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TRANSITIONING STUDENTS WITH DISABILITIES INTO HIGHER EDUCATION

*Christos Kelepouris, J.D., LL.M.**

I. INTRODUCTION

The United States maintains policies that encourage post-secondary education.[1] However, because individuals in the United States do not enjoy a guaranteed right to such an education, there are significant differences between laws governing post-secondary education for disabled students and laws governing primary/secondary education for disabled students. This paper focuses on the daunting transition for disabled students, from secondary school to a post-secondary institution, and the differences of the governing law for disabled students in post-secondary institutions (Section 504 of the Rehabilitation Act and American Disabilities Act) when compared to the governing law in secondary school (Individuals with Disabilities Education Act). The paper concludes with a proposal advocating for changes that if implemented properly will mitigate these difficulties.

II. IDEA AND ITS DIFFERENCES COMPARED TO SECTION 504 AND ADA

The primary difference between disability services obtainable by primary/secondary students and those present

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[1] The purpose of the Higher Education Act of 1965, as amended, is to make higher education a possibility for all eligible students. *See, e.g.,* Higher Education Opportunity Act, 20 U.S.C. § 1051(b) (2008) ("It is the purpose of this subchapter to assist such institutions in equalizing educational opportunity through a program of Federal assistance."); *see also,* 26 U.S.C. § 25A Hope and Lifetime Learning Credits.

for students in post-secondary education stems from the absence of Individuals with Disabilities Education Act (IDEA) in post-secondary education.[2] This absence leaves Section 504 of the Rehabilitation Act (Section 504) and the Americans with Disabilities Act (ADA) as the primary sources of law protecting the educational rights of students with disabilities in post-secondary education. The great significance of IDEA is the guarantee it provides to all students with disabilities—a Free Appropriate Public Education (FAPE).[3] Section 504 and the ADA make no such guarantee. Instead, the focus of educational rights in post-secondary education is not on whether the student is provided a FAPE, but whether the college or university has discriminated against the student because of his/her disability.[4] As a practical matter, this drastically alters the education scheme that students with disabilities may have come to expect and rely upon in their elementary, middle, and high school years.

III. ESTABLISHING A DISABILITY IN POST-SECONDARY INSTITUTIONS

Although colleges are required to provide a disabled student with appropriate academic adjustments if it is reasonable to do so, the student must first establish that he/she has a disability and that he/she is otherwise qualified.[5] Establishing that a student has a disability for purposes of post-secondary education differs from primary/secondary education in two ways. First, unlike primary/secondary schools, colleges have no obligation to seek out and identify students with disabilities.[6]

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[2] *See e.g.,* 20 U.S.C. § 1414(c)(5)(B)(ii) ("The evaluation described in subparagraph (A) shall not be required before the termination of a child's eligibility under this subchapter due to graduation from secondary school with a regular diploma, or due to exceeding the age eligibility for a free appropriate public education under State law.").

[3] 20 U.S.C. § 1400(d)(1)(A) (2005) ("The purposes of this chapter are to ensure 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." (emphasis added)).

[4] *See generally* 42 U.S.C. § 12101 (1990).

[5] Students with Disabilities Preparing for Post-secondary Education: Know Your Rights and Responsibilities. U.S. Department of Education, Office of Civil Rights (September 2007) 2 [hereinafter "Students with Disabilities"].

[6] Students with Disabilities, *supra* note 5, at 4.

Instead, it is the student's responsibility to establish that he/she has a disability.[7] The second difference is that establishing the existence of a disability typically carries a higher burden in post-secondary education than it does in primary/secondary schools.

Students with disabilities at the post-secondary level face an additional challenge in that they no longer can rely solely on an existing Individualized Education Program (IEP), which is a written document that describes the student's disability and the educational program to be provided to him/her.[8] When a student graduates from elementary school and transitions to middle school, or graduates from middle school and transitions to high school, or simply changes schools, the IEP travels with him/her and is usually sufficient evidence for the new school that the student has a learning disability.[9] Such is not the case in college.[10] While the presence of an IEP does prove the existence of a disability, it typically is not, by itself, sufficient to establish that the student is disabled.[11]

Furthermore, there are hurdles that post-secondary students with disabilities may not have had to face when their primary/secondary school IEP was created. Post-secondary institutions are permitted to set reasonable standards as to the documentation required to prove a disability.[12] Commonly, the requisite documentation must include the diagnosis of the current disability, the date of the diagnosis, how the diagnosis was reached, the credentials of the professional, how the disability affects a major life activity, and how the disability affects academic performance.[13] For many students, a new evaluation is necessary to establish the existence of a disability for higher education purposes.[14] However, unlike IDEA, students in college will be required to pay for a new evaluation for this purpose.[15]

Establishing a disability for post-secondary education

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[7] *Id.*

[8] *See* 20 U.S.C. § 1414(d)(1)(A)(i).

[9] *See* 20 U.S.C. § 1414(d)(2)(C)(i)(I)(II).

[10] Students with Disabilities, *supra* note 5, at 4.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

brings to light another hurdle that is not present in the context of IDEA; it is the question "what does it mean for a disability to affect a major life activity?" The applicable regulations clarify that the disability must "substantially limit" a major life activity, but courts are still unclear as to what this exactly means.[16] The majority view that has been gaining support over the past decade is that a person's disability is considered to affect a major life activity if it restricts him/her in comparison to most people.[17]

In *Price v. National Board of Medical Examiners*, the Southern District of West Virginia reiterated a two-step analysis in determining whether a person has a disability under the ADA. First, the person must have an impairment. For certain impairments, such as learning disabilities, the impairment may be medically diagnosed by showing a discrepancy between a person's intellectual capabilities and his/her performance. Second, the person must show that the impairment restricts his/her ability to perform a major life function in comparison to most people.[18]

The court in *Price* used this analysis to determine that three medical students with ADHD did not qualify as disabled because their conditions did not restrict them "in comparison to most people."[19]

The court's "comparison to most people" analytical framework presents some issues. While there seems to be a problem with any court's subjective determination of "most people," the court in *Price* claims in pertinent part that:

> The "comparison to most people" approach has practical advantages because courts are ill-suited for determining whether a particular medical diagnosis is accurate and courts are better able to determine whether a disability limits an individual's ability in comparison to most people. Additionally, this functional approach is manageable and, over time, will promote a uniform and predictable application of the ADA.[20]

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[16] Stephen B. Thomas. College Students and Disability Law. Kent State University Journal of Special Education. Vol. 33, no. 4 (2000) at 251–52 [hereinafter College Students and Disability Law].

[17] *Id.*

[18] Price v. National Bd. of Medical Examiners, 966 F.Supp. 419 (S.D.W.Va. 1997).

[19] *Id.* at 427.

[20] *Id.*

Astonishingly, the court is saying that it would rather use its own subjective judgment as to whether an individual's disability impairs his/her ability to perform a major life function instead of relying on a medical diagnosis by a certified professional and that the subjectivity of courts will be more uniform than professional medical diagnoses. While this functional and pragmatic approach has its advantages for courts and for obtaining consistent results, it is at the expense of individuals with disabilities because it supplements judges' opinions for medically trained and certified professionals.

The Second Circuit Court of Appeals agreed with this interpretation in *Bartlett v. New York State Board of Law Examiners*.[21] In *Barlett*, the court reversed the federal district court's decision holding that an individual's impairment must be viewed in light of the "average person having comparable training, skills, and abilities."[22] In doing so, the court relied on the preamble to the Department of Justice's regulations, which provides, "A person is considered an individual with a disability . . . when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people."[23]

IV. ALTERATIONS OF PROGRAMS OR POLICIES IN POST-SECONDARY INSTITUTIONS

Establishing that a student has a disability under Section 504 of the Rehabilitation Act (Section 504) is not the only obstacle facing students with disabilities in post-secondary education. Because there is no right to a post-secondary education, colleges and other institutions of higher learning still reserve the option to deny services to any individual. In other words, simply because a student can show that he/she possesses a disability under Section 504 does not mean that he/she is entitled to admission to a university or one of its academic programs. Accordingly, a student with a disability must be able to demonstrate that he/she is otherwise qualified for admission.[24] The phrase "otherwise qualified" connotes that

[21] Barlett v. N.Y. State Bd. of Law Exam'rs, 226 F.3d 69 (2nd Cir. 2000).

[22] *Id.* at 80; *see also* Barlett v. N.Y. State Bd. of Law Exam'rs, 970 F.Supp. 1094, 1099 (S.D.N.Y. 1997).

[23] 29 C.F.R. 1630.2(j)(4)(i)-(iii), (2012).

[24] 42 U.S.C. § 12112(b)(5)(A).

the student is capable of meeting the university or program's eligibility requirements, with or without reasonable accommodation.[25]

Furthermore, post-secondary institutions are not required to accommodate students in a way that unreasonably alters a program's fundamental requirements. In *Southeastern Community College v. Davis*, writing for the Supreme Court of the United States, Justice Powell found that Section 504 did not require the defendant college to dispense with its nursing program's need for effective oral communication so as to accommodate a student with a bilateral sensori-neural hearing loss.[26] Relying on 45 C.F.R. § 84.44, Justice Powell wrote that, "it also is reasonably clear that § 84.44(a) does not encompass the kind of curricular changes that would be necessary to accommodate respondent in the nursing program."[27] Accordingly, the Court held that the clinical courses, in which plaintiff was unable to participate without close supervision, were so integral to the program that if they were to be removed, the plaintiff "would not receive even a rough equivalent of the training a nursing program normally gives."[28] The Court held that, "[s]uch a fundamental alteration in the nature of a program is far more than the [reasonable] 'modification[s]' the [statute] or regulation[s] require[d]."[29]

Thus, a significant difference between primary/secondary education for students with disabilities under IDEA and post-secondary education for students with disabilities under Section 504 is that the former requires that all students receive a FAPE, whereas the latter only requires an education where it is reasonable to provide one. The problem with the Court's

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[25] College Students and Disability Law, *supra* note 16, at 253–55.

[26] Southeastern Community College v. Davis, 442 U.S. 397, 407–08 (1979).

[27] 45 C.F.R. § 84.44(a) (stating in relevant part, "Academic requirements. 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. Academic requirements that the recipient can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section.").

[28] SE. Cmty. Coll., 442 U.S. at 410.

[29] *Id.*; *see* Alexander v. Choate, 469 U.S. 287, 300 (1985) (reaffirming the *Southeastern* decision several years later when it held that "while a grantee need not be required to make 'fundamental' or 'substantial modifications' to accommodate the handicapped, it may be required to make 'reasonable' ones.").

holding is that the statue and regulations do not define "reasonable." The Court not only avoids inquiring into the word reasonable, it takes the easy way out by referring to a statute and regulations which give no clarity. The key question which the Court gives no answer to is "reasonable from what prospective?" or "whose definition of reasonableness is being employed?" "The answer to these questions will almost always be that the standard of reasonableness proceeds from the perspective of the 'abled community' in relation to which the disabled are seen as 'special' in a pejorative sense."[30]

By reasonable, S. Fish states

> [m]ost courts assume that everyone who is in the eyes of the 'normal majority' abnormal would prefer to be wholly normal. Even as the courts are extending themselves in an effort to accommodate the disabled they repeat and continue the tradition of thinking in which the disabled are not whole and complete people.[31]

V. POST-SECONDARY ADMISSION FOR STUDENTS WITH DISABILITIES

Traditionally, courts have provided post-secondary institutions with great deference in determining the admission status of students with disabilities.[32] This is sensible because the ultimate determination of whether an education is required often turns on whether an academic adjustment would result in fundamental or substantial modifications to the nature of the academic program and schools are in the best position to make this determination. Judges typically have been hesitant to substitute their own judgment on what is central to the nature of an academic program for the judgment of the educational institution that administers the program. Justice Stevens, writing for the Court in *Regents of University of Michigan v. Ewing*, stated

> [w]hen judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment.

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[30] *Id.*

[31] S. Fish, The Law and Higher Education Class Summary April 13, 2009.

[32] Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985); *see also* Mershon v. St. Louis Univ., 442 F.3d 1069, 1078 (8th Cir. 2006); College Students and Disability Law, *supra* note 16 (citing Se. Cmty. Coll., 442 U.S. 397).

> Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.[33]

It is interesting that courts defer to administrators and faculty of post-secondary institutions when it comes to a matter of a genuinely academic decision, yet courts do not defer to medical professionals when it comes to a genuine question of medicine, in this case, whether an individual is disabled or not.

VI. REASONABLE ACCOMMODATIONS IN POST-SECONDARY INSTITUTIONS

Once a student has demonstrated that he/she possesses a disability that affects a major life activity and that he/she is otherwise qualified to participate in the program, the college is required to provide appropriate academic adjustments so far as it is reasonable to do so.[34] These accommodations, or program modifications, may not result in unfair advantage to the student, significant alteration to the program or activity, lower academic or technical standards, or undue financial hardship. Rather, the adjustments are meant to go only as far as necessary to level the playing field.[35] Typically, such appropriate academic adjustments may include priority registration, adjustments to timelines for completion of degree requirements, substitutions for course requirements, adaptation of specific courses in the way they are delivered, the use of tape recorders in classrooms, and other similar accommodations.[36] As a general matter, accommodations tend to be either those that benefit the college as a whole or at least more than a single student, or those that present a minimal burden on the school to provide. Some adjustments that are

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[33] Regents of Univ. of Mich., 474 U.S. at 225.

[34] 42 U.S.C. § 12112(b)(5)(A), (B); *see also* College Students and Disability Law, *supra* note 16 (citing Tips v. Regents of Tex. Tech Univ., 921 F. Supp. 1515, 1518 (N.D. Tex. 1996)).

[35] D'Amico v. N.Y. State Bd. of Law Exam'rs, 813 F. Supp. 217, 221 (W.D.N.Y. 1993) ("The purpose of the ADA is to place those with disabilities on an equal footing and not to give them an unfair advantage.").

[36] Ind. Dept. of Human Serv. v. Firth, 590 N.E.2d 154 (Ind. Ct. App. 1992) (suggesting auxiliary aids, such as interpreters); 34 C.F.R. § 104.44(b) (including sign language interpreters, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, or the use of a guide dog in campus buildings).

frequently found to be unreasonable and, therefore, not required to be provided by post-secondary institutions include personal health care attendants, readers for personal use or study, or other personal devices or services.[37]

It is important to note that while substitutions for course requirements may be appropriate academic adjustments, waiving a course requirement is less frequently found to be reasonable, as doing so is much more likely to result in a fundamental or substantial change in the program. This is particularly true with regards to out-of-the-classroom requisites. Course requirements such as internships, clinical rotations, fieldwork, and residency placements generally are found to be essential portions of degree programs and are seldom waived for students claiming either physical or mental disabilities.[38]

The majority of requests for accommodation are found by colleges to be within reason, and they are provided without legal action or other controversy.[39] Accordingly, Section 504 largely serves, from a legal standpoint, as an adequate substitute for IDEA. In fact, Section 504 and the ADA seemingly provide many of the same protections and services that can be attained through IDEA.

There is one area, however, in which Section 504 differs fundamentally from IDEA—that area is discipline. When a child with a disability commits an offense that violates school rules and can result in expulsion for longer than ten school days, the IEP team must meet to determine whether the misconduct was a manifestation of the student's disability, or in other words, whether the misconduct resulted from the disability. At the post-secondary level, there is no manifestation determination.

Section 504 provides no protection for students who engage in disruptive behavior, even if the student can show that his/her behavior was the manifestation of his/her disability.[40]

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[37] 34 C.F.R. § 104.44(d)(2).

[38] *See e.g.,* Everett v. Cobb Cnty. Sch. Dist., 138 F.3d 1407 (11th Cir. 1998); Doherty v. S. Coll. of Optometry, 862 F.2d 570 (6th Cir. 1988), *cert. denied* 493 U.S. 810 (1989) (referring to an optometry student with retinitis pigmentosa who was unable to perform certain techniques and use certain instruments necessary to meet clinical proficiency requirements. The court ruled that such requirements were substantial and essential and could not be waived.).

[39] College Students and Disability Law, *supra* note 16.

[40] *See* Perry A. Zirkel, *Suspensions and Expulsions under Section 504: A*

This is a marked difference from IDEA, under which students with disabilities may only be expelled from a school after it is determined that the child's misconduct was not a result of his/her disability.[41] This difference can be particularly difficult for students who are transitioning into a post-secondary institution. A student whose disruptive behavior may have previously been tolerated as a manifestation of his/her disability may now find it necessary to control such behavior to an extent never before required.

VII. TRAVERSING SECTION 504 AND ADA

One of the major issues students with disabilities face is the difficulty in bridging the gap between the IDEA and the ADA/Rehabilitation Act. IDEA's superior protections and the general familiarity of parents and school districts with the statute's regime combine to perpetuate an environment whereby the Section 504 and ADA structure is largely unfamiliar and goes unused. As a result, today's disabled students are likely to encounter Section 504 and the ADA for the first time when they leave high school, whether it is to enter a post-secondary institution or the workforce. The transition from IDEA to Section 504 and the ADA leaves students entering post-secondary institutions without the knowledge necessary to navigate the foreign statutory scheme of Section 504 and ADA in order to receive proper accommodations. Thus, as is often the case with students under IDEA, the issue is not that the student is not legally entitled to particular services, but rather that the student and his/her parents are unaware of what rights they possess and how to exercise them.

Recognizing that the problem lies in a student's inability to traverse Section 504 and the ADA, rather than with the substantive provisions of the statutes themselves, several alternatives present themselves for mitigating the drastic changes faced by students transitioning from IDEA to Section 504 and the ADA. Arguably, students in post-secondary institutions should receive the same or similar procedural assistance to which they are accustomed to in primary/

Comparative Overview, 226 EDUC. L. REP. 9 (2008).

[41] 20 U.S.C. § 1415(k)(1).

secondary education.[42] For example, the burdens of detecting a disability, identifying educational services, and facilitating the procedural stages could be placed on the college as they are placed on primary/secondary schools. This suggestion, however, is both unrealistic and counterproductive. Post-secondary educational institutions, unlike their primary/secondary equals, are far too large and ill-equipped to provide such a high-level of attention to each student. Moreover, the degree of freedom typically granted to students by colleges would make it nearly impossible for the college to satisfy the burdens under this modified statutory scheme. Such changes would also run contrary to our societal notions of neoliberalism and the purpose of post-secondary education, which is to serve as a transition between secondary school and life in the workforce, whereby students gain the life skills they require to live an independent life.

VIII. NEOLIBERALISM AND HIGHER EDUCATION

As a neoliberal state, the U.S. fosters students through their primary/secondary education to prepare them for the competitive marketplace. It seems to be a societal expectation that individuals should be competitive market players upon completion of their mandatory secondary education.[43] If this were not the case then post-secondary education would be mandatory and tuition-free as well. There is a clear neoliberal transition from secondary to post-secondary education, which can be seen by the differences in the laws governing each of them.[44] By transitioning from IDEA to Section 504 and ADA, society is in turn replacing the common good and state concern for public welfare with the entrepreneurial individual aiming to succeed within competitive markets.[45]

It is apparent that universities have moved away from famed philosopher Michael Oakeshott's view of education, which is learning to generate knowledge.[46] Instead, universities

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[42] J. Madaus., Differences in the Regulations for Secondary and Post-Secondary Education. Invention in School and Clinic. Vol. 40, No. 2, pp. 81–87 (November 2004).

[43] *See eg.*, In Re: Deborah Nathan-Crosby v. Lance Crosby 2003 WL 23744502.

[44] S. Fish, The Law and Higher Education Class Summary April 13, 2009.

[45] HELGA LEITNER ET AL., *Contesting Urban Futures: Decentering Neoliberalism, in* CONTESTING NEOLIBERALISM: URBAN FRONTIERS 1 (Helga Leitner et al. eds., 2007).

[46] MICHAEL OAKESHOTT, THE IDEA OF A UNIVERSITY, ACADEMIC QUESTIONS, Volume 17, Issue 1, pp. 22–30 (2004).

look to how they can partner with corporations to create knowledge that has an economic benefit.[47] The transition to post-secondary education is itself neoliberal, because

> students become valued not as learners and individuals who will become a part of the fabric of society, but as little economic engines whose knowledge will fuel an economy and at the same time whose tuition becomes essential for the economic vitality of institutions of higher education in the United States.[48]

So, why should post-secondary institutions that are trying to maximize their revenue wholeheartedly provide accommodations and services at their own cost to individuals who will not be sound "economic engines"? According to U.S. policies they shouldn't, which is why the transition from IDEA to Section 504 and ADA occurs.

IX. A PROPOSED SOLUTION

A realistic option to help students with disabilities transfer into post-secondary institutions is as follows: use the transition plan in the IEP to accustom the student to the procedural nuances of Section 504 and the ADA. This strategy may take two forms. First, the school district could prepare a Section 504 plan alongside the student's IEP. This would familiarize the student with the process of creating a Section 504 plan, inform the student as to what services he/she would be able to receive under Section 504 and the ADA, and caution the student as to any gaps that may exist between the services available under IDEA and those present under Section 504 and the ADA.

Second, the transition plan may include, either on its own or in addition to a Section 504 plan, instructions on what the student will need to know and do to attain disability services in college. Unfortunately, it is often the case that students at the post-secondary level only seek out disability services from the college after the student has experienced difficulties. At this point, it is usually too late to cure the harm that has occurred. Accordingly, it is imperative that disabled students disclose their disability and request proper accommodations prior to the

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[47] ROBERT ZEMSKY, GREGORY R. WEGNER & WILLIAM F. MASSY,.REMAKING THE AMERICAN UNIVERSITY: MARKET-SMART AND MISSION-CENTERED (2005).

[48] SHEILA SLAUGHTER & GARY RHOADES, ACADEMIC CAPITALISM AND THE NEW ECONOMY: MARKETS, STATE, AND HIGHER EDUCATION (2004).

start of classes. As such, the student's high school provides the most ideal venue for teaching disabled students their rights, and the IEP transition plan is the instrument best suited for accustoming the student to the procedural steps necessary to exercise those rights.

X. FINAL WORDS

The transition from high school to college can be a daunting experience for any student and the differences between educational rights available under IDEA and those protected by Section 504 and the ADA can make such a transition even more stressful for students with disabilities. While for most students making the transition the appropriate accommodations attainable under Section 504 and the ADA will serve as an adequate replacement for the services received under IDEA, it is the procedural variations in securing such accommodations that will most likely prevent a student from exercising his/her educational rights. Consequently, students with disabilities must be instructed on such differences so that they may begin their post-secondary educational careers with the appropriate accommodations already in place.