held that a law student's requests that the center allow him to be a part-time student, to continue to take exams at home, and to reduce the GPA requirement would result in fundamental alteration of the school's academic standards and upheld the school's refusal to comply with the student request, noting that the student had been provided with virtually unlimited office hours by one professor, tutorial assistance, additional time to complete some exams, special furniture and equipment, and a student proctor to assist in personal care). These three illustrative cases were all discussed in *College Students and Disability Law*. Stephen B Thomas, *College Students and Disability Law*, LD ONLINE, http://www.ldonline.org/article/6082/ [<perma.cc>].

[63] Daniel-Rivera v. Everglades Coll., No. 0:16-cv-60044-WPD, 2017 WL 5197956 (S.D. Fla. Mar. 1, 2017).

[64] *Id.* at *1 (S.D. Fla. Mar. 1, 2017) ("Multiple interpreters will be required on an ongoing basis to provide appropriate scheduling and interpretation services.").

[65] *Id.* ("Defendant rescinded Plaintiff's admission.").

[66] Daniel- Rivera v. Everglades Coll., No. 0:16- CV- 60044- WPD, 2017 WL 2381887, at *1 (S.D. Fla. Apr. 20, 2017); *see also Auxiliary Aids*, DISABILITY COMPLIANCE FOR HIGHER EDUC., Aug. 2016, at 16 (reporting that Carnegie Mellon University, after refusing to provide closed captioning services for classroom presentations to students with disabilities due to costs, settled two discrimination cases via "voluntary resolution agreements with the Office for Civil Rights").

[67] Griesinger v. Univ. of Cincinnati, No. 1:13-CV-808, 2016 U.S. Dist. LEXIS 39518 (S.D. Ohio Mar. 25, 2016).

[68] *Id.* at *3 ("In her claim for relief under the ADA, plaintiff alleges that [defendant] discriminated against her on the basis of her disability related to its failure to prove accommodations in her externship placement.").

Medical Assisting program at defendant's Blue Ash College.[69] Ms. Griesinger suffered from a learning disability that included significant memory impairment and a diminished information-processing rate.[70] For example, when given information verbally, plaintiff's ability to remember that information a mere twenty minutes later was worse than 998 out of 1,000 people her age.[71] In light of her disability, Ms. Griesinger requested and was given a notetaker for in-class lectures, extended time for testing, and a tape recorder.[72]

As part of her medical assistant program, Ms. Greisinger was required to participate in an externship/practicum where she would work 320 hours as a medical assistant in a medical setting at a facility near the school.[73] Ms. Griesinger's ongoing need for "academic adjustments" during her externship was never communicated to the facility where she worked, Cincinnati Pain Management Consultants (CPMC).[74] CPMC terminated the plaintiff's externship shortly after it began, citing five reasons. Two of these reasons were failure to complete specific vital work tasks.[75] The remaining three reasons were more directly related to her unaccommodated disabilities: plaintiff "seems to be a slower learner; . . . would not finish assigned tasks; and . . . appeared to have problems with her vision and hearing."[76] The University then arranged a replacement externship for Ms. Greisinger, telling the new employer, Family Medical Care Associates (FMCA), that plaintiff "may need some extra time to learn."[77] Within two weeks, the plaintiff was terminated from this second internship.[78] Again, the reasons given were both specific task failures[79] as well as a disability accommodation issue—an inability to complete "simple [clerical] tasks without assistance."[80] Importantly, FMCA stated in its termination explanation that these issues, as well as plaintiff's inability to communicate with patients, "could endanger the

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[69] Griesinger v. Univ. of Cincinnati, No. 1:13-CV-808, 2016 U.S. Dist. LEXIS 58931, at *1 (S.D. Ohio May 3, 2016).

[70] *Id.* at *2.

[71] *Id.*

[72] *Id.* ("Under the terms of her IEP, plaintiff received the following accommodations: extended time to take quizzes or tests, access to a resource room with individualized assistance from an instructor, tests read aloud, the use of notes on tests, the option for a note taker in class, and a separate, quiet room for taking tests and quizzes.").

[73] *Id.* at *4 ("Successful completion of the externship required 320 hours in a medical setting, split equally between administrative and clinical work.").

[74] *Griesinger*, 2016 U.S. Dist. LEXIS 58931, at *6 ("Plaintiff testified that beyond her accommodation request form, she did not tell defendant that she would need any other accommodation related to her externship at Cincinnati Pain Management Consultants.").

[75] These tasks were: copying previous entries from a patient's history instead of writing a new entry concerning the patient's current symptoms; and an inability to properly attach a blood pressure cuff. *Id.* at *7.

[76] *Id.*

[77] *Id.* at *9.

[78] *Id.* at *1.

[79] Plaintiff was "consistently . . . unable to take blood pressure, pulse, respiration, temperature (digital speaking thermometer) . . . [and was unable] to take accurate vitals, perform EKGs." *Griesinger*, 2016 U.S. Dist. LEXIS 58931, at *3.

[80] *Id.*

outcomes of patient health."[81] While part of the resulting lawsuit against the university was settled, the university's motion for summary judgment was allowed in part.

Greisinger illustrates the breakdown in mental disability accommodations once a student leaves the traditional academic setting. Would it be feasible for Ms. Greisinger to have a notetaker or tape recorder in a medical setting, where patient confidentiality is paramount? If so, should the university or the externship company foot the bill for a notetaker? And what about the extra time requirement? How would this play out in a clinical setting? Did the need for extra time contribute to plaintiff's clinical mistakes? Would it be reasonable to impose longer task-completion times on patients? Would extra time even help with such tasks as taking vital signs? This case raises, but does not provide answers to, these questions.[82]

In light of Ms. Greisinger's externship experiences, part of a university's role would seem to be to offer students with disabilities career advice to avoid such situations. After all, career counselors advise students without disabilities on "best fit" careers based on their relative strengths and weaknesses. Would it not make sense to do the same for students with disabilities? A Georgetown University professor who tried to do just this found himself the defendant in an ADA lawsuit. Questioning a student's ability to succeed in the nursing program after the student disclosed that he had a disability, a Georgetown nursing program professor advised the student to withdraw from the university or change to another program.[83] The result of the OCR's subsequent investigation into this alleged ADA violation was a settlement agreement whereby Georgetown refunded $50,000 to the student and then transferred many of his nursing credits to another program at the institution.[84]

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[81] *Id.*

[82] *See generally id.* The case also raises the issue of whether a university can provide private disability information to an external company providing a required externship for a student. *Id.* at *9 ("[The University] told the externship site that plaintiff 'may need some extra time to learn.'"). In the workplace, the decision to disclose a disability rests with the applicant/employee. *The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities*, U.S. EEOC, https://www.eeoc.gov/facts/performance-conduct.html (last updated Dec. 20, 2017) [https://perma.cc/8Q2W-MPMA] (providing multiple examples illustrating that an employee can choose when to disclose a disability, such as that the "ADA does not compel employees to ask for accommodations at a certain time"); U.S. EEOC, *supra* note 10 ("Generally, the individual with a disability must inform the employer that an accommodation is needed."). Externships are a murky area. However, since these medical facilities are not under the direct supervision and control of a university, it seems that a university could neither have disclosed the information without the plaintiff's consent nor required the facilities to accommodate the plaintiff—especially if patient safety was at stake. Other issues, such as whether an externship is paid or unpaid, optional or part of a licensing requirement, may also be germane in resolving the disclosure and control questions.

[83] *A Review of this Month's OCR Letters*, DISABILITY COMPLIANCE FOR HIGHER EDUC., Nov. 2016, at 10 ("The complainant was a student in the Nurse Anesthesia Program at Georgetown's School of Nursing and Health Studies. He alleged that a professor questioned his ability to succeed in the program after he disclosed his disability, advised him to withdraw from the university or transfer from the program, and stated that the complainant would have no option to return to the NAP.").

[84] *Id.* ("Pursuant to the agreement, the complainant transferred to the Family Nursing Practitioner Program, and was able to transfer 11 of the 23 credits he had earned in the NAP. The university agreed to give the complainant a credit equivalent to the cost of the next 12 credits he had to take in

This is a curious settlement since it indicates that the professor's assessment of the feasibility of accommodating the student's disability in this very practicum-based program was correct. Perhaps the disservice to the student with a disability, if there was one, was in admitting him to a program that would lead to a job that could not accommodate the student's disability. Merely providing *access* to an academic program for which a student with a mental disability has the requisite intellectual ability does not appear to be an "appropriate academic adjustment" when the correlative job will be unable to accommodate that student's disability.

B. Worker Cases: "Reasonable Accommodation" versus "Appropriate Academic Adjustments"

The EEOC, not the OCR, evaluates workplace compliance with the ADA.[85] In contrast to the OCR standard of "appropriate academic adjustment," the EEOC enforcement guidance focuses on what is a "reasonable" accommodation versus an "undue hardship" on the employer. The EEOC regulations illustrate the statutory "reasonable accommodation" requirement with multiple examples of low-cost and low-impact accommodations versus high-cost and high-impact accommodations.[86] There is little discussion or consideration of the worker's best interests. Instead, the EEOC Guidelines state that an accommodation "is 'reasonable' if it appears to be 'feasible' or 'plausible.'"[87] This puts primary emphasis on the impact of the accommodation on the employer, though the EEOC Guidelines do acknowledge that an accommodation "must be effective in meeting the needs of the individual."[88] The *degree* of effectiveness of the accommodation is another matter. The EEOC Guidelines explicitly state that employees do not get to choose their preferred accommodation, even if it is the most effective.[89] Instead, an employee must accept any employer-chosen reasonable accommodation that will permit them to do the essential functions of the job.[90] This combination

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the FNPP, with an approximate value of $21,816. The university also agreed to give the complainant an additional credit . . . approximately valued at $31,633.").

[85] *See supra* notes 33 and 34 and accompanying text and parentheticals.

[86] *See supra* note 10 and accompanying text and parentheticals.

[87] U.S. EEOC, *supra* note 10.

[88] *Id.*

[89] *Id.* ("The employer may choose among reasonable accommodations as long as the chosen accommodation is effective.").

[90] *Id.* ("The employer may choose among reasonable accommodations as long as the chosen accommodation is effective. . . . If there are two possible reasonable accommodations, and one costs more or is more burdensome than the other, the employer may choose the less expensive or burdensome accommodation as long as it is effective. . . . Similarly, when there are two or more effective accommodations, the employer may choose the one that is easier to provide. In either situation, the employer does not have to show that it is an undue hardship to provide the more expensive or more difficult accommodation.").

of factors leaves applicants and workers with mental disabilities facing higher hurdles to gain accommodations in the workplace than those that they vaulted in school, where the cost to the school was considered secondary to the benefit to the student.

One might expect this to result in a plethora of ADA mental disabilities claims filed with the EEOC. However, although the ADA applies equally to both physical and mental disabilities, less than twenty-four percent of ADA claims in 2017 were based on mental disabilities.[91] Of these, mental illnesses[92] accounted for 17.8%, drug and alcohol addiction for 0.8%, autism and other neurological disorders for 3.4%, and intellectual and learning disabilities for only 1.7%.[93] University students with learning disabilities and anxiety disorders are the two groups most likely to request and to utilize academic accommodations.[94] Yet these two groups appear highly underrepresented in the ADA cases. This could be because these students' accommodations are being happily continued by employers upon the students' graduation from college. However, studies reveal two more likely explanations. First, adults with mental disabilities often choose not to disclose their disabilities to their employers due to embarrassment caused by the lingering stigma associated with these types of disabilities.[95] Without disclosure, there can be no request for an accommodation and ADA claims cannot be based on a lack of an unrequested accommodation. A second explanation for the paucity of learning disorder cases (1.3%) and anxiety disorder cases (6.4%)[96] may well

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[91] *ADA Charge Data by Impairments/Bases - Merit Factor Resolutions (Charges Filed with EEOC) FY 1997 - FY 2017*, U.S. EEOC, https://www.eeoc.gov/eeoc/statistics/enforcement/ada-merit.cfm [https://perma.cc/X23V-4DK9].

[92] *Id.* (itemizing mental illnesses including anxiety disorder (6.4%), depression (5.3%), manic depressive disorder (2.0%), post-traumatic stress disorder (2.8%), schizophrenia (0.2%), and "other" psychological disabilities (1.1%)).

[93] *Id.*

[94] *See* Belkin, *supra* note 29 ("As many as one in four students at some elite U.S. colleges are now classified as disabled, largely because of mental-health issues such as depression or anxiety, entitling them to a widening array of special accommodations like longer time to take exams."); *Common Accommodations*, SKIDMORE COLL., https://www.skidmore.edu/accessibility/accommodations/ (last visited Apr. 24, 2019) [https://perma.cc/A73G-QJ7C] ("[E]xtended time, distraction reduced location, alternative format, use of laptop are the most requested accommodations."); *Information for Faculty About Academic Accommodations*, WILLIAMS COLL., https://academic-resources.williams.edu/disabilities/information accommodations/ (last visited Apr. 24, 2019) [https://perma.cc/29L6-GNGB] ("The most common accommodation granted in postsecondary institutions is 'extended time for quizzes and exams' since many types of disabilities affect the capability of retrieving and expressing information in time limits.").

[95] *See* NATIONAL CENTER FOR LEARNING DISABILITIES, *supra* note 2 ("Few young adults with LD (19 percent) reported that they have employers who are aware of their disability—the lowest rate of all disability categories. Fewer than one in 20 reported receiving accommodations in the workplace."); Eilene Zimmerman, *On the Job, Learning Disabilities Can Often Hide in Plain Sight*, N.Y. TIMES (Dec. 17, 2006), https://www.nytimes.com/2006/12/17/jobs/17disabled.html [https://perma.cc/MG82-VGYF] (discussing a Temple University study of adult with learning disabilities who chose to work around, rather than disclose, their disabilities to their employers due to embarrassment or concern that they would be labeled by co-workers or employers, and noting further that "as many as one in 10 adults may have a learning disability and the vast majority conceal it from workplace supervisors").

[96] U.S. EEOC, *supra* note 91.

lie in an awareness by those with mental disabilities of the statutory protection given to employers by the "undue hardship" limitation to their accommodation obligations. An "undue hardship" means the following:

> significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation. Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business.[97]

Extra time or special assistance to complete a task that others can do more efficiently and independently may well meet this legal definition of undue hardship. Of course, such requests are not always burdensome, and studies repeatedly reveal that employers frequently overestimate the cost and impact of accommodations.[98] Therefore, when the rare applicant or employee bravely overcomes stigma and requests a typical mental disability accommodation, such as extra time, most employers are likely to immediately refuse such requests as "undue hardships"—even when they are not—and most applicants and employees, already embarrassed by their need to make the request, are unlikely to push back. This analysis is dramatically supported by high unemployment rates of adults with mental disabilities,[99] despite the significant increase in the presence of stu-

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[97] U.S. EEOC, *supra* note 10.

[98] JOB ACCOMMODATION NETWORK, WORKPLACE ACCOMMODATIONS: LOW COST, HIGH IMPACT (2018), *available at* https://askjan.org/publications/Topic-Downloads.cfm?pubid=962628&action=download&pubtype=pdf (https://perma.cc/AEX5-XF45) (last updated Sep. 30, 2018) (providing annually updated research findings addressing the costs and benefits of job accommodations); Katheleen Conti, *Correcting the Misconceptions About Workers with Disabilities*, BOS. GLOBE (Nov. 16, 2017), http://www.bostonglobe.com/business/specials/top-places-to-work/2017/11/16/correcting-misconceptions-about-workers-with-disabilities/D9j655r8O7cDchbSABb5eP/story.html?event=event12 [https://perma.cc/H3SD-JSZE] ("[Christine] Griffin would like to see governmental agencies commit to an annual hiring quota of disabled workers, because it would both entice private employers to do the same and help reduce the stigma around employing people with disabilities."); Steve Wilson, *Study Highlights Employers' Misconceptions About Disabled Workforce*, DAV (Mar. 27, 2017), https://www.dav.org/learn-more/news/2017/study-highlights-employers-misconceptions-disabled-workforce/ [https://perma.cc/69HG-AVLT] ("Research conducted in 2012 and published in the Journal of Vocational Rehabilitation concluded employers are not aware of the resources and guidance they may use when seeking to hire disabled veterans, according to the ADA National Network. Additionally, results showed many civilian employers incorrectly stereotype disabled veteran employees as being more prone to violence, having more frequent workplace accidents or being absent from the job more than other employees. However, according to a study conducted by DePaul University and cited by the ADA National Network, in general, any workers with disabilities tend to perform on par with other employees."); Kay Oder, *Misconceptions About Hiring Employees with Disabilities*, BUS. BANK TEX. (June 9, 2015), https://www.businessbankoftexas.com/business-resource-center/misconceptions-about-hiring-employees-with-disabilities.htm [https://perma.cc/4FUS-6KEE] ("Following are additional common misconceptions about hiring employees with disabilities and facts to dispel them: lower job performance and reliability, increased costs for accommodations, managing employees with disabilities requires a different approach.").

[99] *Myths and Stereotypes About Mental Disabilities Greatest Barrier to Employment*, U.S. EEOC (Mar. 15, 2011), https://www.eeoc.gov/eeoc/newsroom/release/3-15-11c.cfm [https://perma.cc/HQU5-4NS5] ("The greatest barrier to employment for people with intellectual and psychiatric disabilities are employers' myths and fears about their condition, not the disabilities

dents with mental disabilities in post-secondary education.[100] The cases below illustrate these phenomena.

First, two cases demonstrate how employers wrongly assume that intellectual disabilities will impact a person's ability to do the essential functions of the job. In *EEOC v. Bond Brothers Inc.*,[101] a construction company refused to hire an applicant, Mr. Lebovitz, as a carpenter, because of his dyslexia.[102] When Mr. Lebovitz arrived at his job site, the safety officer handed him a packet of safety materials and told him to read and sign the material.[103] Mr. Lebovitz informed the safety officer that he had dyslexia and could not read.[104] He either needed help reviewing the material or, alternatively, he could review it at home.[105] Upon hearing this, the safety officer notified the construction supervisor that, in his opinion, Mr. Lebovitz was a risk to himself and to other employees on the job.[106] This opinion was formed despite the fact that Mr. Lebovitz had fifteen years of experience as a carpenter, had numerous construction safety training certifications, and had never been cited for a safety violation.[107] Additionally, the prior year he had worked at a job site in a similar capacity.[108] The EEOC brought suit on behalf of Mr. Lebovitz, charging that the company violated the ADA by refusing to reasonably accommodate his disability.[109] The case was settled by Bond agreeing to pay $120,000 in monetary relief as well as agreeing to implement substantial training to all employees regarding compliance with accommodations under the ADA.[110]

In another case, *EEOC v. IESI LA Corporation*,[111] Ronald Harper,

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themselves. . . . [O]ne of the biggest obstacles to employment is consciously and unconsciously-held beliefs about people with psychiatric, cognitive or intellectual disabilities. . . . [M]ost of the accommodations individuals with mental disabilities require can be provided in a well-managed, flexible workplace often without any out-of-pocket costs to the employer. . . . *The employment rate for individuals with psychiatric disabilities is not only low compared to the general population, it is also half the employment rate for people with other sorts of disabilities.*" (emphasis added)).

[100] *See* Belkin, *supra* note 29 ("As many as one in four students at some elite U.S. colleges are now classified as disabled, largely because of mental-health issues.").

[101] *McPhee Electric and Bond Brothers to pay $120,000 to Settle EEOC Disability Discrimination Suit*, U.S. EEOC (May 12, 2015), https://www1.eeoc.gov/eeoc/newsroom/release/5-12-15.cfm [https://perma.cc/WQ7B-LZGD] ("The EEOC filed suit filed on May 1, 2014 in U.S. District Court for the District of Connecticut (Civil Case No.: 14-CV-00587).").

[102] *Id.* ("In its lawsuit, the EEOC charged that McPhee and Bond unlawfully refused to hire an applicant as a carpenter because of his disability, dyslexia.").

[103] *New Haven company sued for alleged discrimination against man with dyslexia*, NEW HAVEN REGISTER (May 1, 2014, 3:02 PM), https://www.nhregister.com/connecticut/article/New-Haven-company-sued-for-alleged-discrimination-11374566.php [https://perma.cc/WF7Z-X9TE] ("McPhee's health and safety officer gave him a packet of safety information to review and sign.").

[104] *Id.*

[105] *Id.*

[106] *Id.* ("[T]he health and safety officer later told Bond's superintendent that McPhee believed that Lebovitz would present a risk to himself and other workers at the project.").

[107] *Id.* ("[H]e has 15 years of experience, a clean safety record and numerous safety training certifications along with other qualifications for the job.").

[108] *Id.* ("[H]e had worked on a similar project nearby from December 2011 to July 2012.").

[109] *See* U.S. EEOC, *supra* note 101.

[110] *Id.*

[111] EEOC v. IESI LA Corporation, 720 F. Supp. 2d 750 (W.D. La. 2010).

who had been working for some time for Defendant IESI as a Container Delivery Driver, informed his new supervisor that he was dyslexic.[112] That same day, Harper's employment with IESI was terminated because he allegedly "could not do 'paperwork' and was a danger while driving."[113] Despite contending for five years that Harper did not have a disability and denying that he was fired as a result of his disability, IESA reversed its position shortly before trial on both of these issues, admitting that in fact Harper did have a disability and that the supervisor's sole reason for terminating him was a result of that disability.[114] IESA further admitted that they were in violation of the ADA, conceded that the supervisor who fired Harper had failed to engage in the interactive process regarding reasonable accommodation required by federal law, and agreed to pay $95,000 in settlement.[115] EEOC General Counsel, P. David Lopez, commented at the resolution of the case:

> It is illegal to fire an employee because of a disability if he can perform the essential functions of his job, and that *rule is not limited to physical disabilities. Unfounded fears, myths, or stereotypes* about disabilities cannot be the basis for any personnel action, and it is critical that employers make sure their supervisory and human resources personnel have a thorough understanding of their obligations under the ADA.[116]

The EEOC's senior trial attorney in its New Orleans Field Office, Gregory Judge, commented:

> This is a classic case of an employer firing a worker with a disability because of its own *misconceptions.* Employees with disabilities such as dyslexia are every bit as protected under the ADA as those with more obvious, visible impairments such as blindness or being in a wheelchair.[117]

It is important to note that in both of these cases the mere mention of having a mental disability was the catalyst for the illegal action taken by both companies. In both circumstances, the companies' actions were rooted in ignorance and misinformation regarding mental disabilities, the relevance of the disability to the person's ability to perform the job, and the minimal cost or impact involved in accommodating the disability. This latter issue is poignantly illustrated by two additional cases.

In *EEOC v. Starbucks*,[118] "a barista with mental impairments (in-

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[112] *Id.* at 752.

[113] *Id.*

[114] *National Waste Removal Firm Admits Discrimination, Settles With EEOC For $95,000*, U.S. EEOC (Nov. 24, 2010), https://www.eeoc.gov/eeoc/newsroom/release/11-24-10.cfm [https://perma.cc/FT4R-L3LQ].

[115] *Id.*

[116] *Id.* (emphasis added).

[117] *Id.* (emphasis added).

[118] EEOC v. Starbucks Coffee Co., JVR No. 808288, 2006 WL 5249681 (W.D. Wash. Sept. 1,

cluding bipolar and attention deficit disorders) performed well" and was able to perform the essential job functions of a barista when she was accommodated with extra training and support, "but a new manager stopped accommodating her" and the barista's performance began to suffer.[119] The manager "then cut the barista's hours, berated her in front of customers, placed her on a performance improvement plan," and ultimately fired her.[120] The EEOC filed suit against Starbucks, who settled the case "for $75,000 in monetary relief to the barista and an additional $10,000 to the Disability Rights Legal Center."[121]

In a similar case, *EEOC v. St. Alexius Medical Center*,[122] the plaintiff was hired as a part-time greeter.[123] The job required the plaintiff to direct patients and guests to the appropriate locations in relation to scheduled surgeries and required the plaintiff to interact with physicians and nursing staff.[124] After the plaintiff had been working for three months, her vocational counselor spoke to the employer's Director of Volunteers and Guest Relations about the plaintiff's disability, Moyamoya disease, a progressive cerebrovascular disorder that affected the plaintiff's neurological functions and limited her learning and thinking.[125] The plaintiff's vocational counselor requested that the employer provide written instructions to the plaintiff regarding her responsibilities and inquired if the employer had any other positions to which the plaintiff could transfer.[126] The employer's Director of Volunteers and Guest Relations told the plaintiff's vocational counselor that she felt "tricked" because she was unaware of plaintiff's disability when she hired her, even though the employee had been under no obligation to disclose her disability.[127] The employer did agree to provide the plaintiff with written instructions, but did so only on one occasion. At the plaintiff's six month review, the plaintiff was terminated by the employer, who had never meaningfully attempted to accommodate plaintiff's disability nor considered whether there were other appropriate positions for the plaintiff.[128] The EEOC sued, and St. Alexius Medical Center paid $125,000 in dam-

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2006) (Verdict and Settlement Summary).

[119] *U.S. Equal Employment Opportunity Commission: Twenty Years of ADA Enforcement, Twenty Significant Cases*, U.S. EEOC, https://www.eeoc.gov/eeoc/history/45th/ada20/ada_cases.cfm [https://perma.cc/3LAZ-Q5R5] (summarizing EEOC v. Starbucks Coffee Co.).

[120] *Id.*

[121] *Id.*

[122] EEOC v. St. Alexius Med. Ctr., 30 A.D. Cas. (BNA) 1324, 2014 U.S. Dist. LEXIS 142138, at *2 (N.D. Ill. Oct. 6, 2014).

[123] *Id.* at *2.

[124] *Id.* at *5.

[125] *Id.* at *2 ("Watanuki suffers from moyamoya disease, a progressive cerebrovascular disorder that affects her neurological functions and limits her learning and thinking.").

[126] *Id.* at *6 ("In a November 2009 phone call, Watanuki's vocational counselor, Lisa Hendrickson, told Eorgoff about Watanuki's disability, asked for permission to shadow Watanuki, requested that St. Alexius provide Watanuki with written instructions regarding her responsibilities, and inquired if St. Alexius had other positions to which Watanuki could transfer.").

[127] *Id.* at *6.

[128] *Id.* at *7.

ages.[129] Despite the fact that the required written instructions were not burdensome, the prejudice of the director—as exemplified by feeling "tricked"—shows how negative attitudes about mental disabilities can inaccurately lead employers to view even a minor accommodation as an unreasonable imposition.

Two other cases illustrate situations where a person's mental disability does not impact the way that they learn but, rather, their emotional reactions. The first of these cases involves an employee with autism, who has difficulty understanding and expressing emotions without some coaching. The second case involves an employee with an anxiety disorder who can be readily calmed by the presence of her service dog. While both of these cases present situations where a disability could impact a person's ability to do his or her job, they also both demonstrate situations where effective, inexpensive, and available accommodations were wrongfully refused by employers.

In *EEOC v. Tarsadia Hotels*,[130] a front desk clerk with autism at a Comfort Suites Hotel was denied a reasonable accommodation, disciplined, and ultimately fired, despite having prior successful hotel experience in a similar position.[131] Shortly after starting at Comfort Suites, plaintiff sought a free autism-specific job coach from the state to help him to master the interpersonal aspects of his job.[132] Comfort Suites refused to allow the clerk to use assistance from a job coach and then fired him.[133] As part of a consent decree entered into with the EEOC, Comfort Suites paid the employee $125,000.[134]

In *EEOC v. Direct Optical Inc.*,[135] an optical store paid $53,000 after denying an optician's request to bring her service dog to work to help with her generalized anxiety disorder.[136] The dog alerted the worker to oncoming panic attacks, helped alleviate symptoms during panic attacks, and helped with other tasks, such as retrieving objects and guiding her to exits.[137] The suit alleged that after Direct Optical denied the request, it disciplined and ultimately discharged the employee because of her disability and in retaliation for her request.[138] Once again, disclosure of a

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[129] *St. Alexius Medical Center of Hoffman Estates To Pay $125,000 to Resolve EEOC Disability Suit*, U.S. EEOC (Feb. 12, 2015), https://www.eeoc.gov/eeoc/newsroom/release/2-12-15b.cfm [https://perma.cc/9RNZ-T5CR].

[130] EEOC v. Tarsadia Hotels, JVR No. 1409110039, 2011 WL 12504318 (S.D. Cal. Nov. 3, 2011) (Verdict and Settlement Summary).

[131] *Comfort Suites to Pay $132,500 for Disability Discrimination Against Clerk with Autism, U.S. EEOC (Nov. 7, 2011)*, https://www.eeoc.gov/eeoc/newsroom/release/11-7-11a.cfm [https://perma.cc/9FVQ-J6WV] *("EEOC v. Tarsadia Hotels dba Comfort Suites,* Case No. 10-CV-1921-DMS-BGS.").

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] EEOC v. Direct Optical Inc., JVR No. 1405220081, 2014 WL 2120600 (E.D. Mich. April 14, 2014) (Verdict and Settlement Summary).

[136] *Direct Optical to Pay $53,000 to Settle Disability Discrimination Suit, U.S. EEOC (Apr. 14, 2014)*, https://www.eeoc.gov/eeoc/newsroom/release/4-14-14.cfm [https://perma.cc/MGB6-W5KK].

[137] *Id.*

[138] *Id.* ("The suit further alleges that after Direct Optical denied the request it began disciplining

mental disability, instead of beginning a dialogue about possible accommodations, triggered active mistreatment of a worker with a disability. Against this backdrop, who can blame workers for hesitating to request accommodations?

A final case worthy of mention is *Anderson v. Kaiser Foundation Health Plan of the Northwest.*[139] *The employer, Kaiser,* won the case not because it did not need to accommodate the plaintiff, but because it did not need to give the particular accommodation that the employee requested.[140] This is significant because it illustrates that graduating students cannot assume that they will get the same accommodations in the workforce that they had in school. Employers need only offer a "reasonable accommodation," not the preferred accommodation.

The employee in *Anderson* suffered from anxiety and claimed that she could not work with her co-worker, whose behavior was reportedly erratic and aggressive.[141] To accommodate her anxiety disorder, the employee insisted that she be transferred to a different position at a different location.[142] Her employer denied the request because there were no open positions available and, even if there were, the collective bargaining agreement required open positions to be filled by seniority.[143] The employer did, however, offer her several options that fit within the needs identified by her doctor, such as: assigning someone else to the shift so she would not have to work alone with the co-worker; allowing the employee to alter her shift several days a week so she could avoid direct contact with the co-worker; altering the corporate communication plan to better accommodate the employee's needs; facilitating a meeting between the employees to develop a joint action plan for an improved working relationship; and offering access to the company's employee assistance program to help her manage stress and anxiety.[144] The employee refused all of the options given by her employer and instead filed a lawsuit claiming that her employer violated the ADA by not granting her preferred accommodation.[145] The court sided with the employer without even sending the case to a jury, stating that the employer fulfilled its duty by engaging in the required interactive process and identifying several reasonable options for the employee.[146]

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and ultimately discharged the employee because of her disability and in retaliation for her request.").

[139] *Anderson v. Kaiser Found. Health Plan of the Nw.*, No. 3:15-cv-01389, 2016 U.S. Dist. LEXIS 55800 (D. Or., Apr. 27, 2016).

[140] *Id.* at *16–17 ("The Court concludes that, viewing the evidence in the light most favorable to Anderson and drawing all reasonable inferences in her favor, there is no genuine dispute that requires a trial to resolve. Kaiser is not responsible for the breakdown in the interactive process that occurred after Anderson rejected each offered accommodation and insisted at each step only on a single unreasonable accommodation.").

[141] *Id.* at *3.

[142] *Id.* at *15.

[143] *Id.* at *7.

[144] *Id.* at *14.

[145] *Id.*

[146] *Id.* at *17 ("Kaiser, thus, has satisfied its obligations under the ADA to engage in the interactive process and offer reasonable accommodations.").

Not only are mental disability ADA workplace claims relatively rare, but the cases discussed above illustrate that EEOC active enforcement of the ADA "reasonable accommodation" requirement seems limited to situations where employers refuse the most minimal and non-burdensome accommodations. This is a stark contrast to the student cases, where the OCR insists that universities do all that they can to provide academic adjustments that will permit students with disabilities' full participation in their programs. Why is there such a different approach to student versus worker rights under the ADA? The answer is two-fold. First, there are differences between the emphases of the OCR and EEOC regulations and guidelines, which tip the scales somewhat towards students over universities, and somewhat towards employers over workers. Second, even when applying similar standards, there are very real differences between the costs and impacts of accommodations for universities and for employers, particularly for the sorts of accommodations on which students with mental disabilities have become reliant. As a result of this situation, great progress has been made for students with mental disabilities in secondary and post-secondary education but, as more of these students seek to enter the workforce, a gulf is growing between the world of higher education and the workplace.

This situation begs the question of what the role of higher education is in preparing students for the workplace. After all, it appears that universities and the OCR are doing students a disservice by accustoming them to accommodations that they are less likely to be given when they graduate and enter the workforce, where employers are not expected to accommodate mental disabilities that will disrupt the workplace. Currently, universities can claim that, whatever their views on career preparation, their hands are tied by the OCR regulations. The authors seek to untie those hands by permitting a tiered approach to academic accommodations. A series of iterative steps from accommodations provided at secondary schools to minimal ones by the end of four-year college programs will transform the steep and perilous cliff between university and the workplace into a gentler and less hazardous slope to descend.

IV. PROPOSAL: FASHIONING "STEP"S TO BETTER ACHIEVE THE INCLUSION GOALS OF ALL FEDERAL DISABILITY LAWS

Under current law, in both university and work settings, the concepts of "reasonable accommodation" and "undue hardship" are inextricably interwoven but the application of these two concepts plays out very differently. The OCR defines "reasonable accommodation" within a university as an "appropriate academic adjustment[]" necessary for participation in a school program. While the OCR does acknowledge the "undue hardship" limitation on university accommodation obligations, as a

practical matter, most academic adjustments have minimal cost or impact in a university setting so the OCR will insist that student access outweighs university cost or inconvenience. However, as discussed, these same accommodations may be seen by the EEOC as creating undue hardship for employers. Therefore, simply requiring academic adjustments that provide program access and are not burdensome within a university is a very short-sighted view of that adjustment's "reasonableness." The authors would submit that reasonableness is more than just immediate program access coupled with minimal cost or impact on *others*: instead, reasonableness should also turn on an adjustment's impact—long-term as well as short-term—on the accommodated student's ability to achieve educational goals. In short, reasonableness ought to be tied to long-term effectiveness as well as to short-term effectiveness and cost. To this end, the authors urge the OCR to measure "appropriateness" not only by an adjustment's effectiveness at providing *access* to an academic program, but also in terms of its effectiveness in helping to develop adaptive skills that will support post-graduation success, consistent with the stated goals of both the IDEA and the Rehabilitation Act.[147]

A. A University Education Should Include Preparation for Employment

In this era of unprecedented numbers of Americans attending college[148] and all-time high costs of college education,[149] it is not surprising that forty-seven percent of Americans say that the educational objective of a college education it is to teach work-related skills, while only thirty-nine percent say it is to help students grow personally and intellectually.[150] Indeed, universities themselves, once scornful of "job training" in favor of imparting esoteric knowledge to breed renaissance thinkers,[151]

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[147] *See supra* note 16 and accompanying text.

[148] *Fast Facts: Enrollment*, NAT'L CTR. EDUC. STATISTICS, https://nces.ed.gov/fastfacts/display.asp?id=98 (last visited Apr. 24, 2019) [https://perma.cc/V82V-CJF6] ("Fall enrollment in degree-granting postsecondary institutions increased 23 percent between 1995 and 2005. Between 2005 and 2015, enrollment in degree-granting postsecondary institutions increased 14 percent, from 17.5 million to 20.0 million. The overall increase between 2005 and 2015 reflects an increase of 20 percent between 2005 and 2010.").

[149] *See* Rick Seltzer, *Net Price Keeps Creeping Up*, INSIDE HIGHER ED. (Oct. 25, 2017), https://www.insidehighered.com/news/2017/10/25/tuition-and-fees-still-rising-faster-aid-college-board-report-shows [https://perma.cc/7FRH-45ZN] ("Now, net prices for full-time students at public four-year institutions have increased for eight straight years, for seven straight years for students at public two-year colleges, and for six straight years for those at private nonprofit colleges and universities. So the typical student keeps paying more for college each year.").

[150] Russell Heimlich, *Purpose of College Education*, PEW RESEARCH CTR. (June 2, 2011), http://www.pewresearch.org/fact-tank/2011/06/02/purpose-of-college-education/ [https://perma.cc/5Q8G-DLUF] ("Just under half of the public (47%) says that the main purpose of a college education is to teach work-related skills and knowledge, while 39% say it is to help a student grow personally and intellectually.").

[151] *See generally* Professor S. Alexander, *The Purpose of a University*, 2 POLITICAL QUARTERLY 337, 337 (1931) ("[T]he qualifying words, 'in a liberal spirit,' are not merely not omitted but empha-

have started to embrace their new role.[152] A brief look at a sampling of university mission statements reveals this growing trend.[153] In a similar vein, The Princeton Review's widely read and respected annual college rankings now include a ranking of university career services offices.[154] This shift in mission is consistent with the underlying goals of federal disability education statutes[155] and necessitates a rethinking of the way that universities are accommodating their students with mental disabilities.

Clearly a core purpose or goal of a college education is the acquisition and mastery of a set of knowledge. However, in today's economy and with the ever-higher cost of a university education, the authors submit that part of "educating" a university student should also be to provide the student with the skills necessary to effectively contribute their university-acquired knowledge in the workplace. Starting from this view of what it means to educate a college student, it would seem incumbent upon universities (and perhaps secondary schools) to couple currently acceptable academic adjustments for students with mental disabilities with more affirmative efforts, such as workshops or coaching, to better enable these students to utilize the knowledge that they have acquired in the work environments that they will enter.

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sized."); Claire Kaufman, *The History of Higher Education in the United States*, WORLD WIDE LEARN, https://www.worldwidelearn.com/education-advisor/indepth/history-higher-education.php [https://perma.cc/VZ6B-Y5EJ] ("College education grew more and more relevant to worldly life, as the traditional liberal arts curriculum gave way to science and vocational training.");.

[152] *See* Christopher J. Gearon, *Colleges Take Steps to Prepare Students for Careers*, U.S. NEWS & WORLD REPORT (Sept. 13, 2016), https://www.usnews.com/education/best-colleges/articles/2016-09-13/colleges-take-steps-to-prepare-students-for-careers ("Many liberal arts colleges now are also going all in to help students connect their classroom learning to workplace experiences."); *see also* Paul Fain, *Better Marriage Between College and Job Training*, INSIDE HIGHER ED. (Mar. 22, 2017), https://www.insidehighered.com/news/2017/03/22/ideas-improving-higher-educations-primary-role-work-force-development [https://perma.cc/W9PW-U26D] ("[H]igher education became the preferred system for job training[,] . . . a trend that began in the 1980s and accelerated during the Clinton administration.").

[153] For a sampling of mission statements, see, for example, *Mission Statement and Objectives*, AM. INST. MED. SCI. EDUC., https://www.aimseducation.edu/amp-mission-objectives [https://perma.cc/B8YH-9465] ("The mission of AIMS Education is to offer the highest quality career-focused education to students seeking to improve their lives and those of others by entering the healthcare field."); *Mission Statement*, BLOOMFIELD COLL., http://bloomfield.edu/student-life/career-development/career-development-mission-and-vision [https://perma.cc/KF5T-RK6F] ("The Center for Career Development at Bloomfield College supports and empowers students to be active participants in the career development process."); *Mission and Vision*, MIDWESTERN CAREER COLL., https://mccollege.edu/mission// [https://perma.cc/5B8U-YKPP] ("Provide premier career-focused education to empower students with academic training, technical expertise, and professional support to launch or advance their successful careers."); *Mission Statement*, UNIV. ILL. SPRINGFIELD COLL. BUS. MGMT., https://www.uis.edu/cbam/about/mission/ [https://perma.cc/JY6L-EU5E] ("Our mission is to prepare students for successful business related careers in the public, nonprofit, and private sectors.").

[154] *Best Colleges for Career Services*, PRINCETON REV., https://www.princetonreview.com/college-rankings?rankings=best-career-services [https://perma.cc/6GJD-S6WZ] ("Best Career Services . . . [b]ased on student ratings of their school's career and job placement services.").

[155] *See supra* note 16 and accompanying text.

B. A STEP Approach: "Slowly Teaching Employment Preparation"

To truly accommodate students with mental disabilities in higher education, universities must be allowed to go beyond a student's earlier IEP and to seek ways to move a student towards readiness for the workplace. To this end, OCR regulations should be modified so that they explicitly recognize that: a) accommodations which inadequately prepare a student for post-university life are *neither* appropriate nor reasonable; and b) steadily decreasing accommodations, coupled with coaching or training to acquire skills that will help a student with mental disabilities need fewer traditional accommodations, *can* be considered appropriate. This change would permit colleges to develop and to implement more programs to prepare students with mental disabilities for the workforce without fear of ADA liability from the OCR.

Best practices in special education indicate that students are better served by fostering adaptive skills, in conjunction with necessary adjustments/accommodations.[156] Therefore, the authors propose regulatory approval of university programs that "Slowly Teach Employment Preparation" (STEP). The concept here is to focus on gradual decreases in adjustments/accommodations coupled with expert skill training. One approach might be as follows: allow college freshmen, who are already navigating the cliff from IDEA IEPs and school-initiated needs analyses to self-advocacy, to maintain the same level of adjustment/accommodation that their IEPs provided in high school while requiring these students to participate in an ungraded skills seminar. The goal here would be to begin to reduce the students' reliance on these adjustments/accommodations while still allowing them during the transition year. Such a seminar might include sessions where students practice adaptive skills on current courses and assignments, with the assistance of an instructor. For example, proven techniques[157] that could be taught include:

- Dividing large assignments into several smaller tasks, creating a checklist of intermediate steps, entering interim deadlines for smaller tasks into calendars, and setting elec-

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[156] *See generally* Alia Wong, *Escaping the Disability Trap*, ATLANTIC (June 15, 2016), https://www.theatlantic.com/education/archive/2016/06/escaping-the-disability-trap/487070/ [https://perma.cc/NSH9-F8AK] ("Specialized workforce academies for students with disabilities are growing in popularity[.] Special-education advocates often describe these job-training programs—which often place participants in internships with prospective employers—as the long-awaited solution to the perennial challenge of how to support students with disabilities through graduation and into adulthood.").

[157] For these and a fuller list of possible techniques, see JOB ACCOMMODATION NETWORK, STUDENTS WITH MENTAL HEALTH IMPAIRMENTS 7–8 (2010), *available at* http://www.jan.wvu.edu/media/HiEdStudentsPsych.pdf) [https://perma.cc/C457-G63P] (last updated Mar. 23, 2010) (although listed as "accommodation ideas," most of the suggestions on these pages are actually skills that a student can be trained to develop and to utilize themselves, e.g., creating a checklist, dividing large assignments into several small tasks).

tronic reminders for these deadlines;

- Brainstorming tools to help reduce distraction, such as using a noise canceling headset, using a white noise machine, relocating of a student's chosen workspace to a quiet area of the library, or reducing clutter in the student's desk or work area;
- Creating a system for prioritizing assignments based on difficulty, due date, level of concentration needed, or availability of tutors or professor; or
- Developing a color-coded or other system to organize materials/assignments and reduce anxiety.

Sophomore year, this program might then reduce the traditional adjustments and accommodations by thirty percent while continuing to provide support through weekly one-on-one coaching sessions individualized to each student's particular needs. Adjustments and accommodations could be reduced by another thirty percent each of the junior and senior years. If at any point these reductions seem too severe for a particular student to handle, they could be individually adjusted. By graduation, many of these students could substantially reduce their reliance on the academic adjustments that they had in secondary school and, therefore, be more competitive for jobs.

V. CONCLUSION: ELIMINATE THE UNNECESSARY CLIFF

Businesses increasingly seek not only to comply with the ADA but also to proactively recruit workers with disabilities because it is a socially responsible action.[158] Nonetheless, businesses have a financial duty to their shareholders and are primarily driven by profitability, rather than social responsibility. Therefore, businesses are unlikely to hire or to retain a person whose mental disability creates a liability in the workplace. Businesses are much more likely to hire an applicant with a mental disability who requires minimal accommodation. This, after all, is the very essence of "reasonable accommodation" without "undue hardship." For this reason, the goal of increasing the employment of Americans with mental disabilities needs to be embraced by U.S. schools as well as by U.S. employers to ensure that more Americans with mental disabilities can in fact be reasonably accommodated in the workplace.

The proposal detailed in this paper seeks to enhance both the academic and the legislative conversation about how best to resolve an ap-

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[158] *See, e.g.*, Joyce M. Rosenberg, *More Small Businesses Seek to Expand Opportunities for Disabled Workers*, USA TODAY (June 1, 2018), https://www.usatoday.com/story/money/small-business/2018/06/01/businesses-seek-expand-opportunities-disabled-workers/656481002/ [https://perma.cc/S6ZJ-CTJY] ("Many small business owners are open to hiring or specifically recruit people who have disabilities, sometimes because they want to expand the opportunities for people with talent and skills but who can't find jobs.").

parent conflict between the goals of educational equity and the limitations on employer accommodation requirements. Increased and sustained inclusion of Americans with mental disabilities in mainstream life through a rethinking of educational accommodations is an overdue public policy discussion. Accommodating students with mental disabilities so that they can complete a secondary school and university education is laudable. However, if, upon graduation, these students are not employable, one must question the completeness of their increasingly expensive "education." Beyond attainment of knowledge and mastery of academic skills, isn't education also about preparation for the next stage of life? In any case, the goal of the ADA was to eradicate discrimination—not merely to delay it until after college graduation. Better aligning higher education public policy for students with mental disabilities with public policy for employment of these same individuals promises to be transformative of both the classroom and the boardroom.