September 26, 2013, marked the 40th anniversary of the enactment of Section 504 of the Rehabilitation Act. Section 504 required that programs receiving federal financial assistance (which includes virtually all law schools) could not discriminate on the basis of disability. The enormous impact of this law (and later the Americans with Disabilities Act) on legal education and the legal profession was not foreseen in 1973. Before 1980 very little response to the law occurred. The first Supreme Court case was in 1979. It is not surprising that some of the earliest litigation occurred in the context of legal and medical education and licensing because the stakes are so high for individuals seeking to enter the legal and medical professions, and the concerns about the public interest are of great significance.

Since the early litigation, the application of disability discrimination law has developed, with an enormous body of judicial opinion and regulatory guidance. The enactment of the Americans with Disabilities Act in 1990, applied virtually the same legal requirements as the Rehabilitation Act and made disability discrimination laws more broadly applicable to the legal profession (affecting both employment of attorneys and providing services to clients with disabilities). Bar admission authorities, who were not subject to the Rehabilitation Act, are covered under the ADA. The 2008 ADA Amendments broadened the definition of coverage, so that today’s focus is less on whether the individual has a disability and more on whether the individual is otherwise qualified and what reasonable accommodations are required.

There are a range of issues affecting legal education and the legal profession that fall within the topic of disability discrimination. One of the most significant is the issue of mental health and substance addiction. Bar admission authorities asking applicants about mental health and substance abuse treatment and diagnosis deter individuals from seeking treatment. Recent challenges to these practices under the Americans with Disabilities Act highlight those concern.
WHO IS PROTECTED

Must be substantially limited in one or more major life activities; be regarded as so impaired or have a record of such an impairment.

Must be otherwise qualified – able to carry out the essential functions of the program with or without reasonable accommodation. Undue hardship, fundamental alteration, lowering standards – not required.

Individual must not pose a direct threat to others. While employment consideration may given to danger to self, it is unclear whether danger to self may be a consideration in taking action.

Individual must make “known” the disability and have appropriate documentation, and must do so in a timely manner. Second chances not generally required.

The ADA Amendments Act of 2008 clarifies and amends the definition of “disability”, see 42 U.S.C. § 12102. The regulations pursuant to the amendments were promulgated on March 25, 2011, effective May 24, 2011. They can be found at 29 C.F.R. 1630 and are available through the website at www.eeoc.gov.

The amendments respond to 1999 and 2002 Supreme Court decisions that had narrowed the definition, and provide for a broad interpretation of the definition of disability under the ADA. Under the revisions, whether an individual is substantially limited is to be determined without reference to mitigating measures, with an exception for ordinary eyeglasses and contact lenses. 42 U.S.C. § 12102(4)(E).

The amendments also add an illustrative list of major life activities, and by doing so codify the existing regulatory definitions and add to them.

The new definition of major life activities specifically includes caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working, and operating major bodily functions (which are further defined). Many of the conditions found not to be disabilities may prospectively be determined to fall within the definition, so long as the condition substantially limits one or more of those major life activities.

The Amendments specifically provide that concentrating, thinking, and communicating are major life activities. This amendment may make it more likely that an individual with a learning disability or with certain mental impairments will fall under the definition.

The Amendments clarified that major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working. 42 U.S.C. § 12102(2). [A] major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. 42 U.S.C. § 12102(2).
To meet the requirement of “being regarded as having such an impairment” the individual must establish “that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.” 42 U.S.C. § 12102(3).

The definition of disability does not apply to impairments that are transitory and minor. A transitory impairment is one with an actual or expected duration of six months or less. 42 U.S.C. § 12102(4)(D).

The 2008 amendments further clarify that the determination of whether an impairment substantially limits a major life activity is to be made without regard to the ameliorative effects of mitigating measures. There is an exception for eyeglasses or contact lenses, but covered entities are prohibited from using qualification standards or selection criteria that are based on uncorrected vision unless these are job-related and consistent with business necessity. 42 U.S.C. § 12102(4)(E).

The Amendments also provide that “Nothing in this Act alters the provision…, specifying that reasonable modifications in policies, practices, or procedures shall be required, unless an entity can demonstrate that making such modifications in policies, practices, or procedures, including academic requirements in postsecondary education, would fundamentally alter the nature of the goods, services, facilities, privileges, advantages or accommodations involved.” 42 U.S.C. § 12201(f).

The ADA Amendments of 2008 (42 U.S.C. § 12103(1)) codify the basic provisions of the ADA and Rehabilitation Act regulations by providing that auxiliary aids and services are to include qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments; qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments; acquisition or modification of equipment or devices; and other similar services and actions.

The Amendments state that the definitions are also to be applied to the Rehabilitation Act.

MAJOR ISSUES IN HIGHER EDUCATION
(Cases involving Professional and Graduate Students are in BOLD)

A. Is the student “disabled” within the definition?

Must be substantially limited in one or more major life activities; be regarded as so impaired or have a record of such an impairment. (see above for amplification of these requirements)

Recent Cases
Ladwig v. Board of Supervisors of Louisiana State University, 842 F. Supp. 2d 1003 (M.D. La. 2012) Doctoral student with recurrent depression and head injury was not substantially limited in a major life activity; accommodation of attendance exceptions was contingent on her providing accommodation letter to professors; work was substandard; denying retroactive withdrawal or assigning grade of “incomplete”/doctoral student.
Singh v. George Washington University School of Medicine, 667 F.3d 1 (D.C. Cir. 2011) The 2008 amendments to the ADA do not apply retroactively to student’s claim. The student failed to establish relationship of impairment to her performance. (facts arose pre-ADA amendments)

Swanson v. University of Cincinnati, 268 F.3d 307 (6th Cir. 2001) Surgical resident with major depression was not substantially limited in ability to perform major life activities; difficulty with concentrating was temporary and alleviated by medication; communications problems were short-term, caused by medication and there were only a few episodes. (facts arose pre-ADA amendments)

Cunningham v. University of New Mexico Board of Regents, 2011 WL 1548389 (D.N.M. 2011) Medical school student did not allege that his Scopic Sensitivity Syndrome was a disability in claims against university.

Rumbin v. Association of American Medical Colleges, 2011 WL 1085618 (D. Conn. 2011) Medical school applicant was not disabled. The accommodated convergence ratio was within normal range. Evaluating optometrist did not compare reading skills to average person.

Forbes v. St. Thomas University, Inc., 2010 WL 6755458, 768 F. Supp. 2d 1222 (S.D. Fla. 2010) Issues of material fact remain regarding law student as to whether post-traumatic stress disorder was a disability and if so if student had received reasonable accommodations; requiring some evidence that denial of requests was based on rational belief that no further accommodation could be made without imposing a hardship on the program.

Pre-ADA-Amendment Cases

Davis v. University of North Carolina, 263 F.3d 95 (4th Cir. 2001) Student with multiple personality disorder was not disabled; she was not perceived as unable to perform broad range of jobs.

Bartlett v. New York State Board of Law Examiners, 226 F.3d 69 (2d Cir. 2000); 2001 WL 930792 (S.D.N.Y. 2001) Bar exam applicant with learning disability who had self accommodated was still substantially limited in major life activity of reading.

McGuinness v. University of New Mexico School of Medicine, 170 F.3d 974 (10th Cir. 1998) Test anxiety not a disability for a medical student.

B. Is the student otherwise qualified?

Southeastern Community College v. Davis, 442 U.S. 397 (1979) Nursing school student must be able to meet the essential program requirements in spite of the disability.
C. Has there been discrimination or denial of reasonable accommodation?

KEY CASE FOR SETTING REASONABLE ACCOMMODATION STANDARD:

_Wynne v. Tufts University School of Medicine_, 932 F.2d 19, 26 (1st Cir. 1991). In cases involving modifications and accommodations burden is on the institution to demonstrate that relevant officials within the institution considered alternative means, their feasibility, cost and effect on the program, and came to a rationally justifiable conclusion that the alternatives would either lower academic standards or require substantial program alteration.

The ADA Amendments Act of 2008 provides that nothing alters the ADA requirement provision that specifies that reasonable modifications in policies, practices, or procedures shall be required, unless an entity can demonstrate that making such modification...including academic requirements in postsecondary education, would fundamentally alter the nature of the goods, services, facilities, privileges, advantages or accommodations involved. 42 U.S.C. §12201(f)

D. Application of these issues to cases involving students with learning disabilities and mental health problems

1. Admission issues

Colleges must be sure that they do not discriminate in admissions in the recruiting, application, testing, interviewing, and decision making processes. - 29 U.S.C. Section 794; 34 C.F.R. § 104.42; 42 U.S.C. §§ 12101 et seq.

2. Testing issues

Use of standardized tests and other eligibility criteria that tend to screen out individuals with disabilities does not necessarily violate ADA/504.

   a. Can students with disabilities be required to take standardized admissions tests?
      Probably in most cases. Accommodations are provided by the testing services.

   b. Current litigation about use of certain technology on bar admissions exams.

   c. Deference to previous accommodations issue (see below)

3. Documentation issues

If disability is at issue, can documentation be required? Yes.

Who pays? Usually the student.

Documentation Issues – timing, credentials of evaluator, identification of the condition, relationship of condition to requested accommodations, deference to previous accommodations

ADA regulations promulgated in 2008 for Titles II and III provide new guidance on the documentation that should be required to receive accommodations on tests given by testing
companies. 28 C.F.R. § 36.309(1)(iv)-(vi). This section provides that documentation requests should be reasonable and limited to the need for the accommodation, that considerable weight should be given to documentation of past accommodations, and that responses to requests should be timely.

Recent higher education cases indicate a more stringent assessment about whether a documented condition is a disability within the ADA where individual is not substantially limited in a major life activity.

**In re Reasonable Testing Accommodations of Terry Lee LaFleur**, No. 2006 SD 86 (S.D. 9/20/06) Psychologist testifying about extra time with ADD was not an expert on bar exam accommodations; testimony was discounted.


**Guckenberger v. Boston University**, 974 F. Supp. 106 (D. Mass. 1997) University’s policy of requiring re-evaluations by certified experts every three years was impermissible.

3. Otherwise Qualified

Students must be able to carry out essential requirements of the program, with or without reasonable accommodation. School need not lower standards nor fundamentally alter the program. Misconduct need not be excused even if it relates to the disability, although a later identified disability might justify re-consideration of adverse action in light of the condition.

**Halpern v. Wake Forest University Health Sciences**, 669 F.3d 454, 2012 WL 627788 (4th Cir. 2012) Medical student with ADHD and anxiety disorder did not request accommodations until several years after engaging in unprofessional acts, including abusive treatment of staff and multiple unexcused absences; proposed accommodation (allowing psychiatric treatment, participating in program for distressed physicians, and continuing on strict probation) was not reasonable.

**Ladwig v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College**, 2012 WL 292508 (M.D. La. 2012) A doctoral student with depression and anxiety did not make out Title I or Title II case. Student did not make out case that she was qualified to perform essential functions of graduate assistantship. Student did not adequately request accommodations for head injury excusing her from attendance and allowing additional time to turn in assignments. University had provided accommodations by providing letters supporting absences and extra time.


**Toledo v. Sanchez**, 454 F.3d 24 (1st Cir. 2006) Upholding attendance requirements for student with schizoaffective disorder.
Marlon v. Western New England College, 27 Nat’l Disability L. Rep. ¶ 70 (1st Cir. 2005) Law school did not discriminate against student with learning disability, panic attacks and depression, insufficient evidence as to whether student was regarded as disabled.

Childress v. Clement, 5 F. Supp. 2d 384 (E.D. Va. 1998) Student who had plagiarized was not otherwise qualified for position as graduate student in criminal justice program. His learning disability had been taken into account in evaluating violations of the honor code. Th inquiry was individualized.

Doe v. Vanderbilt University, 983 F. Supp. 205 (D.D.C. 1997) Student with manic depression need not be readmitted to medical school. The dismissal based on academic deficiencies and behavior problems.

Letter to University of Houston, 32 Nat’l Disability L. Rep. ¶ 74 (OCR 2005) Graduate School of Social Work could dismiss student with bipolar disorder who failed exam; student was not treated differently than other students.

4. Accommodations

Cutrera v. Board of Supervisors of LSU, 429 F.3d 108 (5th Cir. 2005) Institutions should engage in interactive process to determine reasonable accommodations.

Accommodations can include the following:

- additional time for exams;
- other exam modifications (separate room; extra rest time);
- reduction, waiver, substitution, or adaptation of course work;
- extensions on assignments;
- extension of time for degree completion;
- preference in registration;
- permission to tape record classes.

New issues arising regarding animals on campus

Halpern v. Wake Forest University Health Sciences, 669 F.3d 454, 2012 WL 627788 (4th Cir. 2012) Medical student with ADHD and anxiety disorder did not request accommodations until several years after engaging in unprofessional acts, including abusive treatment of staff and multiple unexcused absences; proposed accommodation (allowing psychiatric treatment, participating in program for distressed physicians, and continuing on strict probation) was not reasonable.

Ladwig v. Board of Supervisors of Louisiana State University, 842 F. Supp. 2d 1003 (M.D. La. 2012) Doctoral student with recurrent depression and head injury was not substantially limited in a major life activity; accommodation of attendance exceptions was contingent on her providing accommodation letter to professors; work was substandard; denying retroactive withdrawal or assigning grade of “incomplete”/doctoral student.

Schneider v. Shah, 2012 WL 1161584 (D.N.J. 2012) There is an obligation to engage in interactive process regarding accommodations, but that ends on the day the student sues university. Student in paralegal program had excess absences.
Forbes v. St. Thomas University, Inc., 2010 WL 6755458, 768 F. Supp. 2d 1222 (S.D. Fla. 2010) Issues of material fact remain regarding law student had received reasonable accommodations for post traumatic stress disorder; requiring some evidence that denial of requests was based on rational belief that no further accommodation could be made without imposing a hardship on the program.


Ferris State University, No. 15002052 (OCR 2000) Student with dyslexia and test anxiety had absences that affected class grade; insufficient evidence that any denial of accommodations affected grade.

Amir v. St. Louis University, 12 Nat'l Disability L. Rep. ¶ 151 (E.D. Mo. 1998); 184 F.3d 1017 (8th Cir. 1999) Medical student with obsessive compulsive disorder was dismissed because of academic deficiencies; unreasonable to grant request to change supervisors, which would be fundamental alteration; appeal recognized basis for claim of retaliation.

5. Readmission/Second chances

Academic performance need not be excused because of mental or other impairments, although failure to make reasonable accommodations might justify reconsideration.

Halpern v. Wake Forest University Health Sciences, 669 F.3d 454, 2012 WL 627788 (4th Cir. 2012) Medical student with ADHD and anxiety disorder did not request accommodations until several years after engaging in unprofessional acts.

Maples v. University of Texas Medical Branch at Galveston, 2012 WL 4510524, 46 Nat’l Disability L. Rep. 14 (S.D. Tex 2012) A “second chance” was not a reasonable accommodation; it would fundamentally alter the program; alteration of eligibility criteria not required; medical school student with ADHD and depression dismissed academically; discussed causation factors – ADA prohibits exclusion “by reason of disability”; 504 requires that to be the sole factor; paper was not turned in on time and did not meet standards of the course.

Peters v. University of Cincinnati College of Medicine, 45 Nat'l Disability L. Rep. 236 (S.D. Ohio 2012) Failure to allow a student with a learning disability and ADD to retake exams after it was determined that her medication regimen had been stabilized might be required as a reasonable accommodation; student had only failed exam by a few points; student may have been dismissed because of a pattern of psychiatric problems.

Rivera-Concepcion v. Puerto Rico, 2011 WL 1938239 (D. Puerto Rico 2011) Expulsion of student with bipolar disorder from an internship program was made by officials of the state institution, but was made by employees of the non-profit organization with the coop agreement to operate the program. Officials were unaware of bipolar disorder until after the expulsion.
Singh v. George Washington University, 338 F. Supp. 2d 99 (D.D.C. 2005) Obligation is on the individual student to make known the disability to obtain accommodations; institution not required to give a second chance where accommodations were requested after student was dismissed.

Michael M. v. Millikin University, No. 98-2082 (C.D. Ill. 1998) Student with obsessive compulsive disorder reinstated after settlement agreement; student was withdrawn after a panic attack episode; reenrollment conditioned on receiving weekly therapy and compliance with medication regimes prescribed by psychiatrist.

Haight v. Hawaii Pacific University, 116 F.3d 484 (9th Cir. 1997) Where an institution was aware of behavior or performance deficiencies or where reasonable questions are raised after dismissal, institutions may have discretion to make readmission subject to conditions not applied to students in the initial admission process.

Esmail v. SUNY Health Science Center, 633 N.Y.S.2d 117 (AD 1st 1995) Student's dismissal premature for failure to comply with administrative procedures; dismissal was because of drug addiction.

Gill v. Franklin Pierce Law Center, 899 F. Supp. 850 (D.N.H. 1995) Law student was not otherwise qualified under Section 504. Student had not requested any accommodations. Claim that law school should have known he needed accommodations because of post-traumatic stress syndrome resulting from being the child of alcoholic parents.


E. Mental and Substance Abuse Impairments

Is there any way to know there is a problem student in the application process? Application questions should only ask about behavior and conduct, not status or treatment or history.

Clark v. Virginia Board of Bar Examiners, 880 F. Supp. 430 (E.D. Va. 1994). This case provides a detailed discussion of mental health history questions and a review of the status in other jurisdictions.

For an excellent overview of this issue, see Stanley Herr, Questioning the Questionnaires: Bar Admissions and Candidates with Disabilities, 42 Villanova L. Rev. 635 (1997).

The Department of Justice in August 2014 settled a dispute regarding the character and fitness questions asked in Louisiana raising concerns about inquiries about whether mental health treatment and diagnosis violates the ADA.

http://www.ada.gov/louisiana-supreme-court_sa.htm

Procedural safeguards and balancing with safety issues? Those dealing with students need to be educated on the ADA/504 obligations involving expulsion and other disciplinary measures relating to individuals with disabilities (including mental disabilities and contagious diseases). Importance of confidentiality.

Distinguishing between danger to self (depression, eating disorders, etc.), disruption, and danger.
Direct threat –

Title II regulations provide the following regarding direct threat:

*Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services as provided in § 35.139.* 28 C.F.R. §35.104 (definitions). The determination of direct threat is to be based on an individualized assessment “based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence to ascertain the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices or procedures or the provision of auxiliary aids or services will mitigate the risk.” 28 C.F.R. §35.139(b).

Title I regulations applicable to employment, however, allow direct threat as a defense when the individual poses a direct threat to the health or safety of the individual or others in the workplace. See 29 §§1630.2(4) &1630.15(b)(2).

The statutory language of the ADA does not define direct threat. While the EEOC regulation has been upheld by the Supreme Court as being valid and within the scope of the statute, *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002), the Title II regulation (which is part of the regulations issued in 2010) has not been subjected to judicial review.

Many in higher education have raised concerns about how the Title II regulation (not considering threat to “self”) will be applied to actions towards students who are suicidal or who have other self-destructive behaviors such as severe depression or eating disorders.

*Mershon v. St. Louis University*, 442 F.3d 1069 (8th Cir. 2006) Student with disability banned from campus because of threat of violence against a professor.

*Letter to Marietta College*, 31 Nat’l Disability L. Rep. ¶ 23 (OCR XI, Cleveland 2005) Dismissal of student threatening suicide violated Section 504 because decision was not sufficiently based on a high probability to substantial harm.

*St. Thomas University, School of Law*, 23 Nat’l Disability L. Rep. ¶ 160 (2001) (No. 01-4151) Law student with bipolar disorder was dismissed because of threats to “blow up the legal writing department”; dismissal upheld.

*Dixie College (UT)* 8 Nat’l Disability L. Rev. ¶ 31 (OCR 1995) No ADA/Section 504 violation in expelling a student because of stalking and harassing a professor. Expulsion was not because of perceived mental disability but because she posed a threat.

Misconduct and misbehavior need not be excused even if it is caused by mental impairment.

*Rivera-Concepcion v. Commonwealth of Puerto Rico*, 786 F. Supp. 2d 489 (D. Puerto Rico 2011) Student with bipolar disorder expelled from government internship program did not make out case of ADA/504 discrimination. Expulsion was based on manic episode. Program was not aware of mental condition, but based expulsion on behavior.

Other Cases on Mental Impairments

Toledo v. University of Puerto Rico, 36 Nat’l Disability L. Rep. ¶ 127 (D. P.R. 2008) Denying dismissal of case against university. Student claimed he was subjected to harassment and discrimination after revealing schizoaffective disorder. Accommodation of afternoon classes because of medication denied although it had offered afternoon classes in the past.

Letter to Austin Peay State University, 36 Nat’l Disability L. Rep. ¶ 156 (OCR 2006) Student was not denied academic adjustments because he did not provide required documentation to receive them; expulsion after veiled threat against professor and Web site posting targeting another; student claimed paranoid personality disorder.

Northern Michigan University, 7 Nat’l Disability L. Rep. ¶ 244 (OCR 1995) No Section 504 or ADA violation to place observers in classroom of student with Tourette’s Syndrome to evaluate whether placement was for benefit of student.
RECENT PUBLICATIONS BY THE PRESENTER


Laura Rothstein, “Litigation over Dismissal of Faculty with Disabilities,” Appendix C of AAUP Report on Accommodating Faculty Members Who Have Disabilities (January 2012)

Laura Rothstein, Disabilities and the Law Chapter 3 (Thomson West 2013) and cumulative editions (with Julia Irzyk)


Southeastern Community College v. Davis, chapter in EDUCATION STORIES, Michael Olivas & Ronna Schneider eds. (Foundation Press 2007)


Bio Summary
Laura Rothstein, Professor of Law and Distinguished University Scholar
University of Louisville, Louis D. Brandeis School of Law
B.A., University of Kansas; J.D., Georgetown University Law Center

Laura Rothstein joined the Louis D. Brandeis School of Law at the University of Louisville as Professor of Law and Dean in 2000 (serving as dean until 2005). She has written fifteen books and dozens of book chapters, articles, and other works on disability discrimination, covering a broad range of issues. Much of her work is in the area of disability issues in higher education, particularly legal education. She has served as founding co-chair of the AALS Section on Disability Law, Chair of the American Bar Association Section of Legal Education and Admission to the Bar Diversity Committee, and a member of the Law School Admission Council Board of Trustees. From 1980 to 1986, she served as Faculty Editor of the Journal of College and University Law, the law journal published by the National Association of College and University Attorneys. She is the recipient of the 2011 William A. Kaplin Award for Excellence in Higher Education Law and Policy Scholarship, awarded by Stetson Law School’s Institute for Higher Education Law and Policy. This award recognizes scholars who have published works on education law that embrace the intersection of law and policy. In 2012 she was one of five faculty members in the University to be recognized by the University of Louisville for Distinguished Scholarship. She is an elected member of the American Law Institute.

Before coming to the University of Louisville, Professor Rothstein was a Law Foundation Professor of Law at the University of Houston where she served as Associate Dean for Graduate Legal Studies (2004-2005) and Associate Dean for Student Affairs (1987-1993). She began law teaching in 1976 after two years in practice and has served on faculties at five law schools.
APPENDIX A

Excerpt (pages 590-594) from

Forty Years of Disability Policy in Legal Education and the Legal Profession: What Has Changed and What Are the New Issues? by Laura Rothstein


C. Mental Health and Substance Use and Abuse Issues

Impairments resulting from mental health conditions and substance abuse are a significant issue for attorneys as well as law students. A comprehensive discussion of all of these issues is found in a 2008 article, Law Students and Lawyers With Mental Health and Substance Abuse Problems: Protecting the Public and the Individual. The following is a brief summary of the same article by this author and an update of developments since that date.

The article provides an overview of the policies, practices, and procedures relevant to mental impairment and substance abuse, including statutory and regulatory guidance, how the courts have addressed these issues, how regulatory associations (the ABA and the Association of American Law Schools) have responded, the law school admission and enrollment process (including obligations to report mental health and substance abuse issues in the admission and bar certification process), the issue of treatment, issues of discipline, and issues of professional licensing (initial licensing and retention), and employment issues.

The article concludes with a number of recommendations. These include collecting data on the prevalence of mental illness and substance abuse, as well as the impact of stress. The recommendations also include determining what research demonstrates about the benefits of education programs focused on mental health and substance abuse. Collecting data about the effectiveness of treatment programs for lawyers and law students, and on the benefits of education programs about mental health and substance abuse are also recommended. The article further suggests a review and evaluation about initial licensure, issues of license revocation, and other disciplinary measures relating to attorneys with mental health and substance abuse.

problems. It provides a much more detailed discussion than is possible in this Article, but the following provides more recent cases and developments, and details what has occurred with mental health and substance abuse issues since 2008.

1. Definition of Disability for Mental Health and Substance Abuse

As noted previously, Section 504 and the ADA have essentially the same definition of a disability. For individuals with mental health impairments, the condition must substantially limit a major life activity. An important consideration is whether the cases determining if mental impairment is a disability were decided before or after the effective date of the ADA Amendments Act of 2008. The 2008 amendments intend that certain conditions, particularly mental health conditions, be more likely to be classified as disabilities.

2. Otherwise Qualified

As noted previously, meeting the definition of disability is only the first step to finding that impermissible discrimination has occurred. The individual must also be otherwise qualified to carry out the essential requirements of the position or program, taking reasonable accommodations into account. An important change since 2008 is more likely to affect law schools than employers. In the context of determining whether an individual is otherwise qualified, entities can take into account whether the individual presents a direct threat. Since 2008, the issue of whether a threat to “self” can be considered has become the subject of debate.

Consideration of threat to “self” is permissible in the employment context. But for law

2. See supra Part II.A.

3. Compare Marlon v. W. New Eng. Coll., No. Civ.A. 01-12199DPW, 2003 WL 22914304, at *8 (D. Mass. Dec. 9, 2003), aff’d, 124 F. App’x 15 (1st Cir. 2005) (holding, in a pre-amendment decision, that a law school did not discriminate against a student with a learning disability, panic attacks, and depression, because there was insufficient evidence as to whether the student was regarded as disabled), with Ladwig v. Bd. of Supervisors of La. State Univ. & Agric. & Mech. Coll., 842 F. Supp. 2d 1003, 1007 (M.D. La. 2012) (holding that a doctoral student with a head injury and recurrent depression was not substantially limited in a major life activity), and Forbes v. St. Thomas Univ., 768 F. Supp. 2d 1222, 1230-34 (S.D. Fla. 2010) (finding issues of material fact regarding whether a law student’s post-traumatic stress disorder was a disability and, if so, whether the student had received reasonable accommodations, including requiring evidence that the denial of the requests was based on a rational belief that no further accommodation could be made without imposing a hardship on the program).

4. See supra Part II.A.2; see also Halpern v. Wake Forest Univ. Health Scis., 669 F.3d 454, 465 (4th Cir. 2012) (finding that a medical student with ADHD and an anxiety disorder did not request accommodations until several years after engaging in unprofessional acts, including abusive treatment of staff and multiple unexcused absences, and so the proposed accommodation—allowing psychiatric treatment, participating in program for distressed physicians, and continuing on strict probation—was not reasonable); Ladwig, 842 F. Supp. 2d at 1008 (holding that a doctoral student with depression and anxiety did not adequately request accommodations for a head injury to excuse her from attendance and allow additional time to turn in assignments, and that the university had provided accommodations by providing letters supporting absences and extra time).

5. See Mershon v. St. Louis Univ., 442 F.3d 1069, 1073 (8th Cir. 2006) (regarding a student with a disability who was banned from campus because of a threat of violence against a professor). Several opinion letters from the Office for Civil Rights have also addressed this issue. See St. Thomas Univ. Sch. of Law, OCR Resolution Letter, No. 04-01-2098, 23 NDLR 160, 6-9 (Dep’t of Educ. 2001) (upholding dismissal after noting that a law student with bipolar disorder was dismissed because of threats to “blow up the legal writing department”); Dixie Coll., OCR Resolution Letter, No. 08-95-2111, 8 NDLR 31, 4-5 (Dep’t of Educ. 1995) (finding no ADA or Section 504 violation in expelling a student because of stalking and harassing a professor, as the expulsion was because the student posed a threat and not because of a perceived mental disability).

schools addressing mental health concerns such as depression, eating disorders, and other conditions related to their students, this is not as simple. While being otherwise qualified allows the law school to discipline or take other action where a student is disruptive or dangerous to others, when the potential harm is only to the individual students themselves, it is not clear what is allowed.

The Title II regulations issued in 2010 provide that a “direct threat means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.” The determination of direct threat is through an individualized assessment “based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence to ascertain the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices[,] or procedures or the provision of auxiliary aids or services will mitigate the risk.” The Title II regulatory interpretation probably applies to Title III entities as well. Title I regulations applicable to employment, however, allow direct threat as a defense when the individual poses a direct threat to the health or safety of the individual or others in the workplace.

The statutory language of the ADA does not define direct threat. The EEOC regulation has been upheld by the Supreme Court as being valid in the employment context and within the scope of the statute. The Title II regulation, however, has not been subjected to judicial review. DOE unofficial guidance has indicated that the agency enforcement will interpret the requirement to mean that threat to self may not be considered and entities that act on that basis may be in violation of the ADA. Many in higher education have raised concerns about how the Title II regulation (not considering threat to “self”) will be applied to actions towards students who are suicidal or who have other self-destructive behaviors such as severe depression or eating disorders.

3. Law School Admission and Enrollment

Since 2008, there has been little change in law school admission policies and practices regarding mental health and substance abuse issues. Most law schools inquire only about discipline and behavior issues, not diagnosis and treatment. Law schools continue to use their student codes of conduct to address situations where student misconduct is at issue, even where it may be related to a mental health or substance abuse issue. The bar certification reporting processes have not changed substantially since 2008. While the lawyer assistance programs for law students have evolved, there has not been a comprehensive study on the effectiveness of

8. Id. § 35.139(b); see also Marietta Coll., OCR Resolution Letter, No. 15-04-2060, 31 NDLR 23, 12-13 (Dep’t of Educ. 2005) (asserting dismissal of student threatening suicide violated Section 504 because decision was not sufficiently based on a high probability to substantial harm).
11. See Paul Lannon & Elizabeth Sanghavi, New Title II Regulations Regarding Direct Threat: Do They Change How College and Universities Should Treat Students Who Are Threats to Themselves?, NACUA NOTES, Nov. 1, 2011, at 5-6 (discussing that there is a lack of clear guidance to universities on how to analyze self-harm).
12. See Rothstein, Substance Abuse Problems, supra note 387, at 548 (discussing that students with substance use disorders may have to disclose counseling despite counseling being “confidential,” which might
these programs.

Since the 2008 amendments to the ADA, the concerns about stress and its impact on law students have increased. More attention is being paid to what to do about the impact of stress during law school. One of the major concerns beyond recognition of the need to do more is the availability and affordability of mental health services and whether such treatment will remain confidential.

4. Professional Licensing

Concerns about mental health, substance use, and abuse within the practicing bar have received substantial attention since 2008. The practice of asking questions about diagnosis and treatment for mental health and substance abuse during the licensing process continues to be challenged. As of 2008, the vast majority of courts were upholding these questions as permissible under the ADA. More recent cases have hinted that this may change.

reduce the number of students accessing the service).


14. See Jolly-Ryan, Promoting Mental Health, supra note 387, at 96 (exploring the possible causes of law student stress, questioning the teaching method itself, and offering ideas for coping). See generally LAWRENCE S. KRIEGER, THE HIDDEN SOURCES OF LAW SCHOOL STRESS (2005) (discussing reasons that law school is stressful and providing advice to students on how to manage stress, in a booklet that is used at over one hundred law schools).

15. See Michael J. Herkov, Mental Illness and the Practice of Law, B. EXAM’R, Mar. 2013, at 47-51 (providing the perspective of a psychiatrist about what should be appropriate for a bar application review process, and raising concerns about the impact of mental illness on an attorney’s ability to meet essential requirements to practice law); Perlin, Lawyers with Mental Disabilities, supra note 387, at 606 (discussing the value of looking at the role of therapeutic justice in addressing harms done by lawyers with mental illness); see also Symposium, Assisting Law Students with Disabilities in the 21st Century: A New Horizon?, Suffering in Silence: The Tension Between Self-Disclosure and a Law School’s Obligation to Report, 18 AM. U. J. GENDER SOC. POL’Y & L. 121, 122 (2007) (debating amongst panelists on the difficulty on encouraging mental health treatment that carries possible bar application implications); Erica Moeser, Standards, Change, Politics and the Millennium, 28 LOY. U. CHI. L.J. 229, 235 (1996) (discussing ABA accreditation issues); Erica Moeser, Yes: The Public Has the Right to Know About Instability, 80 ABA J. 36, 36 (1994) (asserting that public interest should be balanced against the applicant’s interest and that the ADA does not bar all inquiries into mental health status). See generally JAMES T.R. JONES, A HIDDEN MADNESS (2011) (providing the story of a law professor living with severe bipolar disorder); ELYN SAKS, THE CENTER CANNOT HOLD: MY JOURNEY THROUGH MADNESS (2007) (detailing the experiences of a law professor with severe mental illness).

16. See, e.g., TAYLOR & GOLDSTEIN, supra note 285, at 16, 18-22 (discussing various cases challenging the bar admission process and calling for disclosure to be based on misconduct rather than status); see also Peter Ash, Predicting the Future Behavior of Bar Applicants, B. EXAM’R Dec. 2013, at 6-16 (“Given the complexities inherent in making accurate long-term predictions regarding an individual’s behavior, it seems unlikely that in the coming decade we will have a database that will significantly improve our ability to quantify the future risk of impairment.”). The article discusses the ability to predict future behavior based on past history of substance abuse or mental health problems.

17. See, e.g., Clark v. Va. Bd. of Bar Exam’rs, 880 F. Supp. 430, 431, 438-40, 444 (E.D. Va. 1995) (striking down a question asking whether an applicant has been treated or counseled for any mental, emotional, or nervous disorders within the past five years as being impermissible under Title II). The Clark opinion provides a detailed discussion of the other decisions on this issue and the practices of bar admission authorities in various states. The court left open the possibility that the Texas inquiries might withstand challenge. Id.; see also Campbell v. Greisberger, 80 F.3d 703, 705 (2d Cir. 1996) (indicating that New York had changed its mental health status question); Stoddard v. Fla. Bd. of Bar Exam’rs, 509 F. Supp. 2d 1117, 1124-25 (N.D. Fla. 2006), aff’d, 229 F. App’x. 911 (11th Cir. 2007) (finding no violation of the ADA when reviewing mental health and financial
history or unprofessional conduct, especially since the applicant had many issues that raised concerns); Doe v. Judicial Nominating Comm’n for the Fifteenth Judicial Circuit of Fla., 906 F. Supp. 1534, 1537, 1544-45 (S.D. Fla. 1995) (concluding that questions asked of judicial appointment applicants were overly broad when they concerned any physical impairment, hospitalization, treatment of mental illness, or addiction to drugs or alcohol regardless of whether they would affect applicant’s job performance capabilities); Applicants v. Tex. State Bd. of Law Exam’rs, No. A 93 CA 740 SS, 1994 WL 923404, at *2, *5 (W.D. Tex. Oct. 11, 1994) (permitting narrowly drawn questions asking about treatment for bipolar disorder, schizophrenia, paranoia, or any other psychotic disorders within the past ten years or since age eighteen, whichever time period was shorter); Med. Soc. of N.J. v. Jacobs, No. 93-3607, 1993 WL 413016, at *1 (D.N.J. Oct. 5, 1993) (denying a preliminary injunction to prohibit a state medical board from asking about alcohol or drug abuse and mental or psychiatric illness); In re Frickey, 515 N.W.2d 741, 741 (Minn. 1994) (ordering the board of bar admissions to remove certain mental health treatment questions from Minnesota’s Bar Application because these types of questions would deter law students from seeking appropriate counseling); Jon Bauer, The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act, 49 UCLA L. REV. 93, 94 (2001) (asserting that the bar admissions process is ill-suited to handle disability issues); Stanley Herr, Questioning the Questionnaires: Bar Admissions and Candidates with Disabilities, 42 VILL. L. REV. 635, 637 (1997) (discussing the wide variety of state questionnaires despite increasing number of bar applicants with disabilities); Letter to Karen Richards, Executive Director of Vermont Human Rights Commission, from U.S. Department of Justice Civil Rights Division, Jan. 21, 2014 (responding to inquiries about the use of mental health questions in Vermont, and stating the position that the ADA prohibits discriminatory investigations, investigations and additional burdens imposed on health disabilities). But see In Re Henry, 841 N.W. 2d 471 (S.D. 2013 ) (holding that Board of Bar Examiner’s inquiry into mental health including prior diagnosis of bipolar disorder was not an ADA violation; facts of case included past conduct that had included arrests for reckless driving).

18. See, e.g., Roe v. Ogden, 253 F.3d 1225, 1225 (10th Cir. 2010) (allowing an individual and a student chapter of the ACLU to challenge bar questions on drug use and mental health); ACLU of Ind. v. Individual Members of the Ind. State Bd. of Bar Exam’rs, No. 1:09-cv-842-TWP-MJD, 2011 WL 4387470, at *9 (S.D. Ind. Sept. 20, 2011) (holding that open-ended questions about mental health diagnosis or treatment for any mental, emotional, or nervous disorder were impermissible, and that permissible questions are those asking whether an applicant had been diagnosed with psychotic disorders and whether the applicant had an impairment involving current substance abuse or current mental health conditions); see also Stoddard, 509 F. Supp. 2d at 1123-24 (declaring that immunity does not shield a board from an ADA claim); Caroline M. Mew & Robert A. Burgoyne, ADA Update: The Status of Eleventh Amendment Immunity and Rooker-Feldman Doctrine as Defenses to Claims Asserted Against Bar Examiners Under the ADA; B. EXAM’T, Aug. 2007, at 17 (concluding that the doctrine would be a defense for bar examiners in fewer cases).

19. See, e.g., Iowa Sup. Ct. Bd. of Prof’l Ethics & Conduct v. Erbes, 604 N.W.2d 656, 657 (Iowa 2000) (deciding that public reprimand was the appropriate sanction for the misconduct of an attorney who took “refreshingly proactive” steps to deal with his depression); In re Burch, 975 N.E.2d 1001, 1003 (Ohio 2012) (requiring an applicant to appear before a review panel for a character and fitness process to answer questions about diagnoses of depression and ADD, and how those conditions related to her law school failures and behavior issues, including failure to take responsibility for actions); In re Zimmerman, 981 N.E.2d 854, 856-57 (Ohio 2012) (upholding the board of bar examiners’ findings and recommendations regarding the denial of character and fitness, but allowing the applicant to resubmit, subject to providing a mental health evaluation by a licensed professional to show compliance with treatment); Cincinnati Bar Ass’n v. Stidham, 721 N.E.2d 977, 983 (Ohio 2000) (finding depression to be a mitigating factor when determining sanction for mishandling client funds); see also Fla. Bar v. Clement, 662 So. 2d 690, 692, 700 (Fla. 1995) (concluding that disbarment was not precluded under the ADA despite an attorney’s bipolar disorder, and that no reasonable accommodations could be made to prevent the attorney’s egregious conduct from recurring); In re Blackwell, 880 N.E.2d 886, 886-88 (Ohio 2007) (upholding a determination of psychological unfitness, but allowing a right to apply to take the next bar exam, subject to proof of treatment and reevaluation at his own expense); Leigh Jones, Reciprocity Denied to Lawyer Treated for Depression, NAT’L L.J. (Jan. 7, 2013), available at http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202583364054 (reporting on case involving an Idaho attorney, designated by the Social Security Administration as disabled by depression, whose practice was interrupted by bouts of depression and who lost a bid for admission by reciprocity to the Utah State Bar).
few involving attorneys with ADD and ADHD and other types of conditions. The concept of conditional licensing or admission in light of these kinds of issues has been addressed and would benefit from additional review as to its efficacy.

20. See, e.g., In re Marshall, 762 A.2d 530, 535 (D.C. 2000) (finding that an attorney with a cocaine addiction was not a “qualified” individual protected from disbarment); Fla. Bd. of Bar Exam’rs ex rel. v. Barnett, 959 So. 2d 234, 234-36 (Fla. 2007) (granting conditional admission for three years due to evidence of several years of rehabilitation, after a resignation from the bar in lieu of disciplinary proceedings and a petition for readmission caused by five character and fitness incidents, including charges of misappropriation of client funds, heroin use, possession of cocaine, and resisting arrest); In re Edwards, 958 So. 2d 1173, 1173 (La. 2007) (denying conditional admission to individual with alcohol-related arrests and citations); In re Lynch, 877 N.E.2d 656, 656 (Ohio 2007) (granting qualified admission that required the bar applicant to undergo a Twelve-Step program to address professional responsibility issues and the applicant’s use of alcohol, with the panel’s decision focused on behavior and conduct issues).

21. See Doe v. Attorney Discipline Bd., No. 95-1259, 1996 WL 78312, at *1, 3 (6th Cir. Feb. 22, 1996) (finding that an attorney with ADD who was suspended for misconduct was not qualified under the ADA); In re Sheridan’s Case, 781 A.2d 7, 10-11 (N.H. 2001) (giving public censure to attorney who violated filing deadline requirements when failures occurred while attorney was recovering from serious eye and hip injuries); In re Acton, 902 N.E.2d 966, 967-68 (Ohio 2009) (regarding a character and fitness denial based on eight speeding violations and other misdemeanor charges, where the applicant claimed to have ADD and that it made him forgetful, but the court found that ADD did not affect ability to abide by law but instead caused him to be slow to learn his lessons); State ex rel. Okla. Bar Ass’n v. Busch, 919 P.2d 1114, 1117 (Okla. 1996) (holding that disability should be a mitigating factor in an attorney discipline case).

APPENDIX B  Materials Re: Character & Fitness Issues in Ohio

July 10, 2014

Todd C. Hicks, Esq. Chair
Board of Commissioners on Character and Fitness
The Supreme Court of Ohio
65 South Front Street, 5th Floor
Columbus, Ohio 43215-3431

Dear Mr. Hicks:

This letter is based on my longstanding interest and work on mental health and substance abuse issues within legal education and the legal profession. The views expressed in this letter are my personal perspectives and do not necessarily reflect the viewpoint of the University of Louisville or any organizations with which I have worked on these issues. I have written and spoken extensively on this issue for more than 25 years. Attached is a summary of my work in this area and it demonstrates a broad range of service activities, scholarship, and administrative work that has addressed issues of mental health and substance use and abuse. My work demonstrates scholarly attention and analysis of these issues; service on numerous national boards, committees, task forces, and conference planning committees; implementation of policy as Dean (Brandeis School of Law) and Associate Dean of Students (University of Houston); and speaking at numerous conferences on these topics. All of these experiences have allowed me to interact and hear the perspectives and opinions from a wide range and a large number of individuals within legal education and the legal profession. This broad set of experiences has resulted in my giving substantial thought and attention to this issue.

I write to encourage the Board to accept the recommendation of the Disability Rights Ohio that the Board of Commissioners on Character and Fitness in Ohio remove inquiries about an applicant’s mental health treatment and diagnosis and focus on conduct and behavior and a record that demonstrates a risk that such conduct and behavior would place the public at risk. My views can be summarized briefly as follows:

1) The current practices of most states, including Ohio, violate Title II of the ADA.
2) There is strong evidence that such practices deter individuals from getting treatment. Such deterrence can have grave consequences as highlighted by recent attention to attorney suicide rates.
3) There is virtually no research demonstrating that such practices actually protect the public.
4) There is strong evidence of the substantial burden placed on individuals subjected to these questions -- these burdens include the cost to the applicant of gathering the material from treating professionals, costs of employing legal counsel in some cases, personal time and effort in attending hearings or similar reviews, and delayed admission
to the bar which significantly adversely affects employment prospects.

5) There is little clarity from bar admission authorities about what those receiving and handling very private medical treatment documents do to ensure privacy protection of the information that is gathered during this process.

6) There is also little clarity about the training of those reviewing submitted treatment and diagnosis material.

7) Engaging in these reviews is costly and burdensome to the bar admission agencies, without demonstrated benefit.

The current practices asking about diagnosis and treatment cannot be justified and discriminate against individuals on the basis of disability. Before such invasive, stigmatizing, and costly burdens are placed on individuals, bar admission authorities should present evidence that these burdens are substantially (or at the very least reasonably) related to the interests that bar admission authorities seek to protect.

The purpose of asking questions about character and fitness is to protect the public, and is well intentioned. I applaud you for that. It would be much better, however, to focus on issues of behavior, conduct, and discipline and to ask questions related to those issues rather than questions about status (treatment/diagnosis). These questions are relevant and should be asked regardless of whether the individual has a disability.

I strongly encourage Ohio to be a leader on this issue and to follow the recommendations of Disability Rights Ohio in removing these questions.

Sincerely,

Laura Rothstein
Professor and Distinguished University Scholar

Date prepared – 1/16/15