The 2018 Summer Reading List

Higher Education Student Disability Law Update©

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This document has several purposes:

- To provide an annual update on developments in post-secondary student disability law for disabled student service (DSS) providers, attorneys representing colleges and universities, disability rights advocates, and law school teachers.
- Specifically with regard to higher education, to provide a supplement to the more general 2018 disability law update to Colker and Grossman, ***The Law of Disability Discrimination, Eighth Edition,*** (2013), found at https://cap-press.com/books/isbn/9780769882017/The-Law-of-Disability-discrimination-Eighth-Edition
- To provide an annual update to the many individuals who have received post-secondary disability law training through AHEAD or CAPED and have received the AHEAD publications version of **The Law of Disability Discrimination.**
- To provide college and university administrators with a tool for leading conversations with their colleagues on emerging issues in post-secondary student disability law and policy.

These materials are provided for informational purposes only and are not to be construed as legal advice.

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Process, Process, Process

Index in the AHEAD version of ***The Law of Disability Discrimination*** *to the extemded presentation of* ***Wynne v. Tufts Medical Center***[1] *and the cases that follow* ***Wynne****,* ***pages 207 to 243.***

If there is a discernable theme to this year's court decisions and OCR letters, it is that colleges and universities should never deny an accommodation without first engaging in a case-by-case ("individualized) and "interactive" consideration of the requested accommodation, even if implementing the accommodation would require making an exception or modification to a long-existing rule, practice,

[1] Steven Wynne, a student at Tufts University School of Medicine ("University"), failed eight of fifteen courses in his first year of medical school. Two committees voted to dismiss him. The Dean rejected both committees' recommendations and allowed Wynne to return the following school year, at which time Wynne received neuropsychological testing. This testing revealed weaknesses in sequencing, memory, visual memory, and part-whole relationships. Wynne received multiple forms of support from Tufts but was denied the accommodation he most sought to receive, all multiple-choice examinations in another format, such as essay examinations. Tufts refused this accommodation, concluding it would represent a fundamental alteration.

In 1986, Wynne filed a disability discrimination complaint with the United States Department of Education Office for Civil Rights. OCR dismissed the complaint. In 1988, Wynne sued Tufts in federal court, under Section 504 of the Rehabilitation Act of 1973. The trial court awarded summary judgment in favor of Tufts.

Wynne appealed to the First Circuit. 932 F.2d 19 (1st Cir. 1991). Relying on precedents that accord considerable deference to the academic decisions of colleges and universities. On behalf of the University, the Dean provided the court with only one brief affidavit. It discussed the reasons for exclusively relying upon multiple-choice examinations in some courses. Initially, the court found the affidavit insufficient because it failed to mention any consideration by Tufts of alternative testing methods, made no reference to the unique qualities of multiple-choice examinations, and provided no information about the feasibility of reasonably accommodating Wynne as he had requested or accommodating him by other means.

Balancing Wynne's right to be free from disability discrimination under Section 504 and the academic deference due Tufts as a university, the court of appeals concluded that it would grant deference to Tufts only if Tufts would engage in a "diligent" consideration of Wynne's accommodation request. In its initial decision, the court laid-out what subsequently would be known as the "Wynne test" for determining whether the institution's decision was entitled to deference. 932 F.2d at 26.

According to the court, to earn academic deference, under Section 504, an educational institution must sufficiently explore the availability of reasonable accommodations by "(1) submitting undisputed facts documenting that (2) the relevant officials within the institution (3) considered alternative means and then examined (4) its feasibility, (5) cost, and (6) effect on the academic program." In the event the institution still found that there were no reasonable accommodations, it was then required to rationally explain to the court why each of the considered alternatives would have either: 1) involved lowering its academic standards; or 2) would be a fundamental alteration to its program. Once this process has been followed, only when essential facts are disputed or there is evidence the institution's reasons were pre-textual or asserted in bad faith will further review by the court be required.

Tufts came back to the First Circuit, again seeking summary judgment. 976 F.2d 791 (1st Cir.1992); *cert. denied* 113 S.Ct. 1845 (1993). This time, based on an "augmented record," Tufts convinced the court that it had paid "scrupulous attention" to its earlier guidance. Tufts provided the court with a "rationally justifiable conclusion" for why providing Wynne with tests in other formats would represent a fundamental alteration to its program of instruction. This time, the deference it sought had been earned, and the First Circuit granted Tufts motion.

policy, or assumption. Per the guidance of the First Circuit in ***Wynne***, the evaluation process should include a "diligent consideration," by qualified individuals, of whether the requested accommodation would actually entail a fundamental alteration or an undue burden. Moreover, such a determination must never be a pretext for disability discrimination.

In ***Bied v. Cty. of Rensselaer, Hudson Valley Community College,*** No. 115CV1011TJMDEP, 2018 WL 1628831 (N.D.N.Y. Mar. 30, 2018). Michaela Bied brought claims of disability discrimination under Section 504 of the Rehabilitation Act and Title II of the ADA, as well as other laws, against Hudson Valley Community College. In the documentation submitted for the litigation, Ms. Bied was diagnosed as having a "nonverbal learning disability" including "developmental delays in speech development, cognitive functioning and motor skills." Ms. Bied's primary allegations pertained to her arrest by campus police for stalking a teacher, while she was a student at the College. This allegation is discussed further below under **Student Conduct.** Ms. Bied also alleged an unlawful denial of accommodations on tests and assignments. The College moved for summary judgment on all claims. As to Ms. Bied's allegations concerning tests and assignments, HVCC's motion was granted only in part.

HVCC had a practice of requiring students to deliver an accommodation letter and to discuss implementation of authorized accommodations with each faculty member each semester; failing to do so resulted in non-implementation of the accommodation. The College supported this practice as a way to teach students with disabilities to act like adults and advocate for themselves. Bied's accommodations were implemented the first semester when she delivered the accommodation letters. In the second semester, though prompted to do so, Ms. Bied did not deliver the letter to any of her teachers, even ones with whom she was familiar (Professsor Mehan). Consequently, she received no accommodations, despite showing up during the second semester at the College testing center requesting an accommodated test. Ms. Bied's academic performance suffered greatly as a result of the absence of accommodations.

Ms. Bied argued that, given the nature of her disability, as an accommodation, HVCC should have excused her from this requirement:

> Plaintiff argues that the record is devoid of any evidence that HVCC 'diligently assessed' whether the accommodation that it 'denied and frustrated' … could have been afforded 'without imposing undue

> financial and administrative burdens' on HVCC or would have required a "fundamental alteration to the academic caliber of its offerings." **Bied** at 17.
>
> [A] reasonable factfinder could conclude that HVCC personnel were put on notice that Plaintiff was electing to exercise her accommodations in Prof. Meehan's class when Plaintiff showed up [at the testing center] for the first test but it had not been sent by her professor. A reasonable factfinder could also conclude that HVCC should have, but did not, diligently assess whether, in light of Plaintiff's documented difficulties in communication and self - advocacy, it should have overridden the policy that students present accommodation letters before they receive their accommodations. In this regard, a reasonable factfinder could conclude that HVCC failed to properly assess whether its policies allowed Plaintiff to access her disability accommodations. ***Bied*** at 18.

Based on these determinations, the court allowed these issues to proceed to trial, including an allegation that Ms. Bied was a victim of a form of intentional discrimination by Professor Mehan. Subsequently, a "conditional settlement" was reached between the parties.

For student discussion

The U.S. Department of Education regulation implementing Section 504 found at 34 C.F.R. section 104.4(b)(4) provides, in pertinent part: "A recipient may not … utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap … ." The Justice Department has promulgated a similar regulation, implementing Title II of the ADA, found at 28 C.F.R. section 35.130(b)(3). Though not cited in the above decision, Hudson Valley Community College is required to comply with both of these regulations. Do you think that the College's strict adherence to a practice of requiring all students to personally deliver an accommodation letter to his or her teacher was a "method of administration" that could have the effect of subjecting some students, like Ms. Bied, to discrimination? Should the College have considered making exceptions to this practice on a student –by-student basis? Do you think that making an exception for a student like Ms. Bied would represent a "fundamental alteration" to the College's academic standards or place an undue administrative burden on the College?

In ***Gati v. Western Kentucky University***, ***et al.***, No. 3:14-CV-544-DJH-CHL, 2017 WL 4288749 (W.D. Ky. Sept. 27, 2017) an individual with a spinal injury wanted graduate counseling classes to be taught at the satellite campus near him or through an ITV (video-on-demand) connection, as his injuries made it impossible for him to sit long enough to commute to the University's primary campus. The court expressly considered the claim of the student that his accommodation request had not received a proper consideration process but concluded that it had, earning deference for the University. See ***Wong v. Regents of Univ. of Cal. I,*** 192 F.3d 807 (9th Cir. 1999). Among the arguments proffered by the University: participation in the counseling class required direct, personal observation between students; there was a shortage of qualified teachers who would be available to teach the class in question at a satellite campus; and consequently, implementation of the accommodation would represent a threat to the University's accreditation.

For Student Discussion

Unlike the court in ***Gati,*** *very few courts are even willing to* ***consider*** *as a reasonable accommodation use of ITV or similar technologies to remove barriers to access to brick and mortar classes. Generally, this form of accommodation is considered per se unreasonable. In an era of widespread availability of online classes and emerging technologies, like virtual reality, are courts uniformed and simply "behind-the-times" with regard to implementation of this type of accommodation? How would you distinguish between which brick and mortar classes would be appropriate for ITV or similar technologies and which should not? If a college offers an on-campus section of a class and an on-line section on the same topic, is there any reason the college should not simply refer a student like Mr. Gati to the on-line section rather than having to consider transmitting remotely the on-campus section?*

Though it never cites ***Wynne v. Tufts Medical Center,*** *as demonstrated by the quotations below,* OCR has clearly come to embrace the ***Wynne*** approach to the resolution of accommodation questions pertaining to what is "reasonable" or "unreasonable," "fundamental" or "undue." *See* multiple OCR letters, including:

- ***Irvine Valley College:*** OCR Case Number 09-17-2090 (April 2017) --- extended time on take home exams;
- ***Tulsa Community College - Metro Campus:*** OCR Case Number 07092064 (June 2011) – extended time in a practicum setting;

- ***Gateway Community College***: OCR Case Number 08-16-2199 (February 2017) – extended time on a test of a core competency skill;
- ***University of North Carolina, Greensboro***: OCR Case Number 11-17-2001 (April 2017) – independent study as an accommodation denied, improperly placing burden on student to request that the University initiate proper fundamental alteration and undue burden consideration processes; and,
- ***Surry Community College***: OCR Case Number 11-16-2165 (December 2017) – extended time for weekly, on-line writing assignments authorized by DSS, denied by instructor.

Pertinent and instructive excepts from these letters follow:

> [T]here was … a procedural flaw in the way the University handled the interactive process. Specifically, the University improperly placed the burden on the Student when determining whether XXXX was an essential requirement of the course of study and whether any waiver of the XXXX would constitute a fundamental alteration of the program." ***** "OARS [DSS] should have been leading the efforts to request independent study or an alternative accommodation on behalf of the Student and to ensure that the Student's disability was being taken into account by all decision-makers. Because the University caused a procedural flaw in the interactive process, OCR finds that the University was in violation of Section 504 and Title II. ***Greensboro*** letter at 4.
>
> There are some circumstances where an institution may not be required to provide academic adjustments. Recipients are not required to alter requirements they can demonstrate are essential to the program of instruction being pursued by the student, and they are not required to make modifications that would fundamentally alter the nature of the service, program, or activity. 34 C.F.R. § 104.44(a); 28 C.F.R. § 35.130(b)(7).
>
> However, the determination that an academic adjustment is a fundamental alternation or would alter an essential requirement is a decision that must be made based on documented evidence [considered] on a case-by-case basis. If an institution believes that a requested accommodation would constitute a fundamental alteration of its program, applicable Section 504 and Title II case law requires the institution to make such a determination through a process that includes the following: 1) the decision is made by relevant officials, including faculty members; 2) the decision-makers consider a series of alternatives, their feasibility, cost and effect on the academic program, and 3) after a reasoned deliberation, the decision-

makers reach a rationally justifiable conclusion that the available alternatives would result either in lowering of academic standards or requiring substantial program alterations. ***Gateway*** letter at 7.

"In determining what modifications are appropriate for a student with a disability, the college should familiarize itself with the student's disability and documentation, explore potential modifications, and exercise professional judgment. The question of whether a college has to make modifications to its academic requirements or provide auxiliary aids is determined on a case-by-case basis. Both Section 504 and Title II envision a meaningful and informed process with respect to the provision of modifications, e.g., through an interactive and collaborative process between the college and the student. If a college denies a request for a modification, it should clearly communicate the reasons for its decision to the student so that the student has a reasonable opportunity to respond and provide additional documentation that would address the college's objections.

Section 504 and Title II do not require a college to modify academic requirements that are essential to the instruction being pursued by the student or to any directly related licensing requirement. In reviewing an institution's determination that a specific standard or requirement is an essential program requirement that cannot be modified, OCR considers whether that requirement is educationally justifiable. The requirement should be essential to the educational purpose or objective of a program or class. OCR policy requires, among other factors, that decisions regarding essential requirements be made by a group of people who are trained, knowledgeable and experienced in the area; through a careful, thoughtful, and rational review of the academic program and its requirements; and that the decision-makers consider a series of alternatives for the essential requirements, as well as whether the essential requirement in question can be modified for a specific student with a disability. OCR affords considerable deference to academic decisions made by post-secondary institutions, including what is or is not an essential program requirement." ***Surry*** letter at4-5.

For Student Discussion

Why has OCR come to favor a process orientation to compliance? Does this emphasis place any fewer investigative burdens on the agency? Does it obviate in any manner second-guessing or making difficult decisions on academic matters? Does it create any positive or negative incentives for compliance by colleges and universities with Section 504 or the ADA?

A number of disabled student services directors have faulted OCR and the courts for failing to appreciate just how much time and human resources are entailed in conducting a formal ***Wynne v. Tufts*** *– style deliberative process: a committee of busy individuals must be convened; other colleges should be consulted, expert information may have to be gathered, etc. How would you advise colleges and universities, as a practical matter, to distinguish between when a fundamental alteration determination should be made only after engaging in such a formal process, and when something is so obviously and logically unreasonable that it is unnecessary to convene* ***Wynne****-style process?*

State Supreme Court Tort Decisions Which May Impact Admissions and Retention

Index in the AHEAD version of ***The Law of Disability Discrimination*** to the presentation of **Safety/Direct Threat Defense**, pages 317 to 326**.**

Two state supreme courts have held in the past year that a "special relationship" may exist between a college or university and its students. Consequently, the school may owe certain duties to the student, which, if not fulfilled, can create a form of tort liability. ***Regents of University of California v. Superior Ct.***, __ P.3d.__, 2018 WL 1415703 (S.Ct. Cal,, April 22, 2018) [duty to protect and warn students from other violent students with psychological disabilities]; ***Nguyen v. Massachusetts Institute of Technology***, S.Ct. Mass., SJC-12329 (May 7, 2018) [duty to intervene with a student to prevent his or her suicide]. *See also* ***RONDINI, et al. v. BUNN,*** et al., Case No. 7:17-cv-01114-RDP, N.D. Ala. (January 8, 2018) [duty to not motivate a student to commit suicide by an inadequate response to an allegation of rape].

Though the extent of the relationship varies, in both ***Regents and Nguyen*** cases, state supreme courts found a special relationship between universities and their students, based on the following:

- There are already precedents for this conclusion with a regard to colleges and universities. *See* **Tarasoff** v. **Regents** of University of California, 17 Cal.3d 425, 131 Cal.Rptr. 14, 551 P.2d 334 (1976);
- College is a community of limited size;
- College is a community with a common set of rules, set by the college, representing a degree of control;
- Students are dependent on college for protection; and.
- Colleges can monitor and discipline their students.

However, differences in the facts of these two cases, pertaining to "foreseeability," lead to different outcomes. The California case concerned the nonfatal stabbing of one student by another in a chemistry lab class. The California court held that a conclusion of foreseeability was sufficiently likely to allow the matter to proceed to trial as:

- The perpetrator was an undergraduate student with whom UCLA had a large number of direct interactions;

- UCLA knew that he was an individual with paranoia, schizophrenia, and auditory hallucinations;
- Until dismissed from housing, the perpetrator was observed hearing denigrating messages through the walls of various dorm rooms and otherwise showed that he was unable to adapt to dorm life;
- UCLA had found him sufficiently mentally ill to intervene including involuntary commitment;
- UCLA knew he resisted treatment and medication; and,
- UCLA knew he was trying to specifically identify students who he thought were whispering hostile statements, which angered him greatly

Conversely, the Massachusetts Supreme Court would not allow Mr. Nguyen's Estate to proceed to trial for a wrongful death action following his suicide, as:

- Mr. Nguyen was a twenty-five-year-old adult graduate student with rights to privacy and autonomy;
- Mr. Nguyen never communicated by words or actions to any MIT employee that he had specific plans to commit suicide;
- Any prior suicide attempts by Mr. Nguyen occurred well over a year before matriculation to MIT;
- Mr. Nguyen lived off campus, not under daily observation; and,
- Resistant to intervention by MIT, Mr. Nguyen made clear that he wanted to keep his mental health issues separate from his academic performance problems and that he was seeking professional help from psychiatrists and psychologists outside the MIT Mental Health system and rejecting MIT's services.

For Student Discussion

Do you find persuasive the argument made by UCLA that creating special duties for the protection of students may motivate colleges and universities not to admit or retain individuals with psychiatric disabilities? Do you agree with the Supreme Court of California that, the ADA provides sufficient protections for post-secondary students with disabilities, making UCLA's concerns unpersuasive?

Qualification

Index in the AHEAD version of ***The Law of Disability Discrimination*** to the presentation of **Essential Requirements**, pages 181 to 196.

A Second Bite at the Apple?

An unsettled question in post-secondary disability law is whether a student with a disability, who has failed to request accommodations and is dismissed for poor academic performance or misconduct, may ever be entitled to reinstatement *as a form of accommodation*? (Some courts refer to this as an "after-the-fact" accommodation request.) Even assuming that a second chance is encompassed within the duty to provide students with disabilities accommodations, what must a student prove to a college or court in order to receive this form of accommodation?

This question is sometimes over-simplified to ask whether Section 504 and the ADA include a duty to provide an accommodation in the form of a "second bite at the apple." A more accurate description of the issue is whether a student, who was not a "qualified individual with a disability (QID)," should be given the opportunity to "articulate" (identify) a way in which, prospectively, it is likely that he or she would be a QID? If the student can do so, should the student be given another opportunity to continue in school with the identified or requested accommodation in place?

To date, OCR does not favor after-the-fact accommodations for dismissed students. When a court is open to this possibility, it usually requires the student to establish that:

- he or she is an individual with a disability;
- the student's poor academic performance is causally-connected to the identified disability; and,
- there is an accommodation, "reasonable in the run of cases," that if implemented, would likely bring the student's poor performance up to the prevailing academic or technical standards of the college or university.

Moreover, it is one thing for a court to permit a student to present a claim that he or she should receive a second chance under Section 504 and the ADA, and quite another for a court to conclude that the student has met his or her burdens of proof and thus should receive the requested second chance. *See* ***Stebbins v. Univ. of Arkansas****, unreported, 543 Fed. Appx 616 (8th Cir. 2013);* ***Halpern v. Wake Forest University of Health Sciences****, 2010 WL 3057597 (M.D.N.C. 2010) 669 F.3d 454* (4th Cir. 2012). In these two conduct cases, Plaintiffs argued that they were entitled to after-the-fact accommodations. Though the courts listened to their arguments, both individuals were unsuccessful in gaining reinstatement.

In applying the analytical paradigm, potential distinctions abound:

- whether the student knew of his or her disability prior to dismissal;
- whether the school gave clear notice of how to qualify for and receive accommodations;
- whether the student was dismissed for academic performance or conduct-based deficiencies;
- the nature and degree of poor performance;
- whether the dismissal is still in process or has been finalized;
- whether the student was receiving any form of accommodation prior to dismissal; and,
- what degree of certainty accompanies the requested prospective accommodation as a resolution of the academic or conduct deficiencies; in effect, has the student articulate a "speculative" solution or a "certain" solution, or something in between?

Under highly distinguishable facts, the "second chance question" has come up twice in the past year in ***Profita v. Regents of the Univ. of Colorado***, 709 Fed. Appx. 917 (10th Cir. Oct. 11, 2017); cert. denied 138 S.Ct. 1020 (February 20, 2018); and, ***Shaikh v. Texas A&M Univ. Coll. of Med.,*** No. 16-20793, 2018 WL 3090415 (5th Cir. June 20, 2018).

The Tenth Circuit, in P***rofita*** strongly rejected a "prospective accommodation" argument in a case about clinical performance. Mr. Profita, after failing two clinical rotations at the University of Colorado Health Sciences Center, one of them twice, was dismissed from the M.D. program. He attributed his failures to his physical and mental conditions primarily "major depressive disorder" and "disabling anxiety disorder." He later obtained treatment for these conditions, then sought, as an accommodation, to be readmitted to the M.D. program with full

credit for the work he had performed before the rotations. The University denied him readmission, telling him he must reapply as a new student.

Largely following employment law precedents, the 10th Circuit rejected Mr. Profita's proposed accommodation.

> [T]o provide this requested accommodation, the [University] would be required to ignore, override, or reverse his previous dismissal for unsatisfactory academic performance. …. Mr. Profita's accommodation request, which came months after he had twice failed rotations and had been dismissed from the M.D. program, did not obligate the [University] to reinstate him 'simply because [he] purported to request, at the eleventh hour, an accommodation. …. The disability statutes do not require that a disabled person properly terminated from a … program be given a greater opportunity for reinstatement than that given to a terminated person who is not disabled. In this case, all terminated medical students must apply for readmission; Mr. Profita was not treated differently. … [Mr. Profita] contends that a 'no leniency' rule violates the congressional mandate reflected in [the ADA and the ADAAA]. But such broad policy arguments cannot override statutory language or our precedents. …. Mr. Profita's complaint … fail[s] to state a claim. ***Profita*** at 923-25.

Profita is not a case about misconduct. One also could imagine a distinction developing between conduct-based dismissals and those based on poor academic performance. Indeed, ***Profita*** is most-accurately described as a case about clinical performance, and this too might be a basis for a distinction.

In ***Shaikh v. Texas A&M University College of Medicine,*** a dismissed medical student presented a much more sympathetic set of facts than is usually seen in this type of case, a unique legal claim, and an outcome that was also uncommon. Most important, Mr. Shaik did not allege that his lapse in performance or qualification reflected an improperly denied or inadequately implemented accommodation. In fact, Mr. Shaik had never requested an accommodation. Rather, Mr. Shaik alleged that a requirement that he pass USMLE Step 1 as a condition of remaining and advancing to the fourth year of medical school was not "essential." If the challenged requirement was not essential, then Mr. Shaik was dismissed while he was a "qualified individual with a disability," a form of discrimination prohibited by Section 504.

During his third year as a medical student at Texas A&M University College of Medicine, Danyal Shaikh began experiencing health problems. Prior to the onset of

these problems, Mr. Shaikh had performed well in both the didactic and clinical settings. Originally misdiagnosed with a psychiatric condition, he actually had a pituitary tumor. Ultimately, this tumor was identified as the cause of a loss of memory and concentration, depression, anxiety, extreme fatigue, and muscle weakness.

After Mr. Shaikh's condition prevented him from passing a medical licensing exam (USMLE Step – 1) by the College's deadline, the College gave him the option of being dismissed from the program or withdrawing. He withdrew and was denied readmission on two subsequent occasions. By the time of his second request for readmission, the manifestations of Shaik's medical condition were effectively treated with medication.

Mr. Shaik alleged that his withdrawal was analogous to a "constructive discharge" and that he was refused readmission based on his disability. The Plaintiff's evidence included a statement allegedly made to him by the Dean of Admissions that Shaik was considered a "psychiatric liability."

By a margin of 2 to 1, a sharply divided 5th Circuit reversed the district court's dismissal of the Plaintiff's Section 504 cause of action. A key disagreement between the majority and dissent revolved around whether the plaintiff was "otherwise qualified."

The majority explained its position as follows:

> To be "otherwise qualified" for a postsecondary education program, an individual with a disability must satisfy the program's "essential" requirements, with or without the aid of reasonable accommodations. A requirement is "essential" if "the nature of the program would be fundamentally altered" without it. By contrast, an individual does not need to satisfy non-essential program requirements to be "otherwise qualified." [Citations omitted] ***Shaik*** at * 5.
>
> According to his complaint, Shaikh "successfully passed all the required curriculum" needed to progress to his third year of medical school and passed his third-year clinical rotations with honors. These well-pleaded factual allegations plausibly indicate that Shaikh satisfied the program's "essential" requirements at the time of his dismissal/withdrawal and that he was therefore "otherwise qualified" to remain in the program and to obtain readmission thereafter.

> While Shaikh also alleges that he did not pass or retake the USMLE Step 1 by the end of his leave of absence, nothing on the face of his complaint establishes that doing so was an "essential" requirement of the program. The College's demand that Shaikh retake the exam during his leave of absence suggests that was a requirement for remaining in the program, but it may well have been a non-essential requirement, given the factual allegations before us at this stage. Nor was passing the USMLE Step 1 an essential requirement for readmission, given the College's statements and actions indicating that Shaikh remained eligible to reenter the program after his withdrawal.
>
> Because Shaikh plausibly alleges that he satisfied the medical school's essential requirements *without* a reasonable accommodation, we need not determine whether he also plausibly alleges that he could have satisfied the program's requirements *with* a reasonable accommodation. [Citations omitted] ***Shaik*** at *6.

This decision is also noteworthy for the fact that the majority had no trouble finding that Shaik was an individual with a disability despite the fact that his medical condition was fully in remission at the time of his second request for readmission.

Finally, the question of accommodation in the form of a second chance should not be confused with instances in which a student requested a legitimately reasonable accommodation and it was denied, or the student was promised an accommodation but it was not provided, and subsequently the student was dismissed. Both OCR and the courts are clear that such students are entitled to the opportunity to demonstrate that their poor performance was causally-connected to the denied or failed accommodation. If so connected, the college or university is unlikely to receive academic deference from OCR or the courts and reinstatement of the student becomes a likely remedy.

For Student Discussion

Mr. Shaik brought his action under Section 504. Section 504 regulation, 34 C.F.R. § 104.3(l)(3), defines "a qualified handicapped person" as follows: "With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation

in the recipient's education program or activity." The modifier "essential" appears nowhere in this regulation. Upon what authority did the majority draw when it read the term "essential" as a key, required element of the definition of qualified?

Does the decision in ***Shaik*** *suggest a strategic advantage in alleging that an academic or conduct criterion is not essential rather than that the plaintiff has been unlawfully denied an "second-bite" accommodation? Could one argue both theories at the same time or in the alternative?*

Student Conduct

Index in the AHEAD version of ***The Law of Disability Discrimination*** to the presentation of **Safety/Direct Threat Defense**, pages 317 to 326**.**

As presented above, Michaela Bied is an individual with communication-skills-related disabilities. Following multiple written and explicit verbal warnings, Ms. Bied was arrested for "stalking" a faculty member in whose class she was enrolled. Subsequently, Ms. Bied brought claims of disability discrimination under Section 504 of the Rehabilitation Act and Title II of the ADA, among other laws, against Hudson Valley Community College. In her primary claim, she alleged that the College failed to accommodate her because it failed to take her disability into account before and when disciplining her.

Despite failing to communicate with or respond to prompts from one of her teachers (Professor Mehan), with whom Ms. Bied was familiar, Ms. Bied repeatedly followed her in the hallways of the College, sometimes surreptitiously. Ms. Bied also attempted to communicate with Professor Mehan through a fictitious email account, falsely representing the messages as coming from her mother. Ms. Bied similarly misused a cell phone. These actions made the teacher particularly uncomfortable. At the request of Professor Mehan, she was escorted by security officers to her classroom.

The court dismissed the claim that the College violated Ms. Bied's rights under Section 504 or Title II by failing to appropriately consider her disability before arresting her, thereby depriving her of a reasonable accommodation. Though it put a very substantial burden on Bied, initially the court appears to consider the impact of her disability on her behavior. "[T]hese representations in the Psychological Report, read either singularly or in the context of the entire report, would not lead a reasonable college or law enforcement official to conclude that Plaintiff's conduct … were merely manifestations of Plaintiff's disabilities." Bied at *20. But further on, the court concluded in unambiguous terms that, in the higher education setting, disability is never an excuse for misconduct. "Requiring others to tolerate misconduct … is not the kind of accommodation contemplated by the ADA." Bied at *20. Likewise, a "requested accommodation that simply excuses past misconduct is unreasonable as a matter of law." Bied at 20. "The ADA and the Rehabilitation Act do not restrict a college from disciplining inappropriate behavior, even <u>if</u> that behavior allegedly was caused by the student's disability. To the contrary, both statutes 'permit [a college] to discipline a student even if the student's misconduct is the result of disability.'" [citations omitted] Bied at *21.

For Student Discussion

Should disability ever be an excuse for misconduct in the higher education setting? What if the misconduct is nonviolent and directly caused by a failure to implement a promised accommodation? For example, a veteran with PTSD is promised that his Military Policy class teacher will warn him if the teacher intends to show video materials depicting battle scenes. The teacher forgets to implement this accommodation and, without warning to the student, shows pictures of IED's exploding in Iraq. The student, in the midst of a panic attack, runs into the hallway and pulls a fire alarm, seeking to draw attention to his urgent need for help. Should the college be required to make an exception to a long-standing rule against triggering a false fire alarm? What if the rule that the student violated is not "essential," and the student does not otherwise represent a threat to the health and safety of other students? Should it make a difference if the college is located in the midst of a high-risk fire zone?

What if a student observes that, on the basis of disability, he or she has been subject to a stricter interpretation of the college's code of conduct, or has been provided less due process prior to the imposition of sanctions or dismissal, or has been subject to harsher penalties than students without disabilities? In such circumstances, should a student be permitted to argue that these examples of disparate treatment are a pretext for disability discrimination?

What if a college imposes discipline through a panel of students and faculty. Usually, before deciding upon sanctions, this panel takes into account all kinds of mitigating factors, such as personal or family hardship. Should such a panel also be required to take disability into account as a mitigating factor?

Service Animals in the Post-Secondary Setting

Index in the AHEAD version of ***The Law of Disability Discrimination*** to the presentation of **Service Animals,** pages 290-299**.**

The U.S. Justice Department states that a "service animal" is a dog that has been "individually trained to do work or perform tasks for an individual with a disability" that is related to his or her disability. Title II: Sections 35.104 (definition), 35.136 (requirements); Title III: Sections 36.104 (definition), 36.302(c)(2)-(9) (requirements). (A limited exception also exists for miniature horses.)

The Justice Department has not issued any regulations requiring covered entities to permit the presence of emotional support animals (ESAs) in student housing or other post-secondary facilities settings. However, it has supported the Federal Department of Housing and Urban Development (HUD), in exercising its authority to interpret the Fair Housing Act, Title VIII of the Civil Rights Act of 1968; its regulations implementing Section 504; and other guidance to require colleges and universities to make exceptions to no pet rules for student housing in order to permit the use of emotional support animals (ESAs) by students,. *See* ***http://portal.hud.gov/hudportal/documents/huddoc?id=servanimals_ntcfheo2013-01.pdf***

In one determination letter, the US Department of Education, Office for Civil Rights, has stated, without further guidance, that colleges and universities must also make exception to a no pets policy for the use of ESAs in settings other than housing, such as the classroom. Though not the basis of its violation determination, OCR was explicit that if a student presents proper documentation to establish that he or she is an individual with a disability and that he or she needs and has an ESA, the interactive process must include consideration of permitting the ESA to be present with the student on campus. Such exceptions are to be made on a case-by-case basis for individual students who present sufficient documentation to support this form of accommodation. OCR letter to Delaware Technical College, OCR Complaint 03-15-2416 (July 2016). https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03152416-a.pdf (last visited, August 4, 2018).

For Student Discussion

Given that some lecture halls hold hundreds of students, the odds are good that both a student with a disability, accompanied by a service animal or an ESA, and a student (or teacher) allergic to that animal, will be enrolled in the same course section. How should colleges and universities balance the legitimate interests of both individuals? Does it make a difference when the person with the allergy does not have symptoms so severe as to qualify as a "disability"? Should it matter that the individual with the dog is asserting a civil right and the individual without a disability is not? If both persons are individuals with disabilities, how much or what kind of documentation burden should be put on the individual with the allergy to establish that the service animal or ESA is actually causing him or her a substantial adverse reaction?

See ***Entine v. Lissner,*** Case No. 2:17-cv-946, WL 5507619, (S.D. Ohio, 2017). University ADA coordinator faulted for providing equal weight to the interests of a student with a legitimate service animal and a student with Crohn's disease who claimed that the presence of the service animal caused flare ups of her Crohn's disease. "Before the University can apply its policies equally to two students with disabilities who have requested irreconcilable accommodations, the University must be certain that: (1) the student [without the service animal] has properly requested an accommodation; and (2) that accommodations are indeed irreconcilable. Part and parcel of the second task is properly performing the direct threat analysis and establishing that one student's accommodation is indeed the cause of the aggravation of the other student's disability." ***Entine*** at 21.

More generally, *see* Rothstein, Laura, ***Puppies, Ponies, Pigs and Parrots: Policies, Practices, and Procedures in Pubs, Pads, Planes and Professions: Where We Live, Work, and Play, and How We Get There: Animal Accommodations in Public Places, Housing, Employment, and Transportation*** (August 10, 2018). Animal Law Review, Vol. 24, No. 1, p. 23, 2018. Available at SSRN: https://ssrn.com/ abstract=3235789 .

Students with Sensory Impairments

Index in the AHEAD version of ***The Law of Disability Discrimination*** to the presentation of **Students Who Are Blind or Have Low Vision,** pages 247- 260.

Aleeha Dudley, an individual who is blind, was an undergraduate student at Miami University in Ohio, a public institution. She enrolled at Miami University in the fall of 2011 to pursue a bachelor's degree in zoology so that she might secure admission to veterinary school. According to her federal court complaint, the university sent a letter to her instructors suggesting only two modifications: offering all classroom material in Rich Text Format and allowing double-time for exams and quizzes. The letter made no mention of Braille textbooks, tactile graphics, human assistants, timely course materials or accessible learning management software. Her lecture instructors used LearnSmart to manage homework assignments, which was not accessible to her. She was not permitted to participate fully in lab activities. *See Aleeha Dudley v. Miami University*, No. 1:14-cv-38 (S.D. Ohio filed January 10, 2014). *See* https://nfb.org/ images/nfb/documents/pdf/ miami%20teach.pdf (last viewed on May 22, 2014).

In her complaint, Ms. Dudley also alleged that Miami University made technology procurement decisions with "deliberate indifference" to the accessibility of the technology in question, even though accessible technology existed and was being used at other universities. Subsequent to the National Federation of the Blind, filing her complaint, the United States Justice Department, based, in part, on its own investigation, joined the NFB with additional allegations on Ms. Dudley's behalf. *See Aleeha Dudley v. Miami University*, No. 1:14-cv-38 (S.D. Ohio filed January 10, 2014). *See* https://nfb.org/images/nfb/documents/pdf/ miami%20teach.pdf (last viewed on May 22, 2014).

This matter was ultimately resolved through the provisions of a comprehensive, 60- page consent decree, approved by Judge Susan J. Dlott on December 14, 2016. This decree may serve as a useful reference for other colleges and universities seeking to establish or maintain compliance with their responsibilities to provide auxiliary aids and services and "equal communication" to students with sensory impairments and print disabilities. The decree covers, but is not limited to, students and includes: prospective applicants, applicants accepted but not yet attending, students, and former students. The range of electronic information technology (EIT) covered is broad: website content; learning management systems; instructional support systems (e.g., MyStatLab); student organization information; and, "third party content" that is critical or important (transactional**).**

In a manner analogous to "old and new construction" concepts, Miami must ensure that its web content and learning management systems come into compliance with Web Content Accessibility Guidelines (WCAG) 2.0 level AA standards. Video captioning is explicitly addressed. When procuring technology or software, Miami is required to "meet" WCAG 2 Level AA and, if that is not possible, use a "best meet" standard. In selecting texts and book-length course materials, Miami will "*consider"* the availability of materials in accessible electronic formats. In addition, no EIT may be used in any class in which any DSS student is registered if the EIT is not accessible or it can't be made accessible in a timely manner.

The agreement further provides that the office for disabled student services will meet on a recurring basis with every student with a vision or hearing disability to ensure they are receiving the materials they need or equivalent alternative format materials. This office was also committed to meeting with teachers to review the syllabus and help identify the materials they would need to provide, as well as how to properly accommodate a student.

Finally, under the agreement, Miami must take multiple quality control steps to ensure that the agreement is being implemented.

For a complete understanding of this comprehensive decree go to https://www.ada.gov/miami_university_cd.html (last visited June 17, 2017).

The settlement in ***Dudley v. Miami University*** is also pertinent to **Impact of Emerging Technologies on Students with Sensory Impairments,** immediately below.

Digital Equality

Index in the AHEAD version of ***The Law of Disability Discrimination*** to the presentation of **Impact of Emerging Technologies on Students with Sensory Impairments,** pages 285-290.

Under both Section 504 and the ADA, colleges and universities have been and are currently required to provide students with sensory impairments (deaf or blind, hard of hearing or low vision) with effective access to information and services provided through electronic information technology including websites, learning systems, and on-line courses, as well as information provided by third-party contractors. The most common problem for these students is that the information contained on University websites is not coded so that it can be read, retrieved, or manipulated using common adaptive technology such as JAWS or ZoomText.

It has been reported in the press that, the U.S. Department of Education, Office for Civil Rights, has administratively closed, without a compliance determination, many digital access complaints. https://www.levelaccess.com/web-accessibility-complaints-dismissed-rules-change-doe-office-civil-rights/; Https://www.3play media.com/ 2018/06/18/ocr-complaint/ (last visited August 12, 2018). A reliable OCR source puts the number at several hundred.

As reflected in the new OCR Case Processing Manual (March 5, 2018),[2] OCR's decision appears to represent a concern about who gets to direct OCR resources and how many resources it has available to investigate all bona fide complaints within its case load. https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf Absent new Federal administrative developments to the contrary, it seems both ill-advised and unsupportable to infer that the closures by OCR of "serial complaints" represent an abandonment of its commitment to digital equality. There is no record

[2] The new Manual provides, in pertinent part: OCR may dismiss "a complaint is a continuation of a pattern of complaints previously filed with OCR by an individual or group against multiple recipients or a complaint is filed for the first time against multiple recipients that, viewed as a whole, places an unreasonable burden on OCR's resources. OCR may consider conducting a compliance review or providing technical assistance concerning the issues raised by the complaint." CPM Section 108.

This change has been challenged in a new complaint filed in federal court by a coalition of advocates including The American Federation for the Blind, the NAACP, and The Council of Parent Attorneys and Advocates. https://www.courthousenews.com/naacp-fights-betsy-devos-over-civil-rights-manual/

of dismissal by OCR of a web-access complaint filed by a single individual against a single institution. The Section 504 and Title II regulations pertaining to auxiliary aids and services; methods of administration regulations; and Title II "equal communications" requirements, repeatedly relied upon by OCR in web-access cases, have neither been withdrawn nor revised. 34 C.F.R. §104.4(b)(4) [Section 504 method of administration]; 34 C.F.R. §104.44(d) [Section 504 auxiliary aids and services]; 28 C.F.R. § 35.130 [Title II method of administration]; 28 C.F.R. § 35.160(a) [Title II equal communication]; 28 § 35.160 (b)(1) & (2) [Title II auxiliary aids and services]. Further, though OCR has recently "archived" many of its guidance letters, it has neither withdrawn nor amended the ***Joint Dear Colleague Letter: Electronic Book Readers*** (June 29, 2010) https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100629.html (last visited August 26, 2018) and subsequent ***Electronic Book Reader Dear Colleague Letter: Questions and Answers About the Law, the Technology, and the Population Affected*** (May 26, 2011) https://www2.ed.gov/about/offices/list/ocr/docs/504-qa-20100629.pdf (last visited August 26, 2018). [3]

Before OCR administratively closed the serial complaints, it entered into resolution agreements with a large number of colleges and universities. These settlements can be used as guidance for what OCR is expecting of colleges and universities with regard to digital equality. Gaeir Dietrich, Director of the California Community College System, High Tech Center Training Unit (HTCTU) has reported that common elements of these agreements include the following:

- Broad coverage of digital services including: admissions, academic program descriptions, athletics, library services, health services; faculty and student directory; research tools and resources; courseware, all aspects of distance learning;
- Web pages must be accessible with WCAG 2.0 Level AA held as the benchmark;
- All appropriate personnel must be trained on web accessibility;

[3] Emerging technologies are an educational resource that enhances learning for everyone, and perhaps especially for students with disabilities. Technological innovations have opened a virtual world of commerce, information, and education to many individuals with disabilities for whom access to the physical world remains challenging. Ensuring equal access to emerging technology in university and college classrooms is a means to the goal of full integration and equal educational opportunity for this nation's students with disabilities**. ….** ***Joint Dear Colleague Letter*** at 3.

- New content must be made accessible;
- There must be a process for requesting the conversion of "legacy content" into an accessible format;
- There needs to be (a) system for maintaining quality control by adopting standards for all technologies, on-going testing and accountability (including quality assurance) and creation of a position for an Accessibility Coordinator --someone "with sufficient resources and authority to coordinate and implement the "EIT Accessibility Policy;"
- There has to be a process for reporting inaccessible content; and,
- Procurement procedures need to reflect the importance of accessibility. This will require establishing that all third (hyphen) party products and sites are accessible, verifying vendor's claims of accessibility for third party materials and web pages and distribution of adaptive technology in all computer-based labs.

"Public Accommodations"

Private colleges and universities are not "public entities" under the ADA and consequently are not subject to requirements of Title II of the ADA. These institutions are "public accommodations" and, consequently, are subject to Title III. Title III is enforced by DOJ and also requires the provision of auxiliary aids and services, as well as effective communication for individuals with disabilities. 28 C.F.R. § 36.303. Moreover, under Section 504, OCR has jurisdiction over every private college and university that receives Federal financial assistance. Thus, private colleges and universities are required by OCR to provide students with sensory impairments with auxiliary aids and services and to comply with the guidance contained in the Kindle Letter.

For Student Discussion

What about all those public accommodations that receive no Federal financial assistance and are NOT subject to Section 504? Many of these public accommodations provide on-line services that are very important to post-secondary students such as making airplane reservations and purchasing school supplies. A blind or deaf law school graduate may well want to take on-line video-based bar review classes. *See* ***Stanley, et. al. v BARBRI, Inc.***, Case 3:16-cv-01113-0 (N.D. Tex.) consent decree entered January 22, 2018.

Some of these places of business have an on-line presence only, such as Facebook or Netflix. Some of these entities, such as department stores, have both on-line and a brick and mortar presence. ***The question is, are these commercial websites, "places of public accommodation?" Does it make sense that the answer may vary depending on whether the business does or does not have a brick and mortar presence?***

Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations *of any place of public accommodation* by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a) (emphasis added).

Title III, gives approximately 65 examples of public accommodation. All, or nearly all, are physical venues. How could Title III be construed to ensure that post-secondary students with disabilities are not excluded from the virtual world?

A Split in the Answer

There is a split among the federal courts on the issue of whether only a physical structure may be a "place" of public accommodation. The Courts of Appeals for the Third, Sixth, Ninth, and Eleventh Circuits hold that that Title III is unambiguous: "places of public accommodation" are physical structures only. This does not eliminate jurisdiction over websites altogether; as these circuits follow a "gateway theory." Under this approach, discrimination only exists if the inaccessible element of the challenged website has a "nexus" or connection to the goods and services of a physical location that a plaintiff intends to use. *E.g. see* ***Nat'l Fed'n of the Blind v. Target Corp.,*** 452 F.Supp.2d 946, 949–56 (N.D. Cal. 2006) (emphasis added); *most recently,* ***Gil v. Winn-Dixie Stores, Inc.,*** 257 F. Supp. 3d 1340 (S.D. Fla. 2017); appeal filed (11th Cir., August 1, 2017. Note that by "gateway" logic, a virtual only website like Facebook, cannot be subject to the requirements of Title III. ***Young v. Facebook, Inc****.,* 790 F.Supp.2d 1110, 1115 (N.D. Cal. 2011). *Contra*, ***Nat'l Ass'n of the Deaf v. Netflix, Inc****.,* 869 F.Supp.2d 196 (D. Mass. 2012).

By contrast, the First, Second, and Seventh Circuits, have concluded that "places of public accommodation" need not be physical structures or that a gateway nexus need not exist to establish that a website is subject to the requirements of Title III of the ADA; most recently, ***Andrews v. Blick Art Materials,*** LLC., 268 F. Supp. 3d 381 (E.D.N.Y. 2017).

The First, Second, and Seventh Circuits courts variously cite:

- Use of the word "of"—as compared to "at" or "in"— in Title III.
- Inclusion of "travel service" by Congress in the statute's list, a type of business at the time of the statute's passage that often did not have a physical location, conducting business only by telephone.
- Logic: why should persons with disabilities who cannot make it to an insurance office have less opportunity to purchase and enjoy insurance than the many people who buy their insurance on line? See ***Doe v. Mutual of Omaha Insurance Co.,*** 179 F.3d 557, 559 (7th Cir. 1999)
- Interpreting the intent of Congress, *"it is the sale of goods and services to the public, rather than how and where that sale is executed, that is crucial* when determining if the protections of the ADA are applicable," ***Pallozzi v. Allstate Life Insurance Co***., 198 F.3d 28 (2d Cir. 1999), *opinion amended on denial of reh'g*, 204 F.3d 392 (2d Cir. 2000).

Writing in support of this interpretation, in ***Andrews***, Judge Weinstein stated:

> "The 'broad mandate' of the ADA and its 'comprehensive character' are resilient enough to keep pace with the fact that the virtual reality of the Internet is almost as important now as physical reality alone was when the statute was signed into law. That the meteoric rise of virtual reality through the Internet and its impact on communal and commercial affairs could not have been anticipated by Congress does not mean the law's application to the Internet and website is ambiguous; 'the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" 268 F.Supp.3d 381 at 400. [internal citations omitted]

For Student Discussion

Which interpretation do you favor and why?

Service Animals in the Post-Secondary Setting

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See ***Entine v. Lissner,*** Case No. 2:17-cv-946, WL 5507619, (S.D. Ohio, 2017). University ADA coordinator faulted for providing equal weight to the interests of a student with a legitimate service animal and a student with Crohn's disease who claimed that the presence of the service animal caused flare ups of her Crohn's disease. "Before the University can apply its policies equally to two students with disabilities who have requested irreconcilable accommodations, the University must be certain that: (1) the student [without the service animal] has properly requested an accommodation; and (2) that accommodations are indeed irreconcilable. Part and parcel of the second task is properly performing the direct threat analysis and establishing that one student's accommodation is indeed the cause of the aggravation of the other student's disability." ***Entine*** at 21.

More generally, *see* Rothstein, Laura, ***Puppies, Ponies, Pigs and Parrots: Policies, Practices, and Procedures in Pubs, Pads, Planes and Professions: Where We Live, Work, and Play, and How We Get There: Animal Accommodations in Public Places, Housing, Employment, and Transportation*** (August 10, 2018). Animal Law Review, Vol. 24, No. 1, p. 23, 2018. Available at SSRN: https://ssrn.com/ abstract=3235789 .

Examination Accommodations

Index in the AHEAD version of ***The Law of Disability Discrimination*** to the presentation of **Examinations and Courses**, pages 300-316.

LSAC Held in Contempt of Court http://www.abajournal.com/news/article/council_that_administers_the_lsat_is_held_in_contempt_ada_consent_decree_is/ (last visited, August 4, 2018).

> In 2014, the Law School Admission Council (LSAC) entered into an agreement with the United States Department of Justice regarding its testing practices. Under the consent decree, LSAC agreed to pay $7.74 million in penalties and damages to compensate over 6,000 individuals nationwide who applied for testing accommodations on the LSAT over the preceding five years. LSAC also agreed to end its practice of "flagging" or annotating, (omit comma) LSAT score reports for test takers with disabilities who have received extended time as an accommodation. *See http://www.justice.gov/opa/pr/2014/May/14-crt-536.html* (last viewed on May 22, 2014).
>
> The consent decree created a "Best Practices" panel to resolve about ten issues under the decree. LSAC challenged most of the proposed recommendations of the Best Practices Panel (insert comma) and this matter was subject to further hearings before the federal district court on July 31, 2015. The district court largely upheld the recommendations of the Best Practices Panel. Under the order, the LSAC was bound to implement those provisions of the Best Practices Panel approved by the court. *See Department of Fair Employment & Housing v. Law School Admission Council Inc*, No. 12-CV-01830-JCS, 2015 WL 4719613 (N.D. Cal. Aug. 7, 2015). (Subsequent to the report of the Best Practices Panel, the Department of Justice issued guidance of broader applicability adopting many of the recommendations of the Best Practices Panel.
>
> On March 4, 2018, LSAC was held in contempt of court for not complying with the consent decree. The court extended the consent decree by two years and required additional audits of their compliance. *See Department of Fair Employment and Housing v. Law School Admission Council,* 2018 WL 1156606 (N.D. Calif. March 5, 2018).
>
> The LSAC provided a statement to the National Law Journal. 'While this ruling is not the outcome we had hoped for, [the council] will continue to work steadfastly to comply with the decree under the guidance provided in the court's ruling,' the statement said.