

Practice Makes Perfect: Reasonable Accommodation of Law Students with Disabilities in Clinical Placements

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Clinical legal education provides exceptional benefits to law students.¹ It is one of the best ways that law students can begin to: (1) identify which type of law they wish to practice, (2) make connections in the legal field to foster future employment opportunities, (3) develop mentoring relationships, (4) learn many important skills, and (5) learn professional responsibility and competence. These benefits directly translate into increased opportunities for successful employment upon graduation.²

These benefits are especially relevant to law students with disabilities, because, although there has been some improvement in the employment of lawyers with disabilities over the past few years, they still suffer from significant discrimination.³ Law schools must allow and should

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1. See generally TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, AMER. BAR ASS'N SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 233-38 (1992).

2. See *id.* at 234-35.

3. See Paul Steven Miller, *Coming Up Short: Employment Discrimination Against Little People*, 22 HARV. C.R.-C.L. L. REV. 231 (1987); Amy Virshup, *The Endless Trial of Joe Gibney*, VILLAGE VOICE, Aug. 7, 1990, at 33.

encourage their students with disabilities to participate in clinical legal education to reap its benefits and assist them in developing long-term successful professional lives. For persons with disabilities, the opportunity to experiment with different reasonable accommodations and practice using them can make all the difference in performing the essential functions of a job.

This Article discusses the reasonable accommodation of law students with disabilities in a clinical law environment. Although law review articles and bar journals,⁴ case law,⁵ and administrative regulations⁶ have discussed reasonable accommodations for students with disabilities in the law school setting, none have focused on the unique problems and issues that arise in clinical law placements.

First, this Article provides some background to the issue and outlines the applicable law, specifically, the Americans with Disabilities Act of 1990 ("ADA")⁷ and the Rehabilitation Act of 1973.⁸ This Article also discusses the variety of disabilities, particularly non-physical disabilities, of students protected by those statutes. Second, this Article describes briefly the different varieties of clinical placements, including in-house poverty law clinics and externship placements with both courts and government agencies. This is helpful to decide what might be appropriate reasonable accommodations and how those accommodations might vary given the nature of the clinical placement. Third, this Article suggests an innovative theoretical approach to the decision-making process about reasonable accommodation of law students with disabilities in clinical law placements.

This Article incorporates ideas from the experiences of practicing lawyers, other professional schools, and the development of reasonable accommodation approaches in the employment setting. Previously, reasonable accommodation of law students with disabilities has focused

4. An excellent article that discusses classroom accommodations for law students with disabilities is by Susan Johanne Adams, *Leveling the Floor: Classroom Accommodations for Law Students with Disabilities*, 48 J. LEGAL EDUC. 273 (1988). See also *Reasonable Accommodation Policy; University; ADA Title III; § 504; Learning Disabilities*, 21 MENTAL AND PHYSICAL DISABILITY L. REP. 653 (1997); Laura F. Rothstein, *Disabilities and the Legal Profession in Texas*, 60 TEX. B. J. (1997).

5. See *Guckenberger v. Boston Univ.*, 957 F. Supp. 306, 310 (D. Mass. 1998); see also *Rothman v. Emory Univ.*, 123 F.3d 446, 448 (7th Cir. 1997); *Redlich v. Albany Law Sch. of Union Univ.*, 899 F. Supp. 100, 102 (N.D.N.Y. 1995).

6. See 28 C.F.R. § 39.170-190 (1998). The Office for Civil Rights is the unit of the U.S. Department of Education that hears complaints concerning higher education. See generally 34 C.F.R. §§ 101.21, 101.33 (1998).

7. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 29 U.S.C. § 706, 42 U.S.C. §§ 12101-12213, 47 U.S.C. §§ 152, 221, 611 (1994)) [hereinafter ADA].

8. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701-797(a) (1994)).

on the concept of program access, including whether the student is able to complete the program without fundamentally altering the program to do it. In the clinical law context, this traditional approach is insufficient. This Article suggests that the appropriate approach to reasonable accommodation in clinical law placements must include an analysis patterned on the employment provisions of the ADA.

I. HISTORY AND BACKGROUND

The ADA recognizes that every day a person with a disability faces obstacles that a person without a disability would seldom even notice. Unfortunately, society often attaches a stigma to a person who has a disability. Individuals with disabilities are often perceived as less capable or less intelligent than individuals without disabilities. Accommodation of disabilities is critical to allow people with disabilities the chance to achieve their goals, and also, to dispel the myth that they are inadequate in some way. In an educational setting, the attitudes of the people around them can either help or hinder students with disabilities in reaching their goals. Congress has found that “census data, national polls and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally.”⁹

Significant numbers of law students with disabilities are increasing their requests for accommodations.¹⁰ Students with learning disabilities now constitute “the largest group of identified disabled law students,”¹¹ comprising “6% of all disabled students attending law school.”¹²

Historically, there has been little discussion about students with disabilities in higher education; they simply were not acknowledged as part of the student body. Today, however, it is a recurring issue confronting schools. There are two major reasons for the increased number of accommodation requests for students with disabilities in higher education. The first is that the passage of the ADA greatly

9. 42 U.S.C. § 12101(a)(6) (1994).

10. See Donald Stone, *The Impact of the Americans with Disabilities Act on Legal Education and Academic Modifications for Disabled Law Students: An Empirical Study*, 44 U. KAN. L. REV. 567, 567-69 (1996).

11. M. Kay Runyan & Joseph F. Smith, *Identifying and Accommodating Learning Disabled Law School Students*, 41 J. LEGAL EDUC. 317, 317 (1991).

12. *Id.* at 321.

increased the awareness of people with disabilities about their legal rights. Since the ADA took effect in 1992, undergraduate students have increasingly requested accommodations, and they expect such accommodations to continue in professional schools. The second reason is that these students have attended elementary and high schools since the passage of the Education for All Handicapped Children Act in 1975,¹³ now known as the Individuals with Disabilities Education Act ("IDEA").¹⁴ IDEA applies only to public education at the primary and secondary level, and was enacted because of the failure of state educational systems to meet the educational needs of disabled children.¹⁵ The purpose of IDEA is to:

assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and¹⁶ assure the effectiveness of efforts to educate children with disabilities.

In passing the IDEA, "Congress rejected the assembly line approach to education"¹⁷ and instead, required that "education [be] tailored to the unique needs of each child with a disability."¹⁸ The IDEA provides a free adequate public education only to children with disabilities attending elementary or secondary schools through age twenty-one. Those students with disabilities entering college or graduate school rely on other statutes, specifically the ADA and the Rehabilitation Act, for continuing accommodation.¹⁹ Their experiences with IDEA will

13. Education for All Handicapped Children Act of 1975, Pub. L. No. 91-230, 84 Stat. 175 (codified as amended in scattered sections of 20 U.S.C.).

14. Individuals with Disabilities Education Act of 1990, Pub. L. No. 101-476, 104 Stat. 1141 (codified as amended in scattered sections of 20 U.S.C.) [hereinafter IDEA].

15. See 20 U.S.C.A. § 1400(a) (West Supp. 1998).

16. *Id.* § 1400(c).

17. Alex J. Hurder, *The Individuals With Disabilities Education Act and the Right to Learn*, 24 HUM. RTS., Winter 1997, at 16, 16.

18. *Id.*

19. Additionally, many children who were unable to receive accommodations under the IDEA, because they did not qualify, may find that they can receive them under the ADA. The ADA definition of disability is "far broader than the definitions under IDEA." William D. Goren, *Individuals With Disabilities Education Act: The Interrelationship to the ADA and Preventive Law*, FLA. B. J., July-Aug. 1997, at 76, 77. Under the IDEA, there are specific disabilities defined in the regulations. In contrast, "the ADA defines a disability as any one of the following: 1) a physical or mental impairment that substantially limits one or more of life's major activities; 2) a record of such an impairment; or 3) perception of one as having such an impairment." *Id.* (construing 42 U.S.C. § 12102(2)(A) (1994)). Thus, a student who was denied help because he or she did not qualify for assistance under the IDEA might be granted accommodations under the ADA. See *Board of Educ. v. Rowley*, 458 U.S. 176 (1982).

encourage and assist them in their struggles for accommodations in higher education.

A. *The Rehabilitation Act*

Congress enacted the Rehabilitation Act (Rehab Act) in 1973 and adopted implementing regulations in 1978. The Rehabilitation Act prohibited the federal government, agencies receiving federal funding, and companies with federal contracts from discriminating against persons with disabilities. In the seminal case *Southeastern Community College v. Davis*,²⁰ the U.S. Supreme Court applied the concept of "program access," providing that an otherwise qualified person with a disability is eligible to participate in programs provided by these agencies. However, the Court held that an otherwise qualified person is only one who is able to meet all the program requirements despite the individual's disability.²¹

The Rehabilitation Act laid the groundwork for the passage of the ADA. Cases decided under the Rehabilitation Act are very useful in analyzing specific factual situations under the ADA. All three titles of the ADA addressed in this Article use much of the language developed in and from the Rehabilitation Act.

B. *The Americans with Disabilities Act*

Congress passed the ADA in 1990 and President Bush signed the legislation into law.²² This groundbreaking law applied the concepts of the earlier civil rights struggles of women and people of color to people with disabilities' struggle for civil rights.²³ Although based in large part on the Rehabilitation Act, the ADA went much further in protecting the rights of persons with disabilities to equal access to employment, education, and public accommodations.²⁴

20. 442 U.S. 397, 406-07 (1979).

21. *See id.* at 406.

22. *See ADA, supra* note 7; Statement by President George Bush upon Signing S. 933, *reprinted in* 1990 U.S.C.C.A.N. 601 (July 30, 1990).

23. *See id.*

24. *See* 29 U.S.C. § 794 (1976). The struggle for civil rights for persons with disabilities had gone on for many years. Returning Vietnam War veterans with disabilities were responsible for the first major acts, as they fought for their right to gainful employment. In 1973, Congress passed the Rehabilitation Act, which prohibited discrimination against persons with disabilities by the federal government, institutions

The ADA is composed of five titles. The first three are relevant to this Article and are discussed below.

1. Title I - Employment

Title I focuses on employment and sets forth many of the key concepts for this Article. Congress designed ADA, Title I to prevent employers from discriminating against qualified employees with disabilities. This Title provides, in part, that no covered entity shall discriminate against a qualified individual with a disability because of that disability.²⁵ This provision applies to job application procedures, the advancement or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment.²⁶ A “qualified individual” is:

an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purpose of this [Title], consideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

receiving federal funding, or federal contractors. It took many years for the Congress to pass the supporting regulations, but in 1978, the Rehabilitation Act finally took full effect.

25. See 42 U.S.C. § 12112(a) (1994).

26. See *id.* The ADA defines many of these key words to offer guidance. A “covered entity” means an employer, employment agency, labor organization, or joint labor-management committee.” *Id.* § 12111(2). An “employer” is a “person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person.” *Id.* § 12111(5)(A). However, an “employer” does not include (i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or (ii) a bona fide private membership club (other than a labor organization).” *Id.* § 12111(5)(B).

27. *Id.* § 12111(8). Drug use by employees receives special treatment under the ADA: “For the purposes of this subchapter, the term ‘qualified individual with a disability’ shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.” *Id.* § 12114(a). Nonetheless, qualified individuals who fall into one of the following categories are not excluded from consideration:

- 1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the use of illegal drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
- 2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or
- 3) is erroneously regarded as engaging in such use, but is not engaging in such use;

Id. § 12114(b). Further, employers who adopt or administer reasonable policies or procedures, including drug testing, to ensure that individuals are no longer engaging in

In the employment setting, to receive accommodations for a disability under the ADA, an employee must show that she is a qualified person²⁸ with a disability and that the covered entity subjected her to discrimination because of that disability.²⁹ The courts will allow covered entities to discriminate only if the employee is unable to “perform an essential function of the position and no reasonable accommodation [is] available to enable the individual to perform that function, or the necessary accommodation would impose an undue hardship” on the employer.³⁰

A “reasonable accommodation” may include: (1) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (2) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modifications of equipment or devices, appropriate adjustments or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.³¹

The term “undue hardship” means an action involving “significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth” in the Act.³² To determine whether the entity would face an undue hardship, such that accommodation would not be reasonable, the following factors are considered: (1) the nature and cost of the accommodation needed under the Act; (2) “the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effects on expenses and resources,” or the impact otherwise of such accommodation upon the operation of the facility;³³ (3) “the overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of its

the illegal use of drugs are not in violation of the ADA. *See id.*

28. *See In re Wolfram*, No. 90-TT-16955, 1995 WL 506002, at *6 (Cal. Bar Ct., Aug. 22, 1995). The court cites the “employment” subchapter of the ADA, which defines a “qualified individual” as one who, “with or without reasonable accommodation, can perform the *essential functions* of the employment position that such individual holds or desires.” 42 U.S.C. § 12111(8) (emphasis added).

29. *See Bartlett v. New York State Bd. of Law Exam’rs*, 970 F. Supp. 1094, 1128 (S.D.N.Y. 1997).

30. *Id.* at 1130.

31. *See id.* at 1128-31.

32. 29 C.F.R. § 1630.2(p)(1) (1998).

33. *Id.* § 1630.2(p)(2)

employees, and the number, type and location of its facilities;”³⁴ and, (4) “the type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, the geographical separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.”³⁵

For some professions it is easy to determine the “essential functions” of the job. A running back in football must have the ability to run, a pianist must be able to play the piano, and a truck driver must be able to drive. The regulations use terms such as “essential functions,”³⁶ and “reasonable accommodations”³⁷ that allow the ADA to be applied in a flexible manner. Congress focused the ADA on an individual’s ability to perform the essential job functions, to ensure that people with disabilities are not disqualified because of their inability to perform non-essential or marginal functions of the job.³⁸

The statute itself lays out guidelines for employers to follow. It is important to note that courts will give greater weight to the factors listed in the statute than those factors not listed.³⁹ “[Employers] must now

34. *Id.* § 1630.2(p)(2)(iii).

35. *Id.* § 1630.2(p)(2)(iv).

36. *Id.* § 1630.2(n).

37. *Id.* § 1630.2(o).

38. *See Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 140 (3d Cir. 1998).

39. 29 C.F.R. § 1630.2(n) defines essential functions as:

(1) In general. The term essential functions means the fundamental job duties of the employment positions the individual with a disability holds or desires. The term “essential functions” does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The employer’s judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

29 C.F.R. § 1630(n) (1998).

make job-related decisions on the basis of whether a person does or can perform the essential job functions," with reasonable accommodations.⁴⁰ To determine if a job function is essential under the ADA, employers and courts must study the job and decide if the responsibility or duty is "fundamental to the job—a core, critical, or basic component of the job."⁴¹ However, if the responsibility or duty is incidental to the job, it is considered a "marginal function."⁴² "Whereas an essential function cannot or should not be assigned elsewhere, a marginal function, even though it is desirable to include in the job design, could be made part of another job without causing significant problems."⁴³

Decisions regarding what job functions are essential are critical in determining if the individual with a disability is qualified.⁴⁴ This inquiry initially focuses on whether the employer requires other employees in the position to perform the functions the employer asserts as essential.⁴⁵ If an employer asserts that typing is an essential function, but has never required other employees to type, this is evidence that the function may not be essential.⁴⁶ If the employer requires that the employee perform the allegedly essential function, then "the inquiry will then center around whether removing the function would fundamentally alter that position."⁴⁷ The size of the employer's workforce directly affects the essential function analysis. With a small workforce, reassigning the function might not be reasonable.⁴⁸ As the Equal Employment Opportunity Commission has provided:

A similar situation might occur in a larger work force if the workflow follows a cycle of heavy demand for labor intensive work followed by low demand periods. This type of workflow might also make the performance of each

40. Philip C. Grant, *Essential or Marginal? Job Functions and the Americans With Disabilities Act*, BUS. HORIZONS, Mar.-Apr. 1997, at 71, 71.

41. *Id.*

42. *Id.*

43. *Id.*

44. See EQUAL EMPLOYMENT OPPORTUNITY COMM'N, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT app. at B-19 (1992) [hereinafter EEOC, TECHNICAL ASSISTANCE MANUAL].

45. *See id.*

46. *See id.*

47. *Id.*

48. *See id.*; see also *Treadwell v. Alexander*, 707 F.2d 473, 478 (11th Cir. 1983) (determining that the requested accommodation was unreasonable because it would require hiring additional personnel to perform many of the plaintiff's duties and responsibilities).

function during the peak periods more critical and might limit the employer's flexibility in reorganizing operating procedures.

In determining whether a function is essential, courts must address each case individually. Whether the plaintiff can perform the essential job functions with reasonable accommodations is a mixed question of law and fact, which involves primarily a factual inquiry.⁵⁰

The regulations promulgated pursuant to the ADA give a partial list of the evidence courts should look to in defining essential job functions.⁵¹ Courts have utilized these and other guidelines in determining what is an essential function. Although the employee must prove that she can perform the essential job functions with reasonable accommodations, "much of the information which determines those essential job functions lies uniquely with the employer."⁵² Thus, when an employer disputes an employee's ability to perform the essential job functions, the employer must provide evidence of what those functions are.⁵³ In determining which functions are essential, the Eight Circuit focused on the "consequences of not requiring the [employee] to perform the function," "the work experience of current and former employees," and whether employees in the position are actually required to "perform the functions that the employer asserts are essential."⁵⁴

Originally, most courts focused on job descriptions in which the employer had defined the essential job functions. "In determining the essential functions of a particular position, courts give substantial deference to those functions listed in a written job description prepared by the employer."⁵⁵ The employer is entitled to define the job in terms of essential functions and the qualifications required.⁵⁶ Courts also look to the company's job handbook to determine essential job functions.⁵⁷

However, the courts look beyond job descriptions and employer

49. EEOC, TECHNICAL ASSISTANCE MANUAL, *supra* note 44, at app. B-20; *see also* *Dexler v. Tisch*, 660 F. Supp 1418, 1425-26 (D. Conn. 1987).

50. *See Rascon v. US West Communications, Inc.*, 143 F.3d 1324, 1329-30 (10th Cir. 1998) (stipulating that the issue of whether an employee can perform the essential job functions presents mixed questions of law and fact).

51. *See* 29 C.F.R. §1630.2(n) (1998).

52. *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1113 (8th Cir. 1995).

53. *See id.*

54. *Id.*

55. Lawrence F. Carnevale & Simon R. Malko, *Employers Ask 'May I Have Your Attention Please?': Does ADA Protect Employees Who Cannot Concentrate?*, N.Y. L.J., Feb. 9, 1998, at S6; *see also* ADA, 42 U.S.C. § 12111(8) (1994).

56. *See Webster v. Methodist Occupational Health Ctrs., Inc.*, 141 F.3d 1236, 1238 (7th Cir. 1998).

57. *See Robinson-Scott v. Delta Airlines, Inc.*, 4 F. Supp. 2d 1183, 1188 (N.D. Ga. 1998) (looking through the employee's "In-Flight Service Handbook" to determine whether regular and dependable attendance was essential).

opinions.⁵⁸ Courts look to more than just job descriptions to determine essential job functions,⁵⁹ and one court has stated that job prerequisites are not necessarily essential functions.⁶⁰ For example, once an employee has met the threshold requirements such as a physical entrance exam, she does not need to meet them again. Therefore, such threshold requirements are not essential job functions;⁶¹ essential job functions must be determined on a case by case basis.⁶²

Generally, the courts look to a large number of factors in determining what are the essential functions. In *Deane v. Pocono Medical Centers*,⁶³ the court looked to several sources to determine the essential functions of the job at issue.⁶⁴ The court consulted the Department of Labor's definition and considered both the employer's and employee's thoughts on what functions were essential.⁶⁵ In another case, the court looked to the department's physical standards, medical testimony, the employee's testimony regarding his job experience, and his experience and education.⁶⁶

Once an employer presents evidence that an element of a job is essential, the employee must provide sufficient evidence to rebut the

58. See *Tuck v. HCA Health Servs., Inc.*, 7 F.3d 465, 470 (6th Cir. 1993) (determining that an employer's job description is not dispositive).

59. See Bill Alden, *Panel Reinstates Fireman's Suit Over Disability*, N.Y.L.J., Jul. 3, 1997, at 1, 1.

60. *Valle v. City of Chicago*, 982 F. Supp 560, 566 (N.D. Ill. 1997) (stating that the mere fact that the city purportedly required all of its police officers to run 1.5 miles in fifteen minutes did not automatically elevate the requirement to an essential function).

61. See *id.* at 564-66 (finding that threshold requirements are not essential functions).

62. See *Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 148 (3d Cir. 1998).

63. 142 F.3d 138 (3d Cir. 1998).

64. See *id.* at 147-48.

65. See *id.*

66. See *Doane v. City of Omaha*, 115 F.3d 624, 626-28 (8th Cir. 1997) (determining from these factors whether the loss of vision in one eye prevented a police officer from performing essential job functions); see also *Estate of Mauro v. Borgess Med. Ctr.*, 137 F.3d 398 (6th Cir. 1998) (indicating that the court looked to what employees in training were told; the number of times the employee would have to perform the function; testimony from a task force created to analyze the function; and medical opinions and testimony from the Centers for Disease Control to determine if an employee with HIV who was a surgical technician posed a threat to patients and if having to put his hands inside the body cavity of a surgery patient was an essential job function). But see *Barber v. Nabors Drilling U.S.A., Inc.*, 130 F.3d 702, 708-09 (5th Cir. 1997) (stating the fact that a function is done infrequently does not mean the function is not essential); *Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1527 (11th Cir. 1997) (stating that the time spent on a function is not dispositive because there can be an essential job function that requires little time).

employer's conclusion. If a jury decides that a function is essential, it is more difficult for the employee to get that determination reversed on appeal. The appellate courts apply a deferential standard to the jury's determination of what is an essential job function, because it is largely a question of fact and witness credibility.⁶⁷

The courts have established a number of circumstances under which they have effectively created per se "essential functions." For instance, one essential job function is attending work on a regular basis.⁶⁸ An employee who cannot come to work cannot perform the essential job functions.⁶⁹ "The ADA does not require an employer to accommodate an employee by allowing an indefinite leave of absence."⁷⁰ Punctuality is also an essential job function.⁷¹ The employee who cannot perform the essential job function of arriving at work on time, despite the employer's reasonable accommodations, cannot perform the essential functions.⁷² Additionally, courts have held that cooperating with others in a workplace, completing work on time, being able to deal with the stress inherent in a particular position, and following instructions from a supervisor are all essential job functions.⁷³ Put simply, the essential functions of the job include the fundamental duties of the employment position.

Many cases illustrate the wide range of essential functions, depending on the job involved. In many jobs, poor memory and concentration have

67. See *Ingerson v. Healthsouth Corp.*, 139 F.3d 912 (10th Cir. 1998) (unpublished table decision).

68. See *Jackson v. Veterans Admin.*, 22 F.3d 277, 278 (11th Cir. 1994) (determining that it is an essential job function to be present at a job); *Bazile v. AT&T-Bell Labs., Inc.*, No. Civ. A. 3:96-CV-2652-G, 1997 WL 600702, at *3 (N.D. Tex. Sept. 19, 1997) (determining that an employee who does not come to work cannot perform the essential job functions).

69. See *Nowak v. Saint Rita High Sch.*, 142 F.3d 999, 1001-04 (7th Cir. 1998) (ruling that a teacher did not qualify under the ADA where he missed 18 months of work and never informed his employer that he had any intention to return, even though he had a quadruple bypass and suffered from a severe infection).

70. *Id.* at 1004.

71. See *id.*

72. See *Hollestelle v. Metropolitan Wash. Airports Auth.*, 145 F.3d 1324 (4th Cir. 1998) (unpublished table decision) (stating that an employee who was repeatedly late, despite having his starting time set back two times and being given a fifteen minute window for arrival, could not perform the essential job functions).

73. See *Pesterfield v. Tenn. Valley Auth.*, 941 F.2d 437, 442 (6th Cir. 1991) (stating that the ability to get along with supervisors and co-workers is an essential job function); *Mancini v. General Elec. Co.*, 820 F. Supp 141, 147 (D. Vt. 1993) (indicating that the ability to follow a supervisor's orders is an essential job function of any position); *Pickard v. Widnall*, No. C-3-94-40, 1994 WL 851282, at *9 (S.D. Ohio Dec. 15, 1994) (stating that emotional and mental stability is an essential function for military positions); *Myers v. Hose*, 50 F.3d 278, 282 (4th Cir. 1995) (ruling that it is a matter of law that insulin dependent bus drivers cannot perform the essential job function of being a bus driver).

rendered employees incapable of performing the essential job functions.⁷⁴ In other cases, the inability of the employee to perform the essential job function of rendering safe medical care disqualified her under the ADA.⁷⁵ An essential function of some positions is the ability to interact with customers.⁷⁶ Certain jobs require uninterrupted vigilance for discrete time-periods.⁷⁷ Other occupations, such as teachers, coaches and guidance counselors require the employee to be a role model for

74. See generally *Webster v. Methodist Occupational Health Ctrs.*, 141 F.3d 1236, 1238 (7th Cir. 1998) (stating that the plaintiff nurse was unable to perform the essential job function of administering medications after a stroke left her with memory loss and a low attention span); see also *EEOC v. Amego, Inc.*, 110 F.3d 135, 144 (1st Cir. 1997). In *Amego*, the plaintiff was a nurse whose job included administering medications and filling out logs. Her disability made it difficult for her to do both of these functions. The appellate court ruled that the district court did not err in considering the risk to others in the essential job function determination, when the risk is expressly associated with the performance of the essential job function. When the essential functions necessarily implicate the safety of others, the plaintiff must demonstrate that she can perform those functions in a manner that does not endanger others. See *id.* In *Turco v. Hoescht Celanese Corp.*, 101 F.3d 1090, 1091 (5th Cir. 1996), the plaintiff had diabetes. When his blood sugar got too high, he was unable to concentrate and occasionally could not even remember his own name. In one such circumstance, he mixed highly flammable organic material with the emergency water for extinguishing fires. The court ruled that he was unable to perform the essential job functions because of this loss of concentration. See *id.* In *Cleveland v. Policy Management Systems Corp.*, 120 F.3d 513, 514 (5th Cir. 1997), the plaintiff, who had aphasia, a condition that affects the concentration, memory and language functions, such as speaking, reading and spelling was found unable to perform the essential job functions. See *id.* Finally, in *Burke v. Virginia*, 114 F.3d 1175 (4th Cir. 1997) (unpublished table decision), the plaintiff was training to be a correctional officer. He had dyslexia, attention deficit hyperactivity disorder, developmental expressive disorder, and repetitive language disorder. He was unable to read, respond to questions effectively, retain aurally received information, and had difficulty in following instructions, which rendered him unable to perform the essential functions of this job. See No. 96-1709, 1997 WL 303349, at *1-2 (4th Cir. June 6, 1997) (unpublished disposition).

75. See generally *Webster*, 141 F.3d at 1238.

76. See generally *Taylor v. Food World, Inc.*, 133 F.3d 1419, 1421 (11th Cir. 1998). The plaintiff, who had autism, worked as a sales clerk at a grocery store. Among his symptoms were echolia—constant repetitive speech—inappropriate comments, and asking personal questions of strangers. Some customers complained about him, thinking he was under the influence of drugs. The appellate court remanded the case to determine if it was an essential job function not to offend customers, and if it was reasonable to accommodate him with extra structure, supervision and routine. See *id.*

77. See *Martinson v. Kinney Shoe Corp.*, 104 F.3d 683, 686-87 (4th Cir. 1997) (stating that store security was an essential job function for a store-front sales representative, and plaintiff, who had epilepsy, was unable to perform this function because his seizures rendered him unconscious for approximately ten minutes, which prevented him from monitoring the store).

others.⁷⁸ In some jobs, driving is an essential function.⁷⁹

The determination of essential functions is crucial in the decision-making process about reasonable accommodation of law students with disabilities. However, before the Article applies this concept, it must examine the two remaining ADA sections. The next section, Title II, is extremely important, because it is the basis for a significant number of cases concerning reasonable accommodation in higher education.

2. Title II - Public Entities

ADA, Title II addresses state and local entities and their responsibility to comply with the ADA's nondiscrimination standards. Both courts and academic institutions traditionally employ Title II when determining whether a student with a disability should be given an academic accommodation.⁸⁰ Title II states that a public entity may not deny a qualified individual participation in any of its services, programs, or activities on the basis of that person's disability.⁸¹ Title II defines disability in a manner similar to the Title I definition.⁸²

A "qualified" individual with a disability is an individual, who has a disability, but is still eligible to either receive services or participate in the programs provided by the public entities. These individuals are "qualified" even if special provisions must be made by the public entity

78. See *Maddox v. University of Tenn.*, 62 F.3d 843, 845 (6th Cir. 1995). The court determined that the essential functions of college football coaching position were to serve as a role model and act as a counselor. Thus, the ADA did not protect a football coach with alcoholism, who was arrested for driving under the influence, because he could not serve as either a role model or counselor. See *id.*

79. See *Myers v. Hose*, 50 F.3d 278, 281-282 (4th Cir. 1995). Plaintiff bus driver suffered from diabetes and phlebitis of the legs. He was unable to perform the essential functions required of a bus driver. The bus driver's essential function is to operate his motor vehicle in a timely, responsible fashion. The court indicated that it is essential that a driver perform these duties in a way that does not threaten the safety of his passengers or other motorists. See *id.* See also *Daugherty v. City of El Paso*, 56 F.3d 695, 677 (5th Cir. 1995) (stating plaintiff was not able to perform the essential functions of a city bus driver due to his diagnosis as an insulin-dependent diabetic).

80. See 28 C.F.R. §§ 35.101-35.102 (1998). Subpart B is not germane to this discussion because it only applies to public transportation services.

81. See 42 U.S.C. § 12132 (1994). This section provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." *Id.*

82. "Disability," as used here, means either a physical or mental impairment, which substantially limits at least one major life activity of that individual. See 29 C.F.R. § 1630(g)(1) (1998). The terms "physical and mental impairment" cover almost any type of debilitating physiological or psychological disorder. See *id.* § 1630(h). The definition of "life activity" encompasses the everyday functions of most individuals. It includes physical movement and functioning of the body, the function of the senses, learning, and working. See *id.* § 1630(i). See generally 42 U.S.C. § 12101 (1994).

to assist them in meeting the requirements for participation. They may require either physical modifications to the location of the public entity or other auxiliary aids.⁸³ Auxiliary aids include such things as note-takers, telecommunication devices, and Braille materials. Title II expands the Rehab act definition of “qualified individual” by explicitly including the provision of reasonable accommodation in determining whether a person with a disability can meet program requirements.

3. *Title III - Private Entities*

Title III prohibits private entities that provide public accommodations from discriminating against individuals with disabilities.⁸⁴ Title III

83. See 42 U.S.C. § 12131(2) (1994). This section defines a “Qualified individual with a disability” as:

[A]n individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Id.

84. 42 U.S.C. § 12181(7) (1994). This section declares that a private entity provides public accommodations if it affects commerce and falls within one of the following categories:

- (A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
- (B) a restaurant, bar, or other establishment serving food or drink;
- (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
- (D) an auditorium, convention center, lecture hall, or other place of public gathering;
- (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
- (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
- (G) a terminal, depot, or other station used for specified public transportation;
- (H) a museum, library, gallery, or other place of public display or collection;
- (I) a park, zoo, amusement park, or other place of recreation;
- (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
- (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
- (L) a gymnasium, health spa, bowling alley, golf course, or other place of

provides that:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person [or private entity] who owns, leases (or leases to), or operates a place of public accommodation.

With respect to access to services, ADA Title III provides three mandates. First, it prohibits private entities from discriminating on the basis of disability in places of public accommodation. Second, it requires that all newly constructed and altered places of public accommodation and commercial facilities be designed and constructed in a manner such that they are readily accessible to and usable by persons with disabilities. Third, it orders that all examinations and courses offered with respect to licensing and certification for professional and trade purposes be accessible to people with

exercise or recreation.

Id. See also 42 U.S.C. § 12182(b)(2)(A) (1994). This section provides that discrimination includes:

(A) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;

(B) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;

(C) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;

(D) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable; and

(E) where an entity can demonstrate that the removal of a barrier under clause

(F) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable.

Id.

85. 42 U.S.C. § 12182(a) (1994).

disabilities.⁸⁶

To accommodate people with disabilities, private entities must “make ‘reasonable modifications’ in their practices, policies or procedures, or to provide ‘auxiliary aids and services’ for persons with disabilities, unless such modifications would either ‘fundamentally alter’ the nature of the goods, services, facilities or other benefits offered or would result in an ‘undue burden.’”⁸⁷ A place of public accommodation cannot require that individuals with disabilities pay for any modifications made.⁸⁸ The purpose of Title III is to provide people with disabilities the opportunity to achieve the same results as those achieved by people without disabilities.⁸⁹ Title III applies to private law offices and legal services offices. In an externship placement, the private entity would be liable under Title III and the law school would be liable under Title II and the Rehab Act.

II. DISABILITIES DEFINED AND EXPLAINED

As discussed previously, the ADA and the Rehab Act protect persons with many types of disabilities. This Article, however, focuses primarily on the disabilities that are less familiar to the public-at-large. Some interesting examples of people to whom disability status and protection have been extended are a student with alcoholism,⁹⁰ a person with obsessive compulsive disorder (OCD),⁹¹ a person who is morbidly

86. *See id.*

87. *Id.* As used here, auxiliary aids and services may include, for example, qualified interpreters or readers for hearing-impaired or visually-impaired persons, the acquisition or modification of equipment or devices, or other similar services and actions. The private entity may choose which auxiliary aid or service to provide to the individual as long as it is effective. An “undue burden” is a modification that is considerably difficult or costly.

88. *See id.*

89. *See id.* For example, a restaurant need not provide Braille menus for patrons with visual impairments if it provides a waiter or other employee to read the menu.

90. *See generally* Anderson v. University of Wis., 841 F.2d 737 (7th Cir. 1988). In this case, a black student with alcoholism sued a university alleging that he had been discriminated against on the basis of race and disability. The court held that he had not demonstrated any discrimination based on race but that he had been discriminated against on the basis of his disability. Since the law school generally readmitted students whose problems had been overcome, the fact that he was not readmitted despite his contention that he was recovering indicated discrimination. *See id.*

91. *See* Fields v. Lyng, 705 F. Supp. 1134 (D. Md. 1988). An employee who had obsessive compulsive disorder, which manifested itself in kleptomania, had been reasonably accommodated under the law. The court held that, while the government was obliged to “reasonably accommodate” his disability, since it had done this to the best of

obese,⁹² as well as persons who are compulsive gamblers⁹³ or addicted to narcotics.⁹⁴ On the other hand, courts have not granted handicap status to people with a fear of heights⁹⁵ or a person with a severe sensitivity to insect bites.⁹⁶

The ADA defines a “disability” as an impairment that substantially limits one or more of the major life activities of an individual. The ADA also protects individuals if they are discriminated against on the basis of the perception they have a disability.⁹⁷ “[H]istorically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such . . . discrimination against individuals with disabilities continues to be a serious and pervasive social problem.”⁹⁸

A disability can be either physical or emotional. Generally, the ADA defines a disability as: “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”⁹⁹ Physical disabilities include mobility impairments, hearing impairments, speech impairments and visual impairments.¹⁰⁰ Mental disabilities and learning disabilities may be more difficult to conceptualize, are often overlooked and require more creativity and thoughtfulness to accommodate.¹⁰¹

its abilities and the employee was still unable to perform, he was not an otherwise qualified individual. *See id.*

92. *See Cook v. Rhode Island*, 10 F.3d 17 (1st Cir. 1993) (holding that a condition of morbid obesity could constitute a handicap that requires reasonable accommodation because the employee was able to perform the essential functions of her job, and, therefore, the fact that the supervisor would not hire her because of her weight, in spite of her superlative work record, constituted discrimination).

93. *See Rezza v. United States Dept. of Justice*, 698 F. Supp. 586, 587 (E.D. Pa. 1988) (extending disability protection to plaintiff who had a compulsive gambling problem).

94. *See Nisperos v. Buck*, 720 F. Supp. 1424 (N.D. Cal. 1989) (extending protection to a government attorney who was a cocaine addict).

95. *See Forrisi v. Bowen*, 794 F.2d 931, 932 (4th Cir. 1986) (holding that an employee with acrophobia was not a “handicapped individual” because the employee admitted that the condition did not interfere with a major life activity).

96. *See James v. Runyon*, Civ. A. No. 92-2262, 1998 WL 382311 (E.D. Pa. Dec. 9, 1992), *aff’d*, 6 F.3d 779 (3d Cir. 1993) (unpublished table decision). *See generally* Robert W. Edwards, Note, *The Rights of Students with Learning Disabilities and the Responsibilities of Institutions of Higher Education Under the Americans with Disabilities Act*, 2 J.L. & POL’Y 213, 218-19 (1994) (discussing the cases cited *supra* notes 90-95).

97. *See Edwards*, *supra* note 96, at 216; *see also* 42 U.S.C. § 12102(2) (1994).

98. 42 U.S.C. § 12101(a)(2) (1990).

99. *Id.* §§ 12102(2)(A)-(C) (1994).

100. *See JOHN W. PARRY ET AL., MENTAL DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT 49* (1997).

101. *See Claire E. McCusker, The Americans with Disabilities Act: Its Potential for Expanding the Scope of Reasonable Academic Accommodations*, 21 J.C. & U.L. 619, 621-22 (1995). For example, a student who uses a wheelchair will need handicap

The ADA defines a “mental” impairment as “[a]ny mental or psychological disorder, such as . . . emotional or mental illness.”¹⁰² The term “learning disability” is used to refer to a discrepancy in behavior or skills that is not caused by vision, hearing or motor impairments.¹⁰³ The IDEA, also, is helpful here as it defines “learning disabilities” as: “disorder[s] in one or more of the basic psychological processes involved in understanding or in using language, spoken or written Such disorders include such conditions as perceptual impairments, brain injury, minimal brain dysfunction, dyslexia and developmental aphasia.”¹⁰⁴ Currently, 1.9 million children in the United States have been diagnosed with learning disabilities.¹⁰⁵

A “mental” disability can be described as a “group of impairments that affect mental, developmental or cognitive functioning.”¹⁰⁶ The ADA includes major depression, bipolar disorder, anxiety disorders, schizophrenia and personality disorders as types of mental or emotional impairments which are classified as disabilities. This category includes mental illness, autism, mental retardation and certain other developmental disabilities, cognitive impairments, alcoholism and drug addiction. A diagnosis alone does not equal a limitation that must be accommodated. It is measured by the duration, nature and severity of the disorder.¹⁰⁷

“Mental illness” or “emotional disturbances” are defined as “significant disorders of the mental processes.”¹⁰⁸ Indications of these can be certain behaviors such as delusions, hallucinations, mood

accessible ramps whereas the needs of a person with a learning disability will not be so apparent. *See id.* at 622.

102. 29 C.F.R. § 1630.2(h)(2) (1997).

103. *See* 20 U.S.C. § 1401(a)(15) (1994) (outlining the criteria for certain learning disabilities).

104. 20 U.S.C. § 1401(a)(15) (1988); *see also* Edwards, *supra* note 96, at 220 (stating that courts have held that mental disabilities are within the spectrum of disabilities covered by the ADA).

105. *See* JOHN PARRY, MENTAL DISABILITY LAW: A PRIMER 8 (5th ed. 1995) [hereinafter PARRY, PRIMER].

106. JOHN PARRY, REGULATION, LITIGATION AND DISPUTE RESOLUTION UNDER THE AMERICANS WITH DISABILITIES ACT: A PRACTITIONERS GUIDE TO IMPLEMENTATION app. at 160. (2d. ed. 1996) [hereinafter PARRY, PRACTITIONERS GUIDE].

107. *See* PARRY, PRIMER, *supra* note 105, at 22; *see also* Mackie v. Runyon, 804 F. Supp. 1508, 1510-11 (M.D. Fla. 1992) (focusing on the elements of the disability that made it a substantial limitation; a disability is not covered if it is under control or transitory or if it does not impose a substantial limitation on life’s activities, even if the disability consists of mental retardation, schizophrenia and depression).

108. PARRY, PRIMER, *supra* note 105, at 9.

disturbances and impairments in social and vocational functioning and in self-care.¹⁰⁹ Bipolar disorder/manic depression, clinical depression, schizophrenia, and anxiety disorders exemplify mental disorders.¹¹⁰ As a group, “disordered or distracted thinking, hallucinations and mood or emotional disturbances” typically characterize these disorders.¹¹¹ In general, mental illnesses may make it difficult for people to interact in society. A number of these illnesses and the difficulties they create are discussed below.¹¹²

Individuals with schizophrenia typically may experience “delusions, hallucinations, disorganized speech, [and] grossly disorganized or catatonic behavior.”¹¹³ A person with schizophrenia also has “a range of cognitive and emotional dysfunctions that include perception, inferential thinking, language, communication, [and] behavioral monitoring.”¹¹⁴

A severely depressed person may experience changes in physical appearance, decreased energy, feelings of worthlessness and guilt, disturbance of sleep patterns, difficulty concentrating or thinking, loss of interest in activities, and thoughts of death or suicide.¹¹⁵ The Diagnostic and Statistical Manual (“DSM IV”) describes a “major depressive disorder” as “at least 2 weeks of depressed mood or loss of interest accompanied by at least four additional symptoms of depression.”¹¹⁶ Additional depression symptoms may include severe increases or decreases in appetite, fluctuation in weight, feelings of hopelessness or worthlessness, and thoughts of death or suicide.¹¹⁷

109. *See id.*

110. *See* KRISTI BLEYER ET AL., INTO THE JURY BOX: A DISABILITY ACCOMMODATION GUIDE FOR STATE COURTS 17 (1994).

111. *Id.*

112. *See* PARRY, PRIMER, *supra* note 105, at 4. People with mental illnesses may experience difficulties in one or more of the following areas:

- (A) maintaining concentration, particularly for long periods of time;
- (B) maintaining stamina during long waiting periods;
- (C) screening out external stimuli, particularly in crowded public areas;
- (D) managing time pressure and deadlines;
- (E) initiating contact with other people;
- (F) focusing on multiple tasks simultaneously;
- (G) dealing with spontaneous situations and unexpected obstacles;
- (H) maintaining orientation in unfamiliar surroundings;
- (I) reading, especially under time pressure;
- (J) making decisions under time pressure or stress.

Id.

113. AMERICAN PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 273 (4th ed. 1994) [hereinafter DSM IV] (this manual is widely used to diagnose and categorize mental disabilities).

114. *Id.* at 274.

115. *See* PARRY, PRACTITIONERS GUIDE, *supra* note 106, at app. 161.

116. DSM IV, *supra* note 113, at 317.

117. *See id.* at 320; *see also* CATHERINE CARRIGAN, HEALING DEPRESSION 7 (1997). In this book, the author describes her battle with depression:

A person with bipolar disorder/manic depression experiences dramatic mood swings from extremely depressed to “manic” episodes, which are characterized by feelings of extreme happiness and elevated feelings of self-worth, hyperactivity, insomnia, and risk-taking behavior.¹¹⁸ People experiencing a manic episode experience a mixture of euphoria and dysphoria. Their mood will often change from mere irritability to anger and hostility. They may experience disorganized thinking and have grandiose and paranoid feelings that may become delusional.¹¹⁹

There are several types of anxiety disorders. One example of an anxiety disorder is panic attacks, which are sudden onsets of extremely fearful feelings of doom, shortness of breath and a fear of loss of control. Other symptoms that may accompany panic attacks are heart palpitations, a feeling of choking, dizziness, unsteadiness, and/or numbness.¹²⁰ Other types of anxiety disorders are phobias, which can be specific or social and are characterized by a fear of objects or situations such as agoraphobia, which manifests itself in tremendous anxiety about or avoidance of situations or places.¹²¹ Also included in the anxiety disorder category is posttraumatic stress disorder, which is “characterized by the reexperiencing of an extremely traumatic event accompanied by symptoms of increased arousal and by avoidance of stimuli associated with the trauma,” and generalized anxiety disorders, which are “characterized by at least 6 months of persistent and excessive anxiety.”¹²²

Obsessive Compulsive Disorder (“OCD”) is a type of anxiety disorder that is characterized by obsessions or compulsions that recur to the extent that they occupy more than one hour a day and/or cause distress or impairment in functioning.¹²³ “Obsessions” are persistent ideas,

Once at college I remember bursting into tears in the middle of a restaurant where I was having lunch with my two best friends in the whole world. . . . For some reason, the more my friends talked about my brilliant future, the more terrified I became. Emotion flooded through my body so violently that I could not eat, could not think, could not stop sobbing I did not know how I could live through the next day, let alone years to come.

- Id.*
118. See PARRY, PRACTITIONERS GUIDE, *supra* note 106, at app. 161.
119. See FREDRICK K. GOODWIN & KAY REDFIELD JAMISON, MANIC-DEPRESSIVE ILLNESS 78 (1990).
120. See DSM IV, *supra* note 113, at 393.
121. See *id.*
122. *Id.*
123. See *id.* at 419.

thoughts or impulses that cause much anxiety or distress. According to the DSM IV, the most common obsessions are with: (1) contamination and repeated doubts (worrying if appliances have been unplugged after leaving the house or that a door was left unlocked), and (2) a need to have belongings in a particular order (experiencing severe distress when belongings are asymmetrical or out of place).¹²⁴ “Compulsions” are behaviors that an individual repeats continuously in an attempt to reduce anxiety or distress. Examples of compulsions are the fear of contamination resulting in excessive hand washing (so much so that hands become raw), and safety concerns, which may lead to continuous checking behavior to make certain that doors and windows are locked. For an OCD diagnosis, the obsessive-compulsive behavior must be time consuming (more than one hour per day) and must cause significant interference with a person’s life.¹²⁵

Developmental disabilities include mental, physical and cognitive impairments that begin in childhood or early adulthood.¹²⁶ This category also includes epilepsy, autism, and cognitive communication disorders, including learning disabilities, alcohol, and substance abuse.¹²⁷

Epilepsy is caused by abnormal electrical impulses in the brain that result in seizures. The causes of these electrical impulses are unknown, although sometimes they can be traced to head trauma, illness and other medical factors. Seizures may affect a person’s cognitive abilities and the ability to control their body, but medication can be extremely helpful.¹²⁸

Autism severely impairs a person’s ability to communicate and interact with those around them. One characteristic common to autism is repetitive behavior or motions.¹²⁹ People with autism generally have difficulty developing social, physical, and language skills. They also react and relate to stimuli in unusual ways.¹³⁰ Many autistic children are cognitively impaired, but some have above average abilities such as the ability to multiply long lists of numbers in seconds.¹³¹

Cognitive communication disorders distort an individual’s ability to

124. *See id.*

125. *See id.* at 418-19.

126. *See* PARRY, PRIMER, *supra* note 105, at 5. Another approach was later adopted which takes into account the disorder’s severity, its onset before age 22, and whether it will continue throughout a person’s life. *See id.*

127. *See* Alfreda A. Sellers Diamond, *L.D. Law: The Learning Disabled Law Student as a Part of a Diverse Law School Environment*, 22 S.U. L. REV. 69, 71 n.5 (1994).

128. *See* PARRY ET AL., *supra* note 100, at app. 155.

129. *See* DSM IV, *supra* note 113, at 66-67.

130. *See id.*

131. *See* PARRY, PRACTITIONERS GUIDE, *supra* note 106, at app. 162.

receive and impart information. One category of cognitive communication disorders, learning disabilities, involve "difficulties in the acquisition and use of listening, speaking, reading, writing, reasoning or mathematical abilities."¹³² The DSM IV refers to these as learning disorders and describes them as occurring "when the individual's achievement on . . . tests in reading, mathematics, or [even] written expression is substantially below that expected for age, schooling and level of intelligence."¹³³

Beginning in the 1960's, the term learning disability was adopted to describe these types of disorders, which affect a person's ability to listen, read, reason, speak, write and use mathematical skills.¹³⁴ Previously, a person who exhibited characteristics of a learning disability was described as suffering from "The Awkward Child Syndrome," "Symbolic Confusion," "Minimal Brain Dysfunction," "Minimal Brain Damage," or "Hyperkinetic Child Syndrome."¹³⁵ These labels were recently replaced by the term "learning disability."¹³⁶ According to the National Joint Committee on Learning Disabilities, a person who has a learning disability may experience some of these characteristics: 1) disorganization, 2) inattention, 3) poor memory, 4) distractibility, 5) impulsivity, 6) hyperactivity, 7) poor self-concept, and 8) poor socialization.¹³⁷

Dyslexia, dysgraphia and dyscalcula are common learning disabilities.¹³⁸ Learning disabilities are diagnosed when a large discrepancy exists between a person's performance on a standardized test and the expected score for their age group and educational level.¹³⁹ The DSM IV refers to dysgraphia as a difficulty in expressing written language and often having illegible handwriting.¹⁴⁰ The condition entails more than simply spelling errors, but is characterized by repeated and constant misspellings, almost unintelligible handwriting, and many grammatical and structural errors, indicating tremendous difficulty with

132. PARRY, PRIMER, *supra* note 105, at 8.

133. DSM IV, *supra* note 113, at 46.

134. *See* Diamond, *supra* note 127, at 71 n.5.

135. *Id.* at 73 n.12.

136. *See generally* Susan Johanne Adams, *Because They're Otherwise Qualified: Accommodating Learning Disabled Student Writers*, 46 J. LEGAL EDUC. 189 (1996).

137. *See* Diamond, *supra* note 127, at 71 n.5.

138. *See* DSM IV, *supra* note 113, at 46.

139. *See id.*

140. *See id.*

writing.

Individuals with dyscalculia experience difficulty in performing mathematical calculations. The DSM IV refers to this to describe people who have trouble with mathematical calculations and reasoning.¹⁴¹ It affects linguistic skills in relation to math perceptual skills. It is surprising to note that Albert Einstein had dyscalcula.

Persons with dyslexia, according to the DSM IV, experience an impaired ability to read or understand what they read either aloud or silently.¹⁴² Different types of dyslexia exist; for example, mirror readers reverse words while other types of dyslexia may cause individuals to anticipate letters or sounds incorrectly.¹⁴³ Individuals with dyslexia have difficulty in processing written and oral language and in sequencing and organizing information.¹⁴⁴ As a consequence, they will often experience reduced comprehension of subject matter and reverse letters.¹⁴⁵

Related to Learning Disabilities are other disorders that affect the ability to learn effectively, such as ADD and ADHD.¹⁴⁶ These disabilities affect a person's ability to learn and to retain knowledge and often manifest in underachievement.¹⁴⁷ "The essential feature of Attention Deficit/Hyperactivity Disorder is a persistent pattern of inattention and/or hyperactivity-impulsivity that is more frequent and severe than is typically observed in individuals at a comparable level of development . . ."¹⁴⁸ People with ADD may be unorganized and inattentive. They may not pay close attention to details resulting in many seemingly careless mistakes. Some people with ADD/ADHD frequently shift from one uncompleted task to another and have difficulty following instructions or organizing large amounts of information. People with ADD/ADHD may forget appointments, are chronically late, and in social situations make strange shifts in conversation.¹⁴⁹ These are only a few of the factors that may characterize

141. *See id.*

142. *See id.*

143. *See* EDWARD M. HALLOWELL & JOHN J. RATEY, *DRIVEN TO DISTRACTION: RECOGNIZING AND COPING WITH ATTENTION DEFICIT DISORDER FROM CHILDHOOD THROUGH ADULTHOOD* 164 (1995).

144. *See* BRUCE F. PENNINGTON, *DIAGNOSING LEARNING DISORDERS: A NEUROPSYCHOLOGICAL FRAMEWORK* 80 (1991).

145. *See* DSM IV, *supra* note 113, at 46-49.

146. *See id.* at 47.

147. *See* AMERICAN PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 46 (3rd ed. rev. 1987).

148. DSM IV, *supra* note 113, at 78.

149. *See generally* EDWARD M. HALLOWELL & JOHN J. RATEY, *ANSWERS TO DISTRACTION* 109 (1996). This book responds to specific questions that people have about ADD. One interesting item is that people with ADD often have intelligible handwriting and write with a claw-like grip on their writing implement.

a person with ADD/ADHD.¹⁵⁰

Persons with ADD/ADHD may have difficulty in educational achievement and social situations, feeling alienated and lacking self-confidence and self-esteem.¹⁵¹ They may have decreased confidence in their abilities to relate to others or deal effectively with common situations.¹⁵²

Often a learning disability is compounded by other psychological problems such as low self-esteem and depression.¹⁵³ Parents, teachers and peers¹⁵⁴ may characterize a child with a learning disability as bright but sloppy or lazy.¹⁵⁵ Partially as a result of the mischaracterization, people who have difficulty learning are often reluctant to seek help for various reasons, including low self-esteem and extreme frustration.¹⁵⁶ A

150. See generally HALLOWELL & RATEY, *supra* note 143, at 151-94. The symptoms listed above are only a few of the more common symptoms of ADD. Symptoms can vary from the classic ones listed above to unexpected traits such as inability to control anger. See *id.* See also DAVID SUDDERTH & JOSEPH KANDEL, *ADULT ADD: THE COMPLETE HANDBOOK* 198 (1997).

151. See HALLOWELL & RATEY, *supra* note 143, at 78.

Elizabeth is a forty-six-year-old woman who has struggled with dyslexia since she was a child. What she didn't realize until recently was that she had ADD. 'I always knew I couldn't read. . . . What I didn't understand was why I lived in such a disorganized state all the time. I thought I was just spacey I thought I was simply inept. Then I went to this women's group and I found out about ADD and everything makes sense for the first time. Why I procrastinate. Why I have no confidence. Why I space out in the middle of conversations. Why I can never seem to get it together. I just wish I had found out about this earlier.

Id.

152. See *id.* ADD may affect all facets of a person's life, including marriage, sexuality and relationships with others, both in the family and outside of it.

153. See Adams, *supra* note 136, at 189 n.8.

154. See HALLOWELL & RATEY, *supra* note 143, at 61-64. The author provides a chronology of a boy's struggle with ADD as illustrated by teacher comments he received throughout his scholastic career. He was not diagnosed with ADD until after graduating from high school. The chronology is peppered with comments regarding his underachievement, erratic school performance and inconsistency. There are many references to him not paying attention or not being organized. Also prevalent are comments about his creativity and imagination. *Id.* See also Theresa Glannon, *Disabling Ambiguities: Confronting Barriers to the Education of Students with Emotional Disabilities*, 60 TENN. L. REV. 295, 295-96 (1993). "Many of the problems children with emotional disabilities face in schools arise from the ways in which educators understand and respond to the actions of these children. . . . [P]revailing cultural and institutional conceptions strongly influence certain interpretations, which therefore dominate the views of school personnel." *Id.*

155. See Adams *supra* note 136, at 193.

156. See *id.*

person may experience more than one learning disability or the learning disability may be complicated by a psychological disorder such as depression or obsessive compulsive disorder. In fact, many of the symptoms overlap. Therefore, a person with ADD/ADHD may often be misdiagnosed and consequently treated for the wrong disability.¹⁵⁷

A fear of discrimination prevents them from divulging that they are having trouble. These feelings may persist throughout a person's life.¹⁵⁸ People with learning disabilities have often experienced substantial distress by the time they are finally diagnosed, because many are misunderstood by those around them.¹⁵⁹

Another reason that people with learning disabilities are often hesitant to seek help is the tremendous stigma that our society has attached to the word "disability."¹⁶⁰ There is a strong base of denial in our country; we like to believe in self-reliance and "toughness." Compassion is not as popular as it may appear when we look at behavior through the context of "the Puritan work ethic."¹⁶¹ Also, especially with younger children, people with learning disorders may not realize that learning is not as difficult for everyone and may attribute their below average performance to a lack of intelligence or capability. "Their histories often cause them to face anxiety, doubt and isolation concerning their mental abilities."¹⁶² Because they are embarrassed or fearful of the repercussions of having a disability, they continue to hide it. This makes it extremely difficult to compete with other students and operate in social situations, and makes it almost impossible for them to get help.¹⁶³

Though the learning disabilities listed above are by no means the only challenges that confront students, educators, and employers, their symptoms are sufficient to demonstrate the need for reasonable accomodation for law students with disabilities to function in everyday activities. It is important to keep in mind that a learning disability does not make it impossible for a person to learn nor does the presence of a disability indicate lower intelligence or capability. "[I]ndividuals with disabilities are a . . . minority who have been faced with restrictions and

157. See HALLOWELL & RATEY, *supra* note 143, at 199 (stating that a person with ADD can be misdiagnosed because the symptoms are disguised by another condition, such as substance abuse, depression, or anxiety).

158. See Pamela Coyle, *What Sylvia Law, Jonathon Pazer and David Glass Confront When They Read or Write*, A.B.A. J., Sept. 1996, at 64, 66.

159. "The emotional experience of ADD [may be] filled with embarrassment, humiliation and self castigation. By the time the diagnosis is made, many people with ADD have lost confidence in themselves." HALLOWELL & RATEY, *supra* note 143, at 215.

160. See Adams, *supra* note 136, at 197.

161. See HALLOWELL & RATEY, *supra* note 143, at 166.

162. Diamond, *supra* note 127, at 75.

163. See *id.*

limitations . . . based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.”¹⁶⁴

III. CLINICAL LEGAL EDUCATION

In order to apply the concepts set forth above, it is important to understand the concept of clinical legal education and how it is used in this article. Clinical legal education is by no means a new phenomenon. The earliest legal education in the United States was an apprenticeship system¹⁶⁵ based commonly on the English practice.¹⁶⁶ In the early 1800’s, a majority of states required a period of apprenticeship, but by 1860 (with twenty-one law schools then in existence) very few states required any type of apprenticeship.¹⁶⁷

Clinical law teaching usually occurs either in-house, at the law school, or in an externship placement. Most clinics, whether at the law school or at a field placement, are live-client clinics where the students are involved with actual legal practice. In-house clinics range from general legal service providers to specialty clinics in specific substantive law areas. Externship programs, for the purpose of this Article, are field placements including: internships, judicial clerkships, and any other program where the actual day to day supervision and responsibility for the legal work rests outside of the full-time law school faculty.¹⁶⁸ Each clinical law placement has its own unique characteristics, which demands a different approach to reasonable accommodation for the law student with a disability. “Law schools have a duty to ensure that students with disabilities can participate fully in programs such as . . . an externship.”¹⁶⁹

164. 42 U.S.C. § 12101(a)(7) (1988).

165. See George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162, 163 (1973-74).

166. See William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor*, 28 AKRON L. REV. 463, 465 (1995).

167. See *id.* at 465-66.

168. See Robert F. Seibel & Linda H. Morton, *Field Placement Programs: Practices, Problems and Possibilities*, 2 CLINICAL L. REV. 413, 413 n.2 (1996).

169. Lisa Eichhorn, *Reasonable Accommodations and Awkward Compromises: Issues Concerning Learning Disabled Students and Professional Schools in the Law School Context*, 26 J.L. & EDUC. 31, 58 (1997).

There is significant controversy over whether simulation “skills” courses (which are generally small classes focused on teaching lawyering skills such as interviewing and counseling clients or some type of trial or appellate advocacy) should be considered “clinical education;”¹⁷⁰ for purposes of this Article, these courses will not be discussed. The reasonable accommodation issues in simulation courses are easier and more like other academic accommodations, than clinical placements involving live clients and real cases.

A. Academic Accommodations

Law schools and other institutions of higher education have significant experience with academic accommodations for disabled students with disabilities. Accommodations, such as extra time on examinations, notetakers, and other academic accommodations, have become commonplace.¹⁷¹ The Office of Civil Rights (“OCR”) is the agency charged with enforcement of the ADA in the context of higher education.¹⁷² A review of recent OCR decisions, as well as some court decisions, focusing on issues that might arise in a clinical placement, is enlightening.

The first area of decisions demonstrates that an educational institution’s best protection from liability is a well thought out policy and procedure to deal with students with disabilities. Having such policies and procedures provides clear benefits to the students as well.¹⁷³

170. Simulation courses can be effective in some skills and values training but they certainly cannot begin to teach all that a student could learn working with a real case and client. See generally Nina W. Tarr, *Current Issues in Clinical Legal Education*, 37 *How. L.J.* 31, 32-33 (1993).

171. See McCusker, *supra* note 101, at 619-22.

172. See 49 C.F.R. § 1.70 (1998). The Office for Civil Rights is the unit of the United States Department of Education charged with adjudicating complaints concerning higher education.

173. Of course, even if policies are well established, they still must be fairly and reasonably followed. See *In re Rubenstein*, 4 Nat’l Disability L. Rep. (LRP) 444 (Del. Feb. 28, 1994). A bar applicant learned of her learning disability after her third unsuccessful attempt at passing the bar exam. On her fourth attempt, the Board of Bar Examiners only gave her additional time on one of two portions of the bar exam. She failed the portion for which no additional time was given. The court held that the Board of Bar Examiners arbitrarily granted additional time on one portion of the bar exam, given that an evaluating professional had unqualifiedly recommended additional time. Since the applicant had passed both examination sections, albeit on different occasions, the Board was directed to deliver the certificate. See *id.* But see *Clement v. Virginia Bd. of Bar Exam’rs*, 125 F.3d 847 (4th Cir. 1997) (unpublished table decision). In *Clement*, a bar exam applicant alleged that the state board of bar examiners discriminated against her on the basis of her disability in violation of the ADA. The Board allowed *Clement* to take the exam six times, increasing the accommodations each time. On her final attempt, *Clement* was given twice the allotted time over a four-day period with three-hour rest periods between the two sessions on each day. Ordinarily, only a one-hour rest period is

These cases illustrate that the OCR looks closely at procedural issues to determine whether a school discriminated against a student with a disability. For example, a student who learned that she had dyslexia and significant attention problems during her first year of law school alleged that a law school failed to take her disabilities into account when it denied her petition for readmission. Since the law school agreed to provide significant additional procedural protections for students with disabilities, the OCR agreed to settle and close her file. The law school agreed to: 1) provide the student with diagnostic testing of her learning disability, 2) allow the student to petition for readmission to the school in the event that the student was diagnosed with a disability, 3) convene a faculty committee to consider the student's petition and supporting documentation under the Rehabilitation Act standards, and 4) develop guidelines for considering readmission petitions that raise disability as the basis for deficiencies in academic performance.¹⁷⁴

A recent case, *Guckenberger v. Boston University*,¹⁷⁵ received significant publicity and confirmed the OCR approach. In *Guckenberger*, the president of Boston University changed the existing policy that allowed students with disabilities to substitute an approved course for the university's foreign language and/or math requirement. The University's new policy did not allow class substitutions. Also, in order to receive accommodations, students with learning disabilities had to provide the University with a diagnostic evaluation, less than three years old, performed only by a physician, clinical psychologist, neuropsychologist or licensed psychologist. The court held that the University failed to demonstrate that re-testing of students was required every three years. Only in the case of students with attention disabilities was it appropriate, because the status of those disabilities may change over time. The University also failed to demonstrate that the math and/or foreign language substitutions would fundamentally alter its programs. The president, who had no expertise or experience with the diagnosis of learning disabilities, based his decision to deny course

given. Clement contended that a one-day rest period should have been given. The court held that the accommodations were reasonable and the Board's accommodations were not inconsistent with Clement's physician's recommendations. *See id.* (page numbers unavailable).

174. *See* Pepperdine Univ., 7 Nat'l Disability L. Rep. (LRP) 62 (O.C.R. IX May 24, 1995).

175. 974 F. Supp. 106 (D. Mass. 1997).

substitutions on discriminatory stereotypes.¹⁷⁶

Other cases focus on whether the school had notice of the disability and/or the timing of the request for accommodation. In one case, a student alleged that a college dismissed the student from a nursing program based on the college's perception that the student had a mental disability after the student received failing grades in two courses. OCR held that the college dismissed the student pursuant to an academic policy regarding the two failing grades. The college was unaware of any student disability prior to the dismissal.¹⁷⁷ In another case, a law student with a disability alleged that the law school failed to provide requested accommodations and dismissed her from its law program on the basis of disability in violation of the Rehabilitation Act.¹⁷⁸ When the student appealed the district court's summary judgment order, the appellate court held that the student was not an "otherwise qualified individual" as defined by the Rehabilitation Act. The law school was not charged with notice of the disability until the end of the student's fourth semester, when the student informed the school that her diplopia was interfering with her ability to perform. Although the law school might not have considered the effects of the student's diplopia, the accommodations the student received were not reasonable within the meaning of Rehabilitation Act. Even with the accommodations, the student was not able to meet the law school's requirements.¹⁷⁹

Other cases involve requests to waive a required component of a program or a specific class such as mathematics or a foreign language.¹⁸⁰

176. *See id.* at 114-16.

177. *See* North Cent. Technical College, 11 Nat'l Disability L. Rep. (LRP) 326 (O.C.R. V June 3, 1997); *see also* Everett Community College, 10 Nat'l Disability L. Rep. (LRP) 115 (Dec. 20, 1996) (finding that there was no discrimination based on disability where a student was not permitted to take a final examination at a later date because the college was informed only 3 days prior to the exam and the professor offered the student the option of taking the exam the day before the rest of the class or taking an incomplete); San Diego Mesa College, 10 Nat'l Disability L. Rep. (LRP) 199 (O.C.R. IX Dec. 20, 1996) (finding that the college did not violate Section 504 or Title II of the ADA because the applicant for admission did not request any modification in the interview process until days after the interview was complete).

178. *See* *Murphy v. Franklin Pierce Law Ctr.*, 6 Nat'l Disability L. Rep. (LRP) 331 (1st Cir. May 24, 1995).

179. *See id.*

180. *See* North Seattle Community College, 10 Nat'l Disability L. Rep. (LRP) 42 (O.C.R. X Aug. 23, 1996). A student alleged that the college violated the Rehabilitation Act and the ADA when it denied her request to substitute cooperative work experience for two core classes. OCR held that the student failed to provide the college with diagnostic documentation to support this request. Furthermore, the college was not required to waive requirements that are essential to the program of instruction. *See id.* at 42; *see also* Wheaton College, 7 Nat'l Disability L. Rep. (LRP) 330 (O.C.R. I June 8, 1995) (finding a complaint resolved where the college ultimately granted credit for violin lessons in place of the music theory course that the student dropped because of her

When the Department of Education failed to waive the mathematics portion of the College Level Academic Skills Test, a teacher who had a learning disability alleged that the Department unlawfully denied him a professional teaching certificate.¹⁸¹ OCR held that the Department's requirement did not discriminate on the basis of disability because the Department provided for testing accommodations for persons with disabilities, which the teacher failed to request. Furthermore, although the department did not waive the test requirement, it did provide alternative means for experienced teachers from other states to obtain their professional certificates without taking the test. The complainant could have pursued the alternative means had he so chosen.¹⁸²

There are also cases that begin to approach the issues of accommodation in a clinical placement. A student alleged that a university discriminated against the student on the basis of disability because the university failed to provide academic adjustments during a field placement portion of a Masters in Social Work program.¹⁸³ The student was also denied permission to tape-record a meeting during work. The university's failure to provide an academic adjustment was not discriminatory because the field supervisor did not know about the student's disability. Though the university denied permission to have a conversation taped, the university arranged for the conversation to be

disability); Bellevue Community College, 7 Nat'l Disability L. Rep. (LRP) 135 (O.C.R. X June 13, 1995) (finding that the college violated the ADA because it had not developed specific policies and did not have written procedures or criteria for determining whether a student had a disability or was entitled to services, academic adjustments, auxiliary aids, or other accommodations when a student with a learning disability was denied a waiver of a math requirement for a transfer degree); Northern Ill. Univ., 7 Nat'l Disability L. Rep. (LRP) 392 (O.C.R. V July 7, 1995). A student requested that the university accept a "D" grade in Math 210 as fulfillment of a core competency requirement. OCR held that the university did not violate the ADA or Rehabilitation Act because to allow the waiver would require the university to lower its academic standards. The university provided adequate academic adjustments such as extra time for the student's examinations, peer assisted learning, tutoring, and accommodated testing at an irregular time for the competency exam in another math course (Math 101). The university advised the student to take a lower level math course to fulfill the graduation requirements, but the student refused. Additionally, the university waived its residency requirement to allow the student to take a math course at a community college, in order to transfer the units to the university. *See id.* at 392.

181. *See* Florida Dept. of Educ., 5 Nat'l Disability L. Rep. (LRP) 33 (O.C.R. IV Oct. 20, 1993).

182. *See id.* at 33.

183. *See* University of Cal., Los Angeles, 8 Nat'l Disability L. Rep. (LRP) 314 (O.C.R. IX Feb. 15, 1996).

periodically stopped and repeated or explained.¹⁸⁴

In another case, a student who was enrolled in the clinical component of a required course claimed that the university violated the ADA and Rehabilitation Act when it failed to reasonably accommodate the complications that resulted from her pregnancy.¹⁸⁵ Students were required to put in two clinical days a week for roughly six hours per day. Students were also required to visit non-hospitalized patients to administer home care.¹⁸⁶ The court held that the university met its duty to reasonably accommodate the student because it offered an incomplete for the clinical portion of the course, permitted the student to take patient records home, and allowed the student to see just one patient per clinical day and not climb stairs.¹⁸⁷

Another case involved a university masters program applicant who had a severe panic disorder, which prevented him from physically attending the program classes.¹⁸⁸ The applicant alleged that the university failed to reasonably accommodate him because it refused to allow him to attend the program via telephone. The Court held the university did not violate the ADA.¹⁸⁹ The university made reasonable accommodations such as: 1) allowing the student to be “accompanied by a friend or advisor of his choice;” 2) “giving him access to a vacant room to which he could retreat,” when necessary; 3) “allowing him to be excused from those portions of the residency which were deemed predominantly of a social nature, i.e. lunch, and coffee break periods;” and 4) giving him “choice of location within the meeting area where the residency was to be conducted.”¹⁹⁰ Since the program was designed to provide students with intensive academic interaction with other students and faculty, permitting him to participate over the telephone would interfere with both the educational experience of other students and the applicant.¹⁹¹

Externship programs provide some additional challenges to law schools. When the question is: “What is a public law school’s liability under the ADA in offering and placing people with disabilities in externships?,” one can find the answer in regulations promulgated by the ADA. First, a law school is prohibited from excluding qualified students with disabilities, on the basis of their individual disabilities,

184. *See id.* at 314.

185. *See Darian v. University of Mass., Boston*, 980 F. Supp. 77, 79 (D. Mass. 1997).

186. *See id.* at 80.

187. *See id.* at 90-91.

188. *See Maczaczjy v. New York*, 956 F. Supp. 403, 404 (W.D.N.Y. 1997).

189. *See id.* at 409.

190. *Id.* at 405.

191. *See id.* at 406.

from participating in any activity associated with school.¹⁹² The ADA requires law schools to ensure that educational programs provide equal opportunity for qualified disabled students, even if the law school does not operate each program in its entirety. Any post-secondary institution that assists in making outside employment available to its students must ensure that the employer does not discriminate against the students on the basis of disability.¹⁹³ In addition to this responsibility, the post-secondary institution must be sure that the employer provides appropriate accommodations for the student.¹⁹⁴ The law school has a duty to ensure that its externship placements are, as a whole, accommodating qualified students with disabilities.

192. 34 C.F.R. § 104.43 provides:

Treatment of students; general.

(a) No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education program or activity to which this subpart applies.

(b) A recipient to which this subpart applies that considers participation by students in education programs or activities not operated wholly by the recipient as part of, or equivalent to, and [sic] education program or activity operated by the recipient shall assure itself that the other education program or activity, as a whole, provides an equal opportunity for the participation of qualified handicapped persons.

(c) A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity.

(d) A recipient to which this subpart applies shall operate its programs and activities in the most integrated setting appropriate.

34 C.F.R. § 104.43 (1998).

193. *See id.* § 104.46(b). This section provides:

Assistance in making available outside employment. A recipient that assists any agency, organization, or person in providing employment opportunities to any of its students shall assure itself that such employment opportunities, as a whole, are made available in a manner that would not violate Subpart B if they were provided by the recipient.

Subpart B generally controls employment practices and states that “[n]o qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this part applies.”

Id. § 104.11(a)(1).

194. *See id.* § 104.12(a). This section provides that a “recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.” *Id.*

In order to prevent qualified, disabled individuals from being excluded from activities that are available to other law students, the law school must offer comparable internships at locations that can accommodate students with disabilities. Law schools must afford qualified students with disabilities with a reasonable range of opportunities, which are comparable to the opportunities offered to students without disabilities. Not every option needs to be available to every student with a disability, only enough options to give the student a reasonable choice and a reasonable opportunity to participate in the program.¹⁹⁵

In the case of law school externships, the law school must provide qualified students with disabilities a reasonable range of options by offering accessible externships within each field of law in which externships are offered to all students. For example, if the law school offers externships in entertainment law, at least a reasonable amount of these externships must be accessible to students with disabilities. This way, students with disabilities will have a number of opportunities to secure externships. The number of possible externships available to students with disabilities should be comparable to the number of opportunities available to other students. The desired result is that students with disabilities will not be excluded from an externship on the basis of disability.

The following example illustrates a feasible interpretation of the term “reasonable amount” as used in assessing the number of the externships accessible to students with disabilities.¹⁹⁶ Ted is a third-year medical student at State University Medical School. Ted requests assignment for residency to Central Community Hospital because he wants to work with Dr. Green, a renowned hematologist on Central Community Hospital’s staff. Ted has a qualified disability; he uses a wheelchair for mobility. Ted cannot completely access all levels of Central Community Hospital because the hospital is not fully accessible. Due to the hospital’s inaccessibility, State University Medical School assigns Ted to County General Hospital, which is a modern facility that allows Ted full access to all parts of the building. The question is whether this action provides the “same range and quality of choice” to Ted because it precludes him from working with Dr. Green and places him at an alternative site. Relevant to this analysis is whether County General Hospital, to which State University Medical School assigned Ted for his residency, is comparable to the residency that might have been available

195. See Jane E. Jarrow, Subpart E: The Impact of Section 504 on Postsecondary Education (available from the Association on Higher Education and Disability, www.ahead.org).

196. See *id.* at 12.

at Central Community Hospital. Ted must have the opportunity to do comparable work, possibly with a physician of comparable reputation to Dr. Green, with whom Ted cannot work.¹⁹⁷

Generally, when law schools place students in externships, the schools have several responsibilities. First, law schools must ensure that the externship sites do not discriminate against qualified students with disabilities on the basis of their disabilities. Second, law schools must ensure that externship sites provide reasonable accommodation to students with disabilities. Third, law schools must also ensure that students are given a reasonable range of options and opportunities to participate in an externship.

B. Other Professional Schools

Most published cases dealing with the accommodation of students with disabilities involve medical schools and medical-related programs, including dental, optometry and nursing schools.¹⁹⁸ The disabilities encountered included dyslexia, hearing impairments, visual impairments, and multiple sclerosis. Because medical and medical-related programs require hands-on clinical training on live patients, accommodation issues arise in medicine-based professional schools and programs more often than in other graduate and professional schools. Therefore, it may be more difficult to reasonably accommodate someone who cannot control motor skills, or see, or hear, in a medical program that involves extensive simulation and clinical placement requirements. Arguably, it is much more difficult for medicine-based professional schools to accommodate individuals with disabilities because the schools require that students perform surgeries and work with patients.

On a case-by-case basis, the courts look at each individual's disability and determine the fundamental elements of each program. Each school determines the fundamental program requirements and decides if it can waive such requirements. If the particular school can reasonably accommodate its students with disabilities, so that the students can participate in the program fundamentals, the school must do so. If, however, the students perform cannot meet the requirements, even with accommodations, or there are no available reasonable accommodations,

197. See HEYWARD, LAWTON & ASSOCIATES, LTD., ACCESS TO § 504 (1990).

198. See *id.*

the school does not have to accommodate the students.¹⁹⁹

With regard to issues of discrimination against individuals with disabilities in graduate and professional schools, courts give post-secondary schools great latitude in determining what essential functions students must perform and when students unable to satisfy such functions should be dismissed.²⁰⁰ Courts have consistently held that academic institutions are the best to judge what functions of their programs are necessary and what accommodations are appropriate.²⁰¹ Therefore, unless the institution's decision radically deviates from accepted norms, courts defer to the educational institution's assessment.²⁰² If there is no reasonable accommodation available to enable an individual with a disability to perform those essential functions, the school is not required to accommodate the student.²⁰³ University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation.²⁰⁴ The faculty of each institution determines the essential functions of its own program.²⁰⁵ The faculty at

199. See generally *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19, 25 (1st Cir. 1991).

200. See *id.*

201. See *id.* The court cites *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985): "When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment." *Id.*

202. See *Wynne*, 932 F.2d at 25-26. The court finds that there are two qualifications to the deference to an academic institution's decisions regarding what constitutes an "otherwise qualified" person:

First . . . there is a real obligation on the academic institution to seek suitable means of reasonably accommodating a handicapped person and to submit a factual record indicating that it conscientiously carried out this statutory obligation. Second, the *Ewing* formulation, hinging judicial override on 'a substantial departure from accepted academic norms' is not necessarily a helpful test

Id. Thus, the court recognizes that this *Ewing* formulation is not always useful in light of the rapid advancements in technology made daily that would not be considered "accepted academic norms." *Id.* at 26 (citing *Ewing*, 474 U.S. at 225). The court acknowledges potential technological advances, which "can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment." *Id.* at 26 (citing *Southeastern Community College v. Davis*, 442 U.S. 397, 412 (1979)).

203. See *Ellis v. Morehouse Sch. of Med.*, 925 F. Supp. 1529, 1535 (N.D. Ga. 1996).

204. See *id.* at 1541 (citing *Ewing*, 474 U.S. at 225 n.11, quoting *Board of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78, 96 n.6 (1978) (Powell, J., concurring)). In *Ellis*, the court looked at precedent to determine the court's role in reviewing an educational institution's dismissal of a student. The court found a distinction between a dismissal for academic reasons and a dismissal for disciplinary reasons. In regard to an academic dismissal, the court held that courts must defer to the judgment of the institution. See *Ellis*, 925 F. Supp. at 1541.

205. See *Ellis*, 925 F. Supp. at 1546.

each institution “are entitled to substantial deference and [their judgments] should not be set aside absent evidence that their opinions are so irrational and arbitrary as to not constitute an exercise in professional judgment.”²⁰⁶

In deciding whether a professional school must accommodate a student, the courts must determine three factors. First, the court must determine if the individual is disabled under the ADA or §504 of the Rehabilitation Act. Then, the court must decide if the student is “otherwise qualified.” Finally, the court must assess if there are reasonable accommodations that can enable the student to perform the essential functions of the program.²⁰⁷

The seminal case, *Southeastern Community College v. Davis*,²⁰⁸ was the U.S. Supreme Court’s first chance to interpret section 504 of the Rehabilitation Act. The Court found that:

Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate. Instead, it requires only that an “otherwise qualified handicapped individual” not be excluded from participation in a federally funded program “solely by reason of his handicap,” indicating only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context.²⁰⁹

The nursing college denied Davis admission because the school believed she could not perform adequately in a clinical setting due to her hearing disability.²¹⁰ The Supreme Court affirmed the lower court’s holding that the school did not violate the Rehabilitation Act, because section 504 does not prohibit an academic institution from requiring

206. *Id.* Following the *Ewing* rationale, the *Ellis* Court respected the decision of the faculty at Morehouse in determining the essential functions of the program and *Ellis*’ failure to perform those functions. Only if the professors’ judgments seemed illogical would the court intervene. *See id.*

207. *See id.* at 1540.

208. 442 U.S. 397 (1979).

209. *Id.* at 405 (citations omitted). In looking at the state’s language, the Court held that an academic institution may not exclude a person from participation in its programs solely on the basis of his or her disability. If the person is able to perform in the program and meets the school’s requirements, the school cannot exclude him/her. However, the statute does not require the school to lower its standards or fundamentally alter its requirements or program so to include an individual with a disability. *See id.* at 397-405.

210. *See id.* at 401-02. On the basis of an audiologist’s report, the university excluded Davis because “it would be impossible for her to participate safely in the normal clinical training program, and those modifications that would be necessary to enable safe participation would prevent her from realizing the benefits of the program.” *Id.*

certain physical capabilities for its clinical program.²¹¹ Davis had to satisfy all the requirements of the clinical program “in spite of” her disability.²¹² According to expert testimony, Davis’ hearing impairment would jeopardize the safety of her patients.²¹³ Not only would she need an auxiliary aide, such as a sign-language interpreter, but she would also need constant supervision when working with patients to ensure patient safety.²¹⁴ The ability to hear and understand patients was an essential function of the nursing program and therefore, under the Act, the school did not have to waive the physical admission requirement of hearing or waive classes that were essential elements of the program so to accommodate Davis.²¹⁵

Although some cases follow the reasoning in *Davis*,²¹⁶ others

211. *See id.* at 403-04.

212. *Id.* at 406. “An otherwise qualified person is one who is able to meet all of a program’s requirements in spite of his disability.” *Id.*

213. *See id.* at 401-02. The Executive Director of the North Carolina Board of Nursing based her opinion on the audiologist’s report and recommended to Southeastern College that Davis not be admitted because of her disability and the dangers it posed to patients. *See id.*

214. *See id.* at 409-10. “[T]he only evidence in the record indicates that nothing less than close, individual attention by a nursing instructor would be sufficient to ensure patient safety if [Davis] took part in the clinical phase of the nursing program.” *Id.* at 409. The Court found such an accommodation was unreasonable. *See id.* at 410.

215. *See id.* at 407. The Court recognizes “that legitimate physical qualifications may be essential to participation in particular programs.” *Id.* Hearing and understanding what patients say without having to read lips may be a necessary physical qualification for nursing programs. *See id.*

216. *See Ellis v. Morehouse Sch. of Med.*, 925 F. Supp. 1529 (N.D. Ga. 1996). Ellis was admitted to Morehouse School of Medicine in 1988. Shortly after beginning his first year, Ellis experienced trouble academically. He was subsequently diagnosed as having dyslexia, entered the decelerated program, and received double-time on his exams. As a result of these accommodations, he improved greatly and completed his first two years of medical school in three years. *See id.* at 1532-33. In his third year, Ellis did not pass Medicine, a clerkship program where the third-year students worked with patients. Dr. Rose, the professor of Medicine, stated that Ellis lacked the fundamental skills and knowledge to pass Medicine. Ellis was allowed to advance to his fourth year. Ellis failed Surgery, taught by Dr. Kroger. Surgery was an essential simulation class required of every student. Dr. Kroger testified that there was no possible accommodation to enable Ellis to perform the fundamental functions of Surgery. Determining that there were no reasonable accommodations possible for these simulation classes, the court found that the school was not required to accommodate Ellis. *See id.* at 1533-40, 1544-46; *see also Pushkin v. Regents of the Univ. of Colo.*, 504 F. Supp. 1292 (D. Colo. 1981). Pushkin, a medical doctor with multiple sclerosis, was denied admission to the University’s psychiatric program solely because of his disability. Relying on *Davis*, the court recognized an academic institution’s right to set both academic and non-academic standards where such non-academic criteria included physical abilities. However, in this case, there was no requirement of any physical capability to perform the necessary functions of the program. Therefore, the faculty’s decision was not based on a physical requirement that rendered Pushkin unable to perform the essential functions of the psychiatric program. The faculty felt that Pushkin could not “deal emotionally with potential patient-reaction to his disability—a quality of

recognize that the term “otherwise qualified,” as defined in *Davis* is rather contradictory.²¹⁷ These courts reason that the availability of reasonable accommodations “to satisfy the legitimate interests of both the grantee and the person with the disability must be considered.”²¹⁸

In a case that follows *Davis*, the dissent came close to applying the model suggested in this Article. In *Ohio Civil Rights Commission v. Case Western Reserve University*,²¹⁹ the student, Fischer, was denied admission to Case Western Reserve University’s (CWRU) medical program because she was blind. The faculty stated that Fischer would be unable to complete the “patient-based program.”²²⁰ Her lack of vision rendered her “unable to exercise independent judgment when reading an X-ray, unable to start an I.V., and unable to effectively participate in the surgery clerkship.”²²¹

The Ohio Supreme Court recognized that the definition of an “otherwise qualified” person with a disability is defined in terms of

emotional stability necessary for a psychiatrist.” *Pushkin*, 504 F. Supp. at 1298. The court found that Pushkin was “otherwise qualified” in spite of his disability. The essential functions of the psychiatric program were “intelligence, emotional stability and physical stamina,” all of which Pushkin possessed. *Id.* at 1299. Reasonable accommodations for his disability, such as a lighter patient load, wheelchair access at hospitals, and clinical placement at nearby hospitals were possible and would not constitute a substantial modification of the program. *See id.* at 1295.

217. The term “otherwise qualified” refers to someone who is capable of doing the job or meeting the requirements; it also means someone who cannot perform the job or meet the requirements because of his or her disability—but, with reasonable accommodation could meet the requirements. *See Doherty v. Southern College of Optometry*, 862 F. Supp. 570, 575 (6th Cir. 1988). The *Doherty* court stated:

[I]t is clear that the phrase ‘otherwise qualified’ has a paradoxical quality; on the one hand, it refers to a person who has the abilities or characteristics sought by the grantee; but on the other, it cannot refer only to those already capable of meeting *all* of the requirements—or else no reasonable requirement could ever violate § 504, no matter how easy it would be to accommodate individuals [with disabilities] who cannot fulfill it. . . . The question after *Alexander* is the rather mushy one of whether some ‘reasonable accommodation’ is available to satisfy the legitimate interests of both the grantee and the person [with a disability].

Id.

218. *Id.*

219. 666 N.E.2d 1376 (Ohio 1996).

220. *Id.* at 1380-81. “The patient-based program includes clerkships in internal medicine, pediatrics, surgery, obstetrics and gynecology, psychiatry and primary care. In these different clerkships, students provide direct patient care.” *Id.* at 1380. Other faculty members stated that Fischer would be unable to complete even purely academic classes because she could not visually identify different organs and tissues. *Id.*

221. *Id.* at 1380.

employment, not education.²²² In reference to employment, the term means someone who can perform the essential functions of the job with or without accommodations.²²³ In deciphering the meaning of this term in the context of education, the court looked to section 504 of the Rehabilitation Act and its interpretation in case law.²²⁴ As with the employment context definition, it is necessary to determine exactly what the essential functions of each clinical program are and how the individual's particular disability can be reasonably accommodated. The court then established each party's burden. First, the Ohio Civil Rights Commission (OCRC) had to prove that Fischer could have performed the essential functions of the program with reasonable accommodations. Then CWRU had to prove that Fischer was not "otherwise qualified" because the proposed accommodations would have substantially altered the nature of the program. Finally, the Court gave OCRC the opportunity to rebut CWRU's arguments.²²⁵

Determining the reasonableness of an accommodation is a question of both law and fact.²²⁶ Following *Davis*, the court held that waiving classes and providing constant supervision and intermediaries was not reasonable and would have altered the essential functions of the medical program, which included observing reading X-rays and performing physical exams.²²⁷ As an academic institution, the medical school was afforded great deference in its decisions regarding the academic and non-academic requirements of its students.²²⁸ Although Fischer met the purely academic requirements in regards to grades and scholastic performance, the physical ability to see was a non-academic requirement wholly within the educational institution's discretion to require. As discussed by members of CWRU's faculty, the ability to see is a fundamental requirement of CWRU's medical program.²²⁹ The court found that "an educational institution is not required to accommodate a

222. *Id.* at 1384.

223. *See id.*

224. *See id.* The court first looked at *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), and then at *Alexander v. Choate*, 469 U.S. 287 (1985). Reasoning that "*Alexander* modified *Davis* to the extent that an 'otherwise qualified' person is one who is capable of participating in the program if a 'reasonable accommodation' is available for implementation by the institution." The Ohio Supreme Court applied the definition used in *Alexander*. *See Ohio Civ. Rts. Comm'n*, 666 N.E.2d at 1384.

225. *See Ohio Civ. Rts. Comm'n*, 666 N.E.2d at 1384-85.

226. *See id.* at 1386.

227. *See id.*

228. *See id.* at 1386-87.

229. *See id.* at 1380-81 (stating that both Dr. Fratianne, Associate Professor of Surgery at CWRU, and Dr. Lam, Associate Professor of Medicine at CWRU, determined that Fischer could not complete the clinical and simulation classes because of her blindness).

person with a disability by eliminating a course requirement which is reasonably necessary to the proper use of the degree conferred at the end of the study.”²³⁰

The dissent argued that the school had a duty under section 504 to investigate whether reasonable accommodations could have been provided.²³¹ The dissent addressed the circular reasoning of the majority and that which is present in most such cases, and argued that before the court decided that the student cannot be accommodated, the school must first determine the possible accommodations.²³² According to precedent, “under Section 504, an educational institution must make reasonable efforts to explore alternative methods of accommodating [students with disabilities].”²³³ Because CRWU did not investigate possible accommodations, it could not refute OCRC’s argument that Fischer was “otherwise qualified” with the assistance of reasonable accommodations.²³⁴ Allowing educational institutions to place “blanket exclusions” on participation in their programs on the basis of disabilities allows them to circumvent the Rehabilitation Act and ADA and discriminate against a class of individuals with disabilities, which is the very type of discrimination the legislation was designed to prevent.²³⁵

C. Attorneys with Disabilities

The “essential functions” of an attorney may be difficult to determine. Some accommodations, such as installing a wheelchair ramp for an attorney with a mobility impairment, are clear cut. However, accommodations become more problematic when a person has mental disabilities,²³⁶ because legal jobs have “traditionally required not only an agile mind but also a tireless one.”²³⁷ This being true, the difficulty becomes determining “what the minimum mental qualification” is for a

230. *Id.* at 1386–87.

231. *See id.* at 1388–95 (Douglas, J. & Resnick, J., dissenting).

232. *See id.* at 1389 (Douglas, J., dissenting). Justice Douglas stated: “The law mandates a clear and affirmative duty to investigate whether *reasonable* accommodations could be made by the medical school for Fischer’s needs.” *Id.* (italics in original).

233. *Id.* at 1390 (Resnick, J., dissenting) (italics in original).

234. *See id.* at 1390–91.

235. *See id.* at 1390–92.

236. *See* Amy Stevens, *Boss’s Brain Teaser: Accommodating Depressed Worker*, WALL ST. J., Sept. 11, 1995, at B1.

237. *Id.*

job “that essentially requires mental skills.”²³⁸

Under the ADA, employers are not required to excuse an employee with a disability from performing the “essential functions” of the job. But, the essential functions of a position does not necessarily depend on the manner in which it has traditionally been performed. “[T]here is more than one way in which a lawyer, for example, can fully service his or her clients.”²³⁹

There is no list of the “essential functions” of an attorney, because, as with every profession, the functions may vary from job to job.

Because performing the “essential functions” of a job does not depend on how it has been conventionally performed, the determinative factor is whether, through reasonable accommodations, the individual is able to perform these functions. Most authorities agree that “‘reading’ is a skill necessary to be a lawyer”²⁴⁰ Thus, it seems evident that if an attorney cannot read cases he cannot be effective. Sight, however is not necessarily a prerequisite for reading. A attorney who is blind can function with the use of such devices as a “paperless ‘braille’ that permits [her] to take notes or ‘read’ her prepared questions during a trial”²⁴¹ and a voice synthesizer to read words off a computer screen. Additionally, one attorney, Fred Wisner, who is Assistant General Counsel for the Wisconsin Department of Transportation in Madison, notes that blindness is “an asset overlooked by many—it sharpens hearing, promotes memory retention and shields against intimidation.”²⁴²

Attorneys with hearing impairments have proven that the ability to hear is not an “essential function” of practicing the law. By employing phone amplifiers and interpreters for courtroom appearances, they too can function on or above the level of attorneys who can hear.²⁴³ Similarly, the “essential functions of an attorney’s job [do] not require that the attorney be able to walk.”²⁴⁴ With the use of wheelchair ramps and other accommodations made for attorneys who cannot walk, they are able to perform the “essential functions” of their jobs.

Although the abilities to see, hear and walk are not “essential

238. *Id.* Michael E. Dickstein, a labor lawyer in San Francisco, asked this question and then stated that “the prevailing view is that you can’t be professional and competitive if you’re not willing to work virtually all the time.” *Id.*

239. *Id.* Statement made by Peggy Mastroianni, EEOC, Director of Disability-Law Policy.

240. Coyle, *supra* note 158, at 67.

241. *Accommodating Attorneys with Disabilities*, WIS. LAW., Apr. 1994, at 13, 13.

242. *Id.*

243. *See id.*

244. Stacy J. Bagley, *Enough is Enough! Congress and the Courts React to Employers’ Screening and Surveillance Procedures*, 90 DICK. L. REV. 723, 731 n.49 (1995).

functions” needed to practice law, the abilities to “comprehend, analyze and apply legal concepts of cases” are.²⁴⁵ Those who are skeptical of learning disabilities argue that one “who cannot perform cognitive tasks under time constraints, is incapable of performing the functions of a practicing lawyer and therefore, perhaps, should not be a practicing lawyer.”²⁴⁶ This, however, goes too far. There can be no doubt that some cognitive skills are an “essential function” of the practice of law. On the other hand, sheer “speed” and “ability to read” under specific time constraints are not essential functions of every attorney position.²⁴⁷ Hence, as long as an attorney can perform the “essential functions” of her particular job, such as “present[ing] understandable material to the court”²⁴⁸ and utilizing her ability to “determine and establish the facts necessary to optimize clients’ interests within the bounds of the law,”²⁴⁹ it may not be essential that these tasks be accomplished in record time.

The above mentioned “essential functions” apply to all attorneys in a general fashion. Attorneys who specialize in a particular field may perform additional “essential functions.” “Tracking down leads” and working with “standby witnesses” may be “essential functions” of an attorney who specializes in litigation.²⁵⁰ Moreover, a litigating attorney serving as lead counsel may have to perform “essential functions” such as the “development of trial strategy, coordination of the activities of lawyers during trial, division of work among various lawyers for both pretrial preparation and trial itself, and serving as principal spokesman before the court . . . on all matters of importance during the trial.”²⁵¹

In one case, a Labor Department attorney was demoted after he asked to be excused from performing certain types of legal work, such as the ability to argue appellate cases, due to his depression.²⁵² A federal judge

245. Thurgood Marshall Sch. of Law, 1 Nat’l Disability L. Rep. (LRP) 305 (Feb. 1, 1991).

246. Ruth Shalit, *Defining Disability Down: Why Johnny Can’t Read, Write, or Sit Still*, NEW REPUBLIC, Aug. 25, 1997, at 16, 18.

247. *Bartlett v. New York State Bd. of Law Exam’rs*, 970 F.Supp. 1094, 1128 (S.D.N.Y. 1997).

248. *Forest Travel Agency, Inc. v. Duvall*, No. 87 C 6195, 1989 WL 55336, at *1 (N.D. Ill. May 17, 1989) (unreported memorandum opinion).

249. Robert Ashford, *Socio-Economics: What is its Place in the Law?*, 1997 WIS. L. REV. 611, 620 (1997).

250. *Bohen v. City of E. Chicago*, 666 F. Supp. 154, 158 (N.D. Ind. 1987).

251. *Barcia v. Sitkin*, 683 F. Supp. 353, 356 (S.D.N.Y. 1988).

252. See *Stevens*, *supra* note 236, at B1 (referring to *Bolstein v. Department of Labor*, 55 M.S.P.R. 459, 462-63 (Nov. 3, 1992)).

upheld the demotion because he deemed arguing appellate cases was an “essential function” of the job.²⁵³ Other “essential functions” of attorneys may include the ability to handle “complex issues with little or no supervision,”²⁵⁴ “being independent and resourceful, exercising initiative, analyzing legal problems and policies, and preparing written legal memoranda.”²⁵⁵

The “essential functions” of an attorney are as varied as they are abundant. The ADA now has made it possible for those attorneys, who have the ability to perform the “essential functions” of the law practice they have chosen, to do so without being discriminated against because of their disabilities.

Some attorneys with disabilities choose to keep their disabilities hidden and work additional hours for which they do not bill their clients.²⁵⁶ Moreover, many hesitate to request accommodations for fear of being stigmatized.²⁵⁷ However, with proper accommodations, “lawyers with disabilities can contribute as much [as] or more than others”²⁵⁸ because people who have “gone to law school and passed the bar with disabilities are able, intelligent, and most important, highly motivated.”²⁵⁹ Providing reasonable accommodations in the employment setting for attorneys means different things for different disabilities. Accommodations can range from the simple, such as providing a telephone amplifier for an attorney with a hearing impairment, to the complex, such as constructing a detailed supervision and medication program for an attorney with ADD. The following are some illustrations of attorneys and their successes and failures in seeking accommodations for their disabilities.

Attorney Clarence Cain was employed as a regional partner at the law firm of Hyatt Legal Services when he was diagnosed with AIDS.²⁶⁰ Within a few weeks of the diagnosis, the firm discharged Cain on the grounds that he “would become fully disabled” over time, and that his continued employment would damage staff morale.²⁶¹ When Cain filed

253. *See id.*

254. *Bolstein v. Department of Labor*, 55 M.S.P.R. 459, 463 (Nov. 3, 1992).

255. Hilary Greer Fike, *Learning Disabilities in the Workplace: A Guide to ADA Compliance*, 20 SEATTLE U. L. REV. 489, 501 n.81 (1997).

256. *See Coyle, supra* note 158, at 65.

257. *See id.* at 66.

258. Pamela Wilson, *Attorneys With Disabilities Seek to Raise Consciousness*, SAN DIEGO DAILY TRANSCRIPT, Jan. 22, 1993, available in 1993 WL 3276952 (page numbers unavailable).

259. *Id.* (page numbers unavailable) (referencing Justice Daniel Kremer, Fourth Circuit Court of Appeals, who was disabled as a child by polio, a condition that inhibits mobility, on his views about accommodating disabled attorneys).

260. *See Cain v. Hyatt*, 734 F. Supp. 671, 673-75 (E.D. Pa. 1990).

261. *Id.* at 675.

suit against the firm, the court held that the firm breached its duty to reasonably accommodate his disability, and rejected the firm's argument that such accommodation would have caused them undue hardship.²⁶² In pertinent part, the court suggested that the firm could have provided Cain with accommodations. Following his first AIDS-related hospital trip, the firm should have afforded him the opportunity to "return to work and endeavor to satisfy its demands."²⁶³ The firm was obligated to permit Cain to "exhaust [all] his sick and vacation days and then, if necessary, place him on medical leave of absence until he could return to his former job."²⁶⁴ Additionally, the court said that the firm could have allowed him to "fulfill a portion of his job responsibilities by phone or by sending staff to visit him in the hospital or at home."²⁶⁵

Fred Wisner, Assistant General Counsel for the Wisconsin Department of Transportation in Madison, became blind as an adult in the 1970s, long before he graduated law school in 1984.²⁶⁶ His employer provides him with such accommodations as a voice synthesizer that reads the words off a computer screen and a paperless Braille reader that permits Wisner to "take notes or 'read' his prepared questions during a trial."²⁶⁷

Roberta Cordano, Assistant Attorney General in the Minnesota Attorney General's Office, has a hearing impairment.²⁶⁸ Her office provides her, via a single liaison to address her needs, with accommodations such as "an amplifier for her phone and ongoing scheduling of an interpreter in the courtroom and for meetings of three or more people."²⁶⁹

Even though it may be easier to tailor accommodations for attorneys with physical disabilities than for those with other disabilities, the ADA mandates that accommodations be provided for all types of covered disabilities. The following are some examples of attorneys with non-physical disabilities, and the accommodations they sought, and in some cases, received.

The first case illustrates the proposition that an attorney must be able

262. *See id.* at 683.

263. *Id.*

264. *Id.*

265. *Id.*

266. *See Accommodating Attorneys with Disabilities, supra* note 241, at 13.

267. *Id.*

268. *See id.*

269. *Id.*

to perform the essential functions of the job. Attorney John E. Wolfgram was to be enrolled inactive under the Business and Professional Code, as provided by a State Bar hearing judge's decision.²⁷⁰ Wolfgram requested a hearing to review the trial court's holding, believing that the holding did not "rest on clear and convincing evidence that because of mental infirmity or illness, he was unable or habitually failed to perform his duties or undertakings competently or that he was unable to practice law without substantial threat of harm to his clients or the public."²⁷¹ The reviewing court held that the trial judge's holding rested on sufficient evidence.²⁷²

The court considered the following as indications of Wolfgram's mental infirmity. He had been "unable, due to depression, to concentrate and remember matters such as due dates for documents, court appearances and appointments."²⁷³ He requested that his clients remind him of due dates. In an earlier hearing, he told the judge that "he did not have time to represent himself because he was without energy and unable to concentrate."²⁷⁴ Additionally, the judge noted that Wolfgram appeared in "tenuous emotional control" and that his written submissions "seemed circuitous and repetitive with unexplained references to persons and events."²⁷⁵ At trial, expert testimony provided that, although Wolfgram was not psychotic, "he was undergoing serious thought disorganization" and operated in "an unstable mental state."²⁷⁶ His mental problems were manifested in his "inability to calendar court and document due dates, keep a file system or find his papers" and his habitual inability to "concentrate on many significant matters, 'letting many go unattended.'"²⁷⁷ The court also noted that Wolfgram was unable to focus, resulting in an often "incoherent jumble." He showed great self-preoccupation, which slowed his responses; his "stress-coping mechanisms were stretched to the limit;" he was unable to exhibit emotional control in the courtroom, where he "became sad, wept and broke down;" and he became violent—all symptoms of his "depression not adequately treated."²⁷⁸ Accordingly, the reviewing judge affirmed the hearing judge's holding that Wolfgram's inability to maintain control

270. *See In re Wolfgram*, No. 90-TT-16955, 1995 WL 506002, at *1 (Cal. Bar Ct. Aug. 22, 1995).

271. *Id.* at *1.

272. *See id.* at *7.

273. *Id.* at *1.

274. *Id.*

275. *Id.*

276. *Id.* at *3.

277. *Id.*

278. *Id.*

posed “a substantial threat to his clients or the public.”²⁷⁹

In pertinent part, the court referred to the ADA in rejecting Wolfgram’s request for relief.²⁸⁰ The applicable chapter of the ADA, relied by this court, provides that a qualified individual with a disability is one who “with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by the public entity.”²⁸¹ The court noted that Wolfgram had not been enrolled in inactive status because he had a mental infirmity. Rather, Wolfgram had an inactive status because “clear and convincing evidence” showed that he was “unable or habitually fail[ed] to perform his duties or undertakings competently or that he [was] unable to practice law without a substantial threat to his clients or to the public.”²⁸² Additionally, a person enrolled in inactive status is “clearly not qualified to practice law.”²⁸³ Further, “[u]nlike the duty set forth in the ADA to provide reasonable accommodations to a qualified, disabled test-taker,” Wolfgram could not point to any ADA provision that would require the “State Bar to make accommodations to allow [him] to practice law despite the substantial threat of harm to clients and the public as a result.”²⁸⁴

Attorney Ron Sherman, former in-house counsel for NYLCare Health Plans Inc. (NYLCare), had obsessive compulsive disorder (OCD).²⁸⁵ Sherman brought an employment discrimination suit against NYLCare, claiming that when his employer placed him on probation it “exacerbated his [OCD] and led to his firing.”²⁸⁶ The court found that the ADA did not cover Sherman’s illness and dismissed the case.²⁸⁷

In order to proceed with an ADA suit, “a claimant must satisfy the

279. *Id.*

280. *See id.* at *6.

281. *Id.* The three main subchapters of the ADA are: (1) employment; (2) public services and public accommodations; and (3) services operated by private entities. The second subchapter is applicable here. *See* 42 U.S.C. §§ 12131-12181 (1994).

282. *In re Wolfgram*, 1995 WL 506002, at *7.

283. *Id.*

284. *Id.*

285. *See* Bill Alden, *Attorney Loses Disability Suit Tied to Firing: ADA Found to Exempt a Compulsive Disorder*, N.Y. L.J., Aug. 12, 1997, at 1.

286. *Id.*

287. *See id.*

threshold burden that he or she has a condition which impairs such activities as 'caring for oneself, performing manual tasks, walking, seeing, hearing, breathing, learning and working.'"²⁸⁸ Sherman only referred to the way in which his OCD limited his ability to perform in the stressful situation of the particular position he held at his former job.²⁸⁹

When Sherman received his first written evaluation, he was advised that his work was "unsatisfactory, that he was not getting a raise, and that he was on a three-month probation."²⁹⁰ Later, "Sherman advised NYLCCare that he suffered from OCD, and that he thus needed reasonable accommodations to enable him to continue performing the essential functions of his job."²⁹¹ Sherman's psychiatrist provided NYLCCare with an explanation of the condition and suggested that Sherman be "provided with a job coach to explain assignments and a non-threatening intermediary to provide constructive criticism."²⁹² NYLCCare denied Sherman any accommodation, rejected his contention that he had a disability, and eventually fired him.²⁹³ When Sherman brought suit, the court also found no merit in his contentions. Because Sherman's OCD did not substantially limit a major life activity, the ADA did not protect him. Therefore, no reasonable accommodations were required.²⁹⁴

Soon after attorney Martin Putnam graduated from Harvard Law School with honors, he landed a \$90,000-a-year job in the law department at Pacific Gas & Electric Co. (PG&E) in San Francisco.²⁹⁵ His work was unaffected by his periodic depression until Putnam was assigned a new supervisor, at which point he "fell into a deep despair, his work suffered, and PG&E asked him to resign."²⁹⁶ In response, Putnam filed an ADA-based lawsuit against PG&E, claiming that PG&E should have "cut his hours and made other changes [to accommodate] his disability."²⁹⁷

After Putnam took a two-month medical leave to recover from his breakdown, he told PG&E that he could "still do his job if his hours were reduced."²⁹⁸ Putnam proposed that he should be able to take a half-

288. *Id.*

289. *See id.* at 7.

290. *Id.*

291. *Id.*

292. *Id.*

293. *See id.*

294. *See id.*

295. *See Stevens, supra* note 236, at B1.

296. *Id.*

297. *Id.*

298. *Id.*

day off every time he had to put in two consecutive forty-five-hour weeks, and that he should be assigned to a supervisor who was more supportive and less critical.²⁹⁹ Before his collapse, Putnam worked sixty-hour weeks, which is not uncommon for an attorney.³⁰⁰ PG&E did not reinstate Putnam, nor did they make any of his proposed changes.³⁰¹

When Putnam arbitrated his claim, the arbitrator agreed that PG&E should have accommodated his disability, and awarded him \$1.1 million in damages.³⁰² The arbitrator noted that Putnam's proposals "merited a fair try," and awarded the judgment to cover emotional distress, back pay, and attorneys' fees.³⁰³

As diagnosis and awareness of disabilities in the legal community increase, so will the requests for reasonable accommodations. Law students, who are accommodated in clinical placements, will benefit from current attorneys' experiences, as well as their own in order to successfully seek accommodations.

IV. PROPOSED MODEL OF ANALYSIS

Because much of a clinical program provides a work environment where students can practice their legal skills, it makes sense to use an analysis similar to that used in the employment setting under ADA, Title I, when evaluating students with disabilities' accommodation needs. This approach balances the needs of the student, the school, other students and the clients. Under the employment model, if the student can perform the essential functions of the job with reasonable accommodation, then she can participate in the clinic. The analysis of essential functions protects the student, school, the other clinical students and the clients by ensuring that the person with the disability will be able to competently perform all the essentials.

Going through the process of determining the essential functions of a position in a clinical placement is extremely valuable. This process requires the law school to examine many of the stereotypes about law practice and lawyers. In determining whether a student with a disability can work in a clinical setting, it is necessary to go through a three pronged analysis. The first prong is whether the student is considered an

299. *See id.*

300. *See id.*

301. *See id.* at B5.

302. *See id.* at B1.

303. *Id.* at B5.

individual with a disability under the ADA. The second is to determine what are the essential job functions of the desired position. Finally, if the student's disability presents a problem in performing the essential job functions, it is necessary to determine whether the student can perform the essential job functions with reasonable accommodations. Then, the question becomes how and if the student can be accommodated reasonably.

This Article outlines a number of hypothetical situations to facilitate this analysis and describes hypothetical students with an assortment of disabilities, of varying degrees in mock clinical settings. The disabilities used are autism, dyslexia, and obsessive compulsive disorder (OCD). Each of these disabilities is analyzed below with extreme and moderate symptoms. This Article employs the following clinical settings: a legal clinic; a judicial clerkship; and a volunteer position in the District Attorney's Office. Essentially, the analysis determines whether the student is an ADA qualified individual. As previously defined, a qualified individual is a person with a disability who is able to perform the essential job functions with reasonable accommodations.

A. *Free Legal Clinic*

The law student has several job functions in the hypothetical legal clinic. These job functions include performing client intake, counseling legal and non-legal options, helping clients fill out legal forms, and representing clients in administrative hearings. The job functions also require the law student to perform legal research and writing, work with attorneys, and prepare cases and motions for trials. In addition, the legal clinic job functions may demand that the law student attend judicial hearings, assist in planning and developing materials for presentations, and prepare court documents. The student spends a majority of his or her time dealing with clients and performing legal research and writing. The student also spends a significant amount of time interacting with the attorneys. In this type of clinic, students who demonstrate initiative and perform the other job functions exceptionally well are allowed to represent clients in administrative hearings. The job is very stressful and the students are always very busy.³⁰⁴

In determining the essential functions of the job, it is helpful to first eliminate the marginal job functions. Because it is assigned as a reward, representing clients in administrative hearings is likely a marginal

304. Job description taken from a number of student job descriptions of their student work at the Legal Aid Foundation as collected by the Externship Office at Loyola Law School, Los Angeles, California.

function, not a fundamental one. Furthermore, attendance at judicial hearings is a benefit for the students, and is not essential. Preparation of court documents represents a small percentage of the student's time. Although the court has ruled that time spent does not dictate whether a function is essential, it is probably not an essential function.

The essential functions probably are research and writing, and interacting with the clients. These functions represent the majority of the time student volunteers spend at the clinic, and both are included in the job descriptions. Since these two functions are essential, for the student to be a qualified individual under the ADA she must be able to perform them with or without reasonable accommodations.

*I. Autism*³⁰⁵

At the clinic a student with autism (Anne) has symptoms of echolalia (constant repetitive speech), frequently asks inappropriate questions, and makes inappropriate comments.³⁰⁶ Anne would be considered to have a disability under the ADA if she is substantially limited in performing a major life function.³⁰⁷ The student would not be able to perform the major life functions of getting along with others and speaking. A few of the clients at the clinic became alarmed when she interviewed them, because they thought Anne was on drugs

Anne can perform the research and writing function, in doing so she can work on her own and does not need to interact with many other people. Her disability does not present an obstacle to this function, unless it prevents her from completing her task sufficiently quickly if deadlines are important. This might occur if Anne's repetitive speech and inappropriate questions and comments distract her from doing her work. If so, Anne could be accommodated by giving her extra time, a workstation that is out of the way, or by increasing office awareness and understanding about Anne's disability. If her autism is aggravated by computers, this would present a more unique problem that perhaps could be accommodated by allowing her to conduct research from books rather than computers. This accommodation might not be reasonable if the

305. When most people think of autism they think of people who are incapable of communicating at all. While this may be true of severe cases, for the purposes of this article a less severe case of autism is being used.

306. See generally *Taylor v. Food World, Inc.*, 133 F.3d 1419, 1421 (11th Cir. 1998).

307. See 29 C.F.R. § 1630.2(9) (1997).

office does not have the necessary books or there is not a law library that is reasonably accessible.

Dealing with clients is a function that may be difficult to accommodate. Due to the nature of her disability she might experience difficulty when interacting with clients who already are upset. Anne's inappropriate questions and comments would not be appreciated by the clients and could make them uneasy. This legal clinic could accommodate Anne by having the clients fill out initial paper work, instead of being interviewed. However, this might not be reasonable because every client's case is unique and it might not be reasonable or possible to create a form to effectively deal with all the intricacies of each case. This accommodation might result in insufficient and incomplete statements from the clients, who are unfamiliar with the law and might not incorporate all the relevant facts.

If the clinic's workforce is sufficiently large, Anne may be assigned the research while other students conduct the client interviews. However, if there is a small workforce such a reassignment may not be feasible.

2. *Dyslexia*

The hypothetical student with dyslexia (Diana) working at the free legal clinic has difficulty reading and writing. Her disability becomes worse when she is stressed, needs to work quickly, or when there is substantial activity around her while she is reading or writing. Because Diana is substantially limited in the major life function of learning, reading and writing, she would be considered disabled under the ADA. Therefore, if Diana can perform the essential functions of the job with reasonable accommodations she will be a qualified individual under the Act.

Depending on the severity of the dyslexia, Diana could have significant difficulty performing the essential functions of this job. Although there are not often strict deadlines in the clinic, other students describe the work as fast-paced and stressful. Both of these conditions could aggravate Diana's disability. Diana may have difficulty researching and writing. Due to her disability, she might not be able to research cases either on the computer or in the books quickly enough. If reasonable, Diana could be accommodated either with extra time or by completing smaller projects. She could also be assigned projects that are not immediately needed. If the office is large enough and has available room, she could be given a space to work that is away from most of the office activity, thereby reducing the effects of her dyslexia. If the office is small or does not have additional space, then this may not be a

reasonable accommodation.

Any difficulty Diana has with interviewing clients could easily be accommodated by allowing her to tape record the sessions. That way she could later review, transcribe, or give the tape to somebody else to transcribe. The legal research and writing problems that Diana might encounter can most likely be reasonably accommodated with extra time. Clients could be given questionnaires to complete and Diana could assist them by answering their questions and explaining the law.

Many people with learning disabilities can generate the same work product as people without learning disabilities by employing slightly different methods of working. Indeed, while lay people may think of people with learning disabilities as those who cannot reach the same goals as others, a more accurate paradigm would cast people with learning disabilities as those who take alternate routes to arrive at the same destinations as people without learning disabilities.³⁰⁸

3. *Obsessive Compulsive Disorder (OCD)*

OCD is a prime example of the need to analyze disabilities on an individual basis. A student with mild OCD (Olivia) might be compelled to keep files and her work area neat and organized. In many job settings, Olivia might perform certain essential functions better than other students. However, if Olivia has severe OCD, she might not be able to perform even the simplest tasks. Olivia, in this hypothetical, has moderate OCD. Her symptoms consist mainly of paranoia and a recurring belief that she has forgotten something. Olivia might repeatedly check to make sure she locked her car, only to turn around and check once again, just to be sure. Or she might be driving home, hit a bump in the road, and repeatedly return to the spot where her car was jolted, convinced that she ran over something.

Olivia's OCD could be difficult to accommodate because it affects her reliability and attendance. When doing research Olivia might read every case that came up under a particular search, where students might be able to quickly rule out certain cases as not applicable. She might be unable to complete her research, and begin to process the materials she has found, because of a nagging feeling that there is a better case that she has not yet found. In either case, Olivia might not be able to perform the essential function of researching without accommodations.

308. See Eichhorn, *supra* note 169, at 37.

Is reasonable accommodation for this student possible? Additional time may be a reasonable accommodation, if Olivia is able to stop her research at a reasonable point. If she was unable to stop researching, after sufficient time had passed for the student to amass enough research materials, an attorney could review her progress. If the attorney felt it was sufficient, then Olivia could be told to stop researching and begin processing the materials. Alternatively, if the workforce is large enough, the clinic could assign another student to perform the research function and Olivia could do the writing.

Other problems Olivia might face are attendance and punctuality. For example, if she needs to return home repeatedly to make sure that her front door is locked or that her cat has water, she may frequently be late for work. A flexible work schedule or allowing her to work at home are possible and reasonable accommodations in this circumstance. However, the clinic must determine if attendance is an essential function of this position.³⁰⁹

Other characteristics of OCD include compulsively counting objects and compulsive hand washing. These could present problems with deadlines in the clinical setting. The clinic might be able to accommodate Olivia with extra time. Alternatively, if Olivia was constantly compelled to wash her hands, this could present a problem that could not be reasonably accommodated, if it prevented her from meeting deadlines. Perhaps the legal clinic could accommodate Olivia by allowing her to keep some disinfectant hand soap nearby, but even then she would be washing her hands and might not be working.

Olivia could be reasonably accommodated in the legal free clinic setting by allowing her more time or by allowing her to work in an uncluttered, secluded workplace. If reasonable, she could be allowed to do her research at home, thereby alleviating most of her symptoms. However, this would prevent the clinic from assigning her work that needs to be done immediately, and from regulating and observing her work, and so maybe unreasonable.

Olivia's ability to interview clients depends on the severity of her OCD. If she frequently leaves the interview session, this may inhibit the client's testimony and reduce the effectiveness of the interview. Furthermore, if Olivia is distracted during an interview, she may not obtain valuable information from the client. The legal clinic might reasonably accommodate her by recording the sessions. However, if this accommodation does not prove reasonable, then it is possible that Olivia cannot perform the essential functions of the job.

309. See *Nowak v. Saint Rita High Sch.*, 142 F.3d 999, 1003 (7th Cir. 1998).

B. Judicial Clerkship

A law student in a judicial clerkship may have many essential functions. These functions would likely consist of reading memos, motions and pleadings, researching a variety of topics, and writing memos to the judge or law clerks. The position may also require the law student to discuss the memos with the judge to make sure the judge agrees with the student's conclusion. The position may also require the law student to observe courtroom hearings. Deadlines are of the utmost importance in judicial clerkships. Reassignment of tasks may not be reasonable because the judges often employ only a few students.

The essential functions for the judicial clerk are research and writing. These are often the essential functions for which the student was hired. It is also probably essential that she be able to read the motions and pleadings so that she can focus her research.

1. Autism

If Anne, the student with autism, has the same symptoms described in the legal clinic context, she will face several obstacles in performing the essential functions of the judicial clerkship position. It is an essential function of the judicial clerkship to meet deadlines, and Anne's constant repetitive speech and compulsive question asking could prevent her from doing so. If her disability prevents her from completing her tasks on time, she might need an accommodation. Perhaps the judge could accommodate Anne with a quiet corner in which to work when she is faced with deadlines. This might be reasonable depending upon the size and available space of the Judge's chamber. Alternatively, the judge may accommodate Anne by allowing her to work at home, where there are fewer distractions. Whether this accommodation is reasonable depends on whether being available, in the office, to do emergency or high priority assignments, is an essential function of the job.

If Anne's disability prevents others from completing their work on time, the same accommodations could be provided, as long as they are reasonable. Finally, because attending hearings or bench trials is not likely to be an essential function of the job, it does not need to be accommodated.

2. *Dyslexia*

Depending on the severity of Diana's dyslexia, an accommodation for the legal research might not be feasible, especially if her condition worsens under stress or when she works with time constraints. The inability to read quickly might prevent her from being able to complete her research assignments on time. If this could be accommodated by giving her less assignments at the same time, or by allotting her more time in which to complete her tasks, then she can perform the essential functions. However, under some circumstances neither of these two solutions might be reasonable, and the employer is not required to change their production standards. The judge could hire a person to read cases for her or provide appropriate computer assistance as a reasonable accommodation.

In writing reports, if Diana is unable to type or write at a sufficient speed she could dictate to another student or other employee. If Diana is able to read and write reports, discussing them with the judge would not present a problem.

3. *OCD*

The student with OCD, Olivia, faces many of the same problems in the judicial clerkship as she does at the free legal clinic. If Olivia is compelled to do repetitive tasks, so that the quality and speed of her work drastically suffers, she might be unable to perform the essential functions of her job. If Olivia cannot perform her job by meeting the required deadlines, then she cannot meet the essential functions of the job.

If this can be reasonably accommodated by giving her extra time, allowing her to do some of the work at home, or if her condition can be controlled with medication, then she would be qualified under the ADA. However, if Olivia's OCD is severe enough that she cannot leave her house, or cannot perform the essential functions of her job, she does not qualify for protection under the ADA.

C. District Attorney's Office

This position is as a certified law student representing the state of California in preliminary hearings. There is very little legal research and writing. Students may review briefs, write written responses to motions, observe proceedings and negotiations, check citations, transcribe tapes, summarize documents, and occasionally present trial witnesses and motions in trial.

The most obvious essential function is the ability to present a

preliminary hearing. This includes being able to organize questions, listen carefully to the answers, speak to the judge, and many other skills needed for a trial attorney.

1. Autism

Anne, a student with autism will have great difficulty with communication that would probably be insurmountable in the stressful environment of trial work. However, it is possible that by working with another student as a team they could divide the work so as to allow the student with autism the chance to participate without having to speak in public.

Providing Anne a script of questions to ask witnesses and allowing her significant practice time could solve this problem; if so, then that would probably be a reasonable accommodation. If Anne cannot control her inappropriate questions and comments, interacting with crime victims and witnesses could require significant accommodation, such as giving her strict guidelines to follow, supervising her closely, and coaching her on interviewing skills. The reasonableness and success of these accommodations would be highly dependent on Anne, the degree of her disability and the effectiveness of these measures. Alternatively, Anne might conduct the preparatory interviews and legal research. Also, in larger cities the DA's office is generally staffed with a large workforce and tasks can be reassigned or supervised with little problem.

2. Dyslexia

Diana faces many of the same problems in the DA's office that she did in the previous two settings. She may have significant problems completing research and writing tasks; however, because these tasks are not the majority of work students perform in the office, they are not essential functions. Diana needs almost no accommodation. Because of the nature of the position, with very little written assignments, this student could perform excellently. In fact, Diana's performance will most likely be indistinguishable from other students. If needed, Diana might be reasonably accommodated with extra time, extra supervision and assistance, or by carrying a smaller workload. Other possible accommodations are to provide her a reader or technological assistance.

3. *OCD*

Olivia faces the same research problems as she did in the above settings. Also, because the Preliminary Hearings are unpredictable, this could be very stressful. One possible accommodation might be an expanded training and observation period and assignment to a single court, because allowing Olivia to remain in familiar surroundings could avoid aggravation of her disability.

V. CONCLUSION

Law schools and clinical supervisors can help to ensure the future equal treatment of law students with disabilities by using the proposed analysis in this article to provide proper accommodations. In doing so, everyone benefits: students with disabilities, schools, employers, clients, and the legal community as a whole.