

NOTES

ACCOMMODATING LEARNING DISABLED STUDENTS IN HIGHER EDUCATION: SCHOOLS' LEGAL OBLIGATIONS UNDER SECTION 504 OF THE REHABILITATION ACT

Today, more and more learning disabled students are demanding the equal opportunity to attend colleges and universities.¹ These students have a disorder that impairs one or more of the cognitive processes involved in understanding or using language.² As a result, learning disabled individuals may have an impaired ability in speaking, reading, or writing.³ Because of their mental difficulties, learning disabled students had historically been labeled as not being college material.⁴ In the 1988-89 school year, however, thirty-six percent of the postsecondary students who reported having a handicap also reported that they had a learning disability.⁵ Over the past few years, the percentage of learning disabled persons attending institutions of higher education has increased more rapidly than the percentage of students with any other reported disability.⁶

These statistics result, in part, from broad education legislation, such as the Education for All Handicapped Children's Act of 1975 ("EAHCA").⁷ This act provides for special education programs in public schools, such as programs for the early detection of learning

¹ Sears, *Learning Disabilities, Postsecondary Education, and Section 504 of the Rehabilitation Act of 1973*, 12 LAW & PSYCHOLOGY REV. 61, 69 (1988).

² Education of All Handicapped Children's Act of 1975 ("EAHCA"), 20 U.S.C. § 401(a)(15) (1988).

³ *Id.*

⁴ *Id.*

⁵ D. CLARK, NATIONAL ASSESSMENT OF HANDICAPPED STUDENT SERVICE PROGRAMS IN POSTSECONDARY EDUCATION: SURVEY OF PROGRAMS, 4 (1990). For more information regarding this survey, contact Dr. Donald M. Clark, National Association for Industry-Education Cooperation (NAIEC).

⁶ *Id.*

⁷ Rothstein, *Section 504 of the Rehabilitation Act: Emerging Issues for Colleges and Universities*, 13 J.C. & U.L. 229, 230 (1986). See EAHCA, 20 U.S.C. §§ 1400-1461 (1985).

disabilities and for the special education of learning disabled students.⁸ Furthermore, under section 504 of the Rehabilitation Act of 1973 ("section 504"), no otherwise qualified handicapped persons can be excluded from any program receiving federal financial assistance solely because of their handicap.⁹ A large percentage of colleges and universities are recipients of federal financial assistance and, thus, must comply with section 504.¹⁰ Section 504's regulations mandate that those colleges and universities that receive federal financial aid provide reasonable academic accommodations to their disabled students in order to ensure equal access to higher education.¹¹

Commentators have noted that although case law has developed in the general area of the application of section 504 to higher education, there are still many unanswered questions, including the types of accommodations that schools must provide learning disabled students.¹² Moreover, commentators note that litigation in this area is likely to increase due to the large numbers of learning disabled students in higher education.¹³ Consequently, universities must examine what accommodations section 504 requires that they provide to learning disabled students to protect against section 504 suits.¹⁴

This note will focus on what institutions of higher education must provide for handicapped students in order to comply with section 504 of the Rehabilitation Act. Although section 504 applies to all handicapped students, this note will pay particular attention to the special concerns of learning disabled students. Section I will review the legislative and regulatory history of section 504, as well as discuss the broad policies behind section 504 and how these policies relate to the specific regulatory requirements designed to effectuate section 504.¹⁵ Section II will then examine judicial interpretation of section 504 with respect to disabled students in postse-

⁸ See Rothstein, *supra* note 7, at 230 n.8.

⁹ 29 U.S.C. §§ 794(a),(b) (1988). Under section 504 of the Rehabilitation Act of 1973, "[n]o otherwise qualified individual with handicaps . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance"

¹⁰ Rothstein, *supra* note 7, at 229.

¹¹ See generally 45 C.F.R. §§ 84.4, 84.44 (1989).

¹² See, e.g., Rothstein, *supra* note 7, at 230.

¹³ *Id.* at 234.

¹⁴ See, e.g., *id.* at 230-31.

¹⁵ See *infra* notes 23-98 and accompanying text.

condary education.¹⁶ This discussion will focus on the special concerns that learning disabled students face, such as documentation requirements. It will also examine the concerns that institutions of higher education face in complying with section 504, such as issues related to cost and academic integrity.¹⁷ Finally, section III will analyze the current status of the law on these issues, and will provide guidance for universities in structuring learning disabled programs that are effective for learning disabled students and meet section 504 requirements.¹⁸

I. SECTION 504 OF THE REHABILITATION ACT OF 1973

Commentators have noted that the legislative and regulatory history of section 504 defines its scope.¹⁹ The legislative history of section 504, and the later amendments to it, indicate that Congress intended section 504 to be a broad civil rights act aimed at providing equal opportunities for the handicapped.²⁰ Furthermore, its regulatory history emphasizes section 504's purposes of equal opportunity and nondiscrimination.²¹ The regulations themselves discuss the types of academic accommodations that schools must provide for their handicapped students to protect against discrimination.²²

A. *The Legislative History of Section 504*

Commentators have noted that when Congress first passed section 504, the paucity of explicit legislative history made it difficult to determine the section's scope.²³ Congress stated generally that section 504 prohibits discrimination and the exclusion of benefits on the basis of handicaps to otherwise qualified individuals participating in any program receiving federal financial assistance.²⁴ Con-

¹⁶ See *infra* notes 108-248 and accompanying text.

¹⁷ See *infra* notes 169-248 and accompanying text.

¹⁸ See *infra* notes 267-362 and accompanying text.

¹⁹ See *infra* notes 23-98 and accompanying text for a discussion of the scope of section 504.

²⁰ See *infra* notes 23-43 and accompanying text for a discussion of the legislative history of section 504.

²¹ See *infra* notes 45-98 and accompanying text for a discussion of section 504's regulations.

²² See *infra* notes 58-98 and accompanying text for a discussion of the specific accommodations required under the HEW regulations.

²³ Note, *Disparate Impact and Meaningful Access Under Section 504 of the Rehabilitation Act*, 16 CONN. L. REV. 609, 610 (1984).

²⁴ S. REP. NO. 318, 93rd Cong., 1st Sess. 119, reprinted in 1973 U.S. CODE CONG. & ADMIN. NEWS 2076, 2143.

gress also stated that it intended section 504 to ensure that federally assisted programs would not exclude handicapped persons simply because a handicap appeared to be too severe.²⁵

Following the passage of section 504, scholars commented that these general statements of intent made it uncertain whether section 504 merely represented a general philosophy of nondiscrimination against the handicapped or whether it represented the beginning of a substantial civil rights movement for the handicapped.²⁶ In 1974, Congress amended the Rehabilitation Act ("amendments").²⁷ The passage of these amendments somewhat clarified the uncertainty surrounding section 504's scope, although they involved no specific changes to section 504.²⁸ Rather, Congress made technical and clarifying changes to the Rehabilitation Act as a whole with these amendments.²⁹ Nonetheless, accompanying these changes, the legislature made more explicit statements of the policy behind section 504.³⁰

For example, the Senate reports pertaining to the 1974 amendments explicitly stated that Congress had modeled section 504 after title VI of the Civil Rights Act of 1964.³¹ The Senate reports further explained that section 504 established a broad government policy that colleges and universities receiving federal financial assistance shall operate without discrimination on the basis of handicap.³² Furthermore, Senator Humphrey remarked that the framers of section 504 aimed to provide equal opportunities for the handicapped.³³

The legislative history of the 1974 amendments also provided some guidelines for the enforcement of section 504.³⁴ Congress

²⁵ *Id.* at 2079.

²⁶ Note, *supra* note 23, at 610.

²⁷ *Id.* See S. REP. NO. 1297, 93rd Cong., 2d Sess. 120, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 6373, 6374-75.

²⁸ See S. REP. NO. 1297, 93rd Cong., 2d Sess. 120, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 6373, 6374-75.

²⁹ *Id.*

³⁰ See Note, *supra* note 23, at 610.

³¹ S. REP. NO. 1297, 93rd Cong., 2d Sess. 120, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS at 6390. See 42 U.S.C. § 2000d-1 (1988). Title VI of the Civil Rights Act contains virtually the same anti-discrimination language as section 504—"No person in the United States shall on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 42 U.S.C. at § 2000d-1.

³² S. REP. NO. 1297, 93rd Cong., 2d Sess. 120, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS at 6390.

³³ 118 CONG. REC. 525 (1972).

³⁴ S. REP. NO. 1297, 93rd Cong., 2d Sess. 120, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS at 6390-91.

stated that although section 504 does not explicitly mandate the issuance of regulations, Congress intended that the Department of Health, Education, and Welfare ("HEW") issue such regulations.³⁵ During Senate subcommittee meetings on the proposed amendments, HEW officials stated that HEW would treat section 504 as civil rights legislation, and that it would interpret section 504 broadly to correct all types of discrimination against handicapped individuals in federally-assisted programs.³⁶ Thus, the Secretary of HEW assumed the responsibility for coordinating regulations and enforcement procedures.³⁷

In sum, when Congress first passed section 504, the legislative history stated generally that section 504 prohibits discrimination on the basis of handicap, leaving commentators uncertain as to the scope of section 504.³⁸ The legislative history accompanying the 1974 amendments, however, demonstrates that section 504 is a broad civil rights act.³⁹ This legislative history also reveals that the purpose of section 504 is to provide equal opportunities to handicapped persons.⁴⁰ Furthermore, it clearly indicates that Congress intended that HEW issue regulations to clarify section 504 further, and that HEW intended to interpret section 504 broadly when promulgating these regulations.⁴¹

B. *The Regulatory History of Section 504*

In 1978, the Secretary of HEW responded to Congress's intent that HEW promulgate section 504 regulations by issuing regulations ("1978 regulations") to effectuate section 504 of the Rehabilitation Act.⁴² These regulations define a number of section 504's terms.⁴³ They also describe the discrimination prohibited under section 504, and discuss the types of modifications that federally-assisted schools

³⁵ *Id.* at 6391.

³⁶ Cook, *The Scope of the Right to Meaningful Access and the Defense of Undue Burdens Under Disability Civil Rights Laws*, 20 LOY. L.A.L. REV. 1471, 1479 (1987).

³⁷ S. REP. NO. 1297, 93rd Cong., 2d Sess. 120, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS at 6391.

³⁸ See *supra* notes 24-26 and accompanying text for a discussion of section 504's legislative history.

³⁹ See *supra* notes 31-37 and accompanying text for a discussion of the legislative history accompanying the 1974 amendments to section 504.

⁴⁰ See *supra* note 33 and accompanying text for a discussion of Senator Humphrey's statements regarding the purpose of section 504.

⁴¹ See *supra* notes 35-37 and accompanying text for a discussion of the role that Congress intended HEW to play in effectuating section 504.

⁴² See generally, 45 C.F.R. § 84 (1989).

⁴³ *Id.*

must make in their programs to provide for handicapped individuals.⁴⁴

1. Definitional Aspects of the HEW Regulations

Specifically, the 1978 regulations further define section 504's definition of handicapped individuals.⁴⁵ For example, section 504's definition of handicapped persons includes those with "mental impairments."⁴⁶ The regulations expanded on the definition of handicapped persons to include persons having any mental or psychological disorder such as specific learning disabilities.⁴⁷

Although the regulations do not define "specific learning disabilities," the regulations HEW promulgated to enforce the EAHCA define learning disabilities.⁴⁸ Under EAHCA's regulations, the term "specific learning disability" refers to a disorder in one or a few of the psychological processes involved in comprehending or using oral or written language.⁴⁹ These regulations also provide that manifestations of such a disorder may include an impaired ability to read, speak or spell.⁵⁰ Courts have applied this definition of learning disabilities in cases involving section 504 claims.⁵¹

Additionally, in defining the types of discrimination that section 504 prohibits, the 1978 regulations stress section 504's purpose of equal opportunity.⁵² Specifically, the regulations state that rather than ensuring equal results in education, section 504 only requires that federally-assisted programs provide handicapped students equal opportunities to achieve the same results.⁵³ Furthermore, the regulations state that schools must provide an integrated setting for their handicapped students.⁵⁴ Thus, although section 504 does not

⁴⁴ *Id.* §§ 84.4, 84.44 (1989). On May 9, 1980, the Department of Education was created and these regulations were transferred to this new department. The regulations are now located, in substantially the same form, at 35 C.F.R. § 104 (1989) as well as at 45 C.F.R. § 84 (1989) where they were originally placed by HEW.

⁴⁵ 45 C.F.R. § 84.3(j).

⁴⁶ *Id.* § 84.3(j)(1)(i).

⁴⁷ *Id.* § 84.3(j)(2)(i)(B).

⁴⁸ 34 C.F.R. § 300.5(b)(9) (1989). This act mandates primary and secondary schools to provide special education programs for handicapped students. *See* 20 U.S.C. § 1400 (1988).

⁴⁹ 34 C.F.R. § 300.5(b)(9) (1989).

⁵⁰ *Id.*

⁵¹ *See, e.g., Wynne v. Tufts Univ. School of Med.*, 932 F.2d 19, 21 (1st Cir. 1991) (learning disabled student handicapped under § 504).

⁵² *See* 45 C.F.R. § 84.4(b)(2) (1989).

⁵³ *Id.*

⁵⁴ *Id.*

require affirmative action, courts have noted that it may require postsecondary schools to make modifications in their academic programs to accommodate their handicapped students.⁵⁵

2. Reasonable Accommodation Requirements of the HEW Regulations

a. *Modification of Academic Requirements*

The 1978 regulations also discuss what academic modifications postsecondary institutions must make for handicapped students.⁵⁶ Under these regulations, schools must modify their academic requirements to ensure nondiscrimination of handicapped students.⁵⁷ For example, one regulation directs postsecondary institutions to modify examinations for students with handicaps that impair their sensory, manual or language skills.⁵⁸ This regulation states that schools must provide examination formats that will best ensure results reflecting the student's abilities rather than the student's disability.⁵⁹ David Matthews, Secretary of HEW at the time HEW promulgated the regulations, stated that handicapped persons often require different treatment in order to be afforded equal access to programs receiving federal financial assistance because identical treatment often results in discrimination.⁶⁰

Handicap students' advocate groups such as Higher Education and the Handicapped ("HEATH") have agreed that identical treatment of handicapped and non-handicapped students often results in discrimination.⁶¹ HEATH emphasizes that the use of traditional exam formats, such as multiple choice, often merely serves to reflect a learning disabled's deficiencies.⁶² Experts in the field of handicapped students have found that although learning disabled students have the capability to learn, their deficiencies in processing

⁵⁵ See, e.g., *Doherty v. Southern College of Optometry*, 862 F.2d 570, 575 (6th Cir. 1988) (College of Optometry has an obligation to provide reasonable accommodations for its students).

⁵⁶ 45 C.F.R. § 84.44.

⁵⁷ *Id.* § 84.44(a).

⁵⁸ *Id.* § 84.44(c).

⁵⁹ *Id.*

⁶⁰ 41 Fed. Reg. 20,296 (May 17, 1976) (to be codified at C.F.R. § 84).

⁶¹ HEATH RESOURCE CENTER, *MEASURING STUDENT PROGRESS IN THE CLASSROOM* (1985-1986).

⁶² *Id.*

information cause them to learn differently.⁶³ Further, experts have noted that generally, a learning disabled student's processing abilities are deficient only in one or a small number of areas.⁶⁴ Consequently, scholars in the area of learning disabilities have found that by allowing alternate test formats, learning disabled students are able to show their abilities, rather than disabilities.⁶⁵

Nevertheless, a concern arose among commentators regarding the regulation requiring alternate test formats.⁶⁶ This concern was that the regulation would require schools to perform a global search for alternate test formats that did not discriminate against handicapped students.⁶⁷ HEW announced that this result was not the intent of the alternate test format requirement, and amended the regulation so that the Director of the Office of Civil Rights, rather than individual schools, had the burden of finding alternate test formats.⁶⁸

In addition to requiring alternate test formats when necessary to evaluate a handicapped student's abilities more adequately, the regulations provide for other modifications that schools may need to make in order to accommodate their handicapped students. For example, a school may have to modify the length of time permitted for the completion of a degree, substitute required courses, or adapt the manner in which some courses are conducted.⁶⁹ The regulations also provide, however, for the so-called "essential to the program" exception.⁷⁰ This exception states that where a school can show that an academic requirement is essential to its educational program, the requirement will not be deemed discriminatory under section 504, and the institution need not modify the requirement.⁷¹ The regulations, however, are silent as to what burden of proof falls on

⁶³ See Adler, *Library Orientation: Intervention Strategies for Students with Learning Disabilities*, 7 J. OF POSTSECONDARY EDUC. & DISABILITY 45, 46-47 (1989).

⁶⁴ See Sears, *supra* note 1, at 65.

⁶⁵ See, e.g., L. SMITH, *THE COLLEGE STUDENT WITH A DISABILITY: A FACULTY HANDBOOK* 12 (1982).

⁶⁶ 45 C.F.R. § 84 App. A (29) (1989).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* § 84.44(a). Some educators are concerned about the possibility of students demanding alternate forms of instruction. Telephone interview with Karen Muncaster, Director of Learning Disabilities Office, Middlesex Community College (Sept. 20, 1990). Although the regulations expressly provide for changes in the way courses are conducted, some educators have questioned whether HEW has the power to force professors to change their methods of instruction. Karen Muncaster, *supra*.

⁷⁰ 45 C.F.R. § 84.44(a).

⁷¹ *Id.*

the school in showing that a requirement is essential.⁷² Thus, although schools may need to make reasonable accommodations for their handicapped students, they do not have to make fundamental changes in their programs under section 504.

b. *Auxiliary Aids Regulation*

The regulations also attempt to effectuate section 504 through an auxiliary aids provision.⁷³ Under this provision, schools must provide their handicapped students with necessary auxiliary aids, such as taped texts, hearing aids and similar devices.⁷⁴ The auxiliary aids regulation, however, does not require schools to provide more costly personal aids such as individual attendants.⁷⁵

Institutions of higher education have expressed concern regarding the costs of providing auxiliary aids.⁷⁶ Other than excluding personalized services, the regulations did not originally address this cost issue.⁷⁷ In 1980, however, HEW attempted to respond to the concerns of universities regarding the cost of complying with accommodation provisions, especially the auxiliary aids section.⁷⁸ In an appendix to the regulations, HEW emphasized that universities can usually meet the auxiliary aids requirement through the use of resources already in place such as outside rehabilitation agencies and charitable organizations.⁷⁹ HEW noted that by using these existing resources, schools would not incur any costs for most auxiliary aids.⁸⁰

HEW further emphasized in the appendix that where a school has to pay for such devices, it has flexibility in deciding how to supply the aids.⁸¹ For example, HEW noted that universities could use volunteer students to work with the handicapped.⁸² Other than this general statement, however, the regulations did not discuss whether a university could ever use excessive cost as a defense to non-compliance with section 504.⁸³

⁷² See *id.*

⁷³ See *id.* § 84.44(d).

⁷⁴ *Id.*

⁷⁵ *Id.* § 84.44(d)(2).

⁷⁶ *Id.* App. A (31).

⁷⁷ See *id.* § 84.44(d)(2).

⁷⁸ See *id.* App. A (31).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

Thus, one commentator has noted that section 504 and its regulations impose a duty on schools to provide potentially expensive accommodations.⁸⁴ Nonetheless, a provision of the Rehabilitation Act pertaining to employment discrimination, allows courts to consider cost when determining what types of reasonable accommodations employers must provide for their handicapped employees.⁸⁵ Thus, this commentator has argued that this provision should apply to schools because the cost of providing accommodations to handicapped students could become a severe financial burden on schools.⁸⁶

Nevertheless, another commentator has suggested that schools' cost analysis should be different from employers' cost analysis because schools incur a lower cost risk in admitting handicapped students into their programs than employers do in hiring handicapped employees.⁸⁷ This commentator has suggested that if a disabled employee cannot master his or her work after the employer has provided reasonable accommodations, the employer suffers direct costs in lost productivity.⁸⁸ This commentator has also noted that if a handicapped student, after receiving accommodations, cannot meet a school's academic requirements, only the student is adversely affected by poor grades.⁸⁹ Thus, this commentator argues that universities' cost analysis is likely to be narrower than the broad cost analysis used in employment situations.⁹⁰

c. *Flagging*

Another concern related to HEW's regulations is the practice of flagging.⁹¹ Under section 504's regulations, schools may not make any pre-admission inquiry as to whether a candidate has a disability.⁹² Flagging, however, is a procedure whereby tests are marked to indicate which students have received examination format modifications, and what types of accommodations they received while

⁸⁴ See Note, *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act*, 55 N.Y.U. L. REV. 881, 888-89 (1980).

⁸⁵ *Id.* at 900.

⁸⁶ *Id.*

⁸⁷ See Rothstein, *supra* note 7, at 250.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 237.

⁹² 45 C.F.R. § 84.42(b)(4) (1989).

taking these tests.⁹³ HEW did not mention the practice of flagging in its regulations.

Commentators have noted that flagging is most often found in the admissions process, because the Department of Education allows the standardized testing services that are used in the college/university admissions process to report to schools any special modifications that a test-taker received.⁹⁴ Consequently, commentators have noted that, with flagging, schools may indirectly discover students' disabilities during the pre-admission process.⁹⁵ The HEW regulation is designed to avoid this result.⁹⁶

In sum, section 504's regulations serve to define the terms contained within the section. In doing so, these regulations reiterate Congress's announcement that the section's purpose is to provide handicapped students with equal access to colleges and universities that receive federal financial assistance.⁹⁷ For example, the HEW regulations state that schools must provide an integrated setting for handicapped students to help ensure equal opportunities for handicapped students.⁹⁸

Furthermore, the regulations require schools to provide their handicapped students with reasonable academic accommodations.⁹⁹ Such accommodations include providing handicapped students with alternate test formats, additional time to complete their degrees and necessary auxiliary aids.¹⁰⁰ The regulations, however, explicitly limit this reasonable modifications requirement with the so-called "essential to the program" exception.¹⁰¹ Consequently, under the regulations, where a school can prove that its requirement is essential to the academic program, the school does not have to modify the requirement to accommodate a handicapped student.¹⁰²

Moreover, the legislative and regulatory histories of section 504 emphasize that it is a civil rights act for the handicapped.¹⁰³ As such,

⁹³ Rothstein, *supra* note 7, at 237.

⁹⁴ *Id.* at 245, 253.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See *supra* notes 54-57 and accompanying text for a discussion of HEW's regulations.

⁹⁸ See, e.g., 45 C.F.R. § 84.4(b)(2) (1989).

⁹⁹ See *supra* notes 58-62, 71-77 and accompanying text for a discussion of the reasonable accommodations required under HEW's regulations.

¹⁰⁰ *Id.*

¹⁰¹ See 45 C.F.R. § 84.44(a).

¹⁰² See *id.*

¹⁰³ See *supra* notes 31-39 and accompanying text for a discussion of the legislative and regulatory history announcing that section 504 is a broad civil rights act.

the legislative and regulatory history indicates that a major goal of section 504 and its regulations is to provide equal opportunities to handicapped students in their pursuit of higher education.¹⁰⁴ Thus, the HEW regulations mandate that schools must, when necessary, provide reasonable accommodations that ensure handicapped students the equal opportunity to attain their educational goals.¹⁰⁵

II. JUDICIAL INTERPRETATION OF SECTION 504

Commentators have noted that courts interpreting section 504 have clarified some of the questions regarding the procedural and substantive issues that its legislative history and regulations left unanswered.¹⁰⁶ The basic procedural issue that courts have faced is whether a handicapped student has a private cause of action under section 504.¹⁰⁷ Courts have established that handicapped students do not have a private right of action against the Secretary of Education under section 504.¹⁰⁸ The courts have, however, upheld a private cause of action against universities.¹⁰⁹ Thus, handicapped students may sue the universities that they attend for violations of section 504.¹¹⁰

¹⁰⁴ See *supra* notes 35, 54 and accompanying text for a discussion of the equal opportunity purpose of section 504.

¹⁰⁵ 45 C.F.R. § 84.44(a).

¹⁰⁶ See Rothstein, *supra* note 7, at 230.

¹⁰⁷ See *Salvador v. Bell*, 622 F. Supp. 438, 440-42 (N.D. Ill. 1985); *Barnes v. Converse College*, 436 F. Supp. 635, 638 (D. S.C. 1977).

¹⁰⁸ *Salvador*, 622 F. Supp. at 442. The plaintiff, Salvador, a learning disabled student, had enrolled in defendant school's master degree program. *Id.* at 439. Salvador claimed that the school failed to modify its academic program for him in violation of section 504. Thus, Salvador sued the Secretary of the Department of Education, alleging that the Secretary had failed to investigate his complaints that the university had discriminated against him in violation of section 504. The district court reasoned that because title VI of the Civil Rights Act of 1964 ("title VI") did not recognize a right to a private cause of action against the Secretary, and because section 504 was modeled after title VI, a private cause of action did not exist under section 504. *Id.* at 441.

¹⁰⁹ *Barnes*, 436 F. Supp. at 638. In *Barnes*, the defendant, Converse College, admitted Barnes, a deaf student, to its graduate summer school program. *Id.* at 636. Because Converse College refused to provide Barnes with an interpreter, a necessary auxiliary aid, she sued the university for noncompliance with section 504. In ruling that section 504 allowed this student a private cause of action, the court reasoned that the relative judicial ease in implementing the right, the assurance of administrative due process, and the administrative consistency that the right would provide was in accordance with the legislative intent of providing equal opportunity to handicapped students. *Id.* at 638. Thus, the *Barnes* court concluded that a private cause of action exists under section 504. *Id.*

¹¹⁰ *Id.*

In the substantive areas of section 504, courts have examined the definition of "otherwise qualified."¹¹¹ This definition has evolved over a number of cases.¹¹² Furthermore, the courts' interpretation of "otherwise qualified" has led to an examination of what types of academic accommodations schools must provide for their handicapped students under section 504.¹¹³

Other substantive issues of section 504 have concerned the extent to which section 504 mandates schools to provide their handicapped students with reasonable academic accommodations.¹¹⁴ In determining these accommodations, courts have addressed such issues as whether a school must have documentation of a handicapped student's disability before section 504 requires it to provide reasonable accommodations, and whether a school can use excessive cost as a valid defense to not providing reasonable accommodations.¹¹⁵ The reasonable accommodation analyses of the courts have also examined the role that the doctrine of academic deference plays in section 504 litigation.¹¹⁶ Specifically, courts have had to determine the extent to which they should defer to a school's decision that an academic accommodation is not reasonable because it would modify an essential requirement of the school's program.¹¹⁷

A. The Evolution of the "Otherwise Qualified" Standard

1. Early Definition of "Otherwise Qualified": *Southeastern Community College v. Davis*

To establish a claim against a university under section 504, a person must prove that he or she: is handicapped under section

¹¹¹ See *infra* notes 119-34 and accompanying text for a discussion of the judicial interpretation of "otherwise qualified."

¹¹² Compare *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979) ("otherwise qualified" handicapped students are those able to meet all of a program's requirements despite their handicap) with *Doherty v. Southern College of Optometry*, 862 F.2d 570, 575 (6th Cir. 1988) ("otherwise qualified" analysis involves a consideration of reasonable accommodations) and *Wynne v. Tufts Univ. School of Med.*, 932 F.2d 19, 24 (1st Cir. 1991) (in "otherwise qualified" analysis, the ultimate question is whether reasonable accommodations exist).

¹¹³ See *infra* notes 135-98 and accompanying text for a discussion of courts' reasonable accommodations analyses.

¹¹⁴ *Id.*

¹¹⁵ See *infra* notes 148-98 and accompanying text for a discussion of knowledge and cost issues arising under section 504.

¹¹⁶ See *infra* notes 196-248 and accompanying text for a discussion of the academic deference doctrine.

¹¹⁷ See *infra* notes 196-248 and accompanying text for a discussion of different courts' treatment of the academic deference doctrine in section 504 litigation.

504; is otherwise qualified to complete the school's program; was excluded from the school's program solely because of the handicap; and that the school receives federal financial aid.¹¹⁸ Under the substantive development of section 504 case law involving higher education, one area that courts have addressed is what satisfies the "otherwise qualified" requirement of section 504.¹¹⁹

The first case to define "otherwise qualified" was the 1979 case of *Southeastern Community College v. Davis*, in which the United States Supreme Court held that an "otherwise qualified" handicapped person is one who is capable of meeting all of a program's requirements despite his or her handicap.¹²⁰ In *Davis*, the defendant, Southeastern Community College ("Southeastern"), denied the plaintiff, a deaf student, admission to its nursing program.¹²¹ The Court reasoned that the student was not "otherwise qualified" under section 504 because the ability to understand spoken words was necessary for the clinical part of the program.¹²² Thus, the Court established that where a student cannot meet a necessary requirement of a school's program, that student is not "otherwise qualified" for section 504 purposes.¹²³

In *Davis*, the student suffered from a severe hearing disorder.¹²⁴ Although the use of a hearing aid greatly increased the student's ability to hear sounds, she still depended heavily on her lip-reading ability to understand others.¹²⁵ The school, Southeastern, concluded that the student's disability made it unsafe for her to participate in the clinical training program. Thus, Southeastern denied her admission to its nursing program.¹²⁶

Upon reviewing the plaintiff's section 504 claim in *Davis*, the Court agreed with Southeastern's determination that the student was not qualified for the nursing program because her disability made her participation in the program unsafe.¹²⁷ In making this determination, the Court defined an "otherwise qualified" person as one who is able to meet all of a program's academic requirements

¹¹⁸ See *Aloia v. New York Law School*, No. 88 Civ. 3184, 1988 U.S. Dist. LEXIS 7769 (S.D.N.Y. July 27, 1988).

¹¹⁹ See, e.g., *Southeastern Community College v. Davis*, 442 U.S. 397, 405-06 (1979).

¹²⁰ *Id.* at 405-06.

¹²¹ *Id.* at 401-02.

¹²² *Id.* at 406-07.

¹²³ *Davis*, 442 U.S. at 406.

¹²⁴ *Id.* at 400.

¹²⁵ *Id.* at 401.

¹²⁶ *Id.* at 401-02.

¹²⁷ *Id.* at 414.

despite his or her handicap.¹²⁸ Thus, because the student was unable to meet satisfactorily the nursing program's requirements, the *Davis* Court held that she was not "otherwise qualified" under section 504, and consequently, she had no discrimination claim against the school.¹²⁹

In its decision, the *Davis* Court did not examine what may constitute reasonable accommodations under section 504.¹³⁰ The Court did, however, examine whether the school's requirements that Davis could not meet were necessary for participation in the program.¹³¹ Although the Court did determine that Southeastern's requirements were essential to its nursing program, it reasoned that if the requirements had not been essential, and if reasonable modifications would have enabled Davis to complete the program successfully, the school's refusal to make reasonable modifications would have violated section 504.¹³² Furthermore, the *Davis* Court noted that situations might arise in which insistence on a particular program requirement might discriminate against a handicapped student in violation of section 504, and that the identification of those instances was an important responsibility of HEW.¹³³ In Davis's case, however, the modifications that she needed would have fundamentally altered the program, and consequently, were more extreme than the type of modifications required under the regulations. Thus, the Court reasoned that Davis was not "otherwise qualified."¹³⁴

2. Determining "Otherwise Qualified" in Terms of Reasonable Accommodations: *Doherty v. Southern College of Optometry*

Following *Davis*, courts began to recognize that a determination of whether a handicapped student is "otherwise qualified" necessarily involves an inquiry into reasonable accommodations.¹³⁵ For example, in the 1988 case of *Doherty v. Southern College of Optometry*, the United States Court of Appeals for the Sixth Circuit held that an "otherwise qualified" handicapped person is one who, with the

¹²⁸ *Id.* at 406.

¹²⁹ *Id.* at 414.

¹³⁰ *See id.* at 407-10.

¹³¹ *Id.* at 407.

¹³² *See id.* at 409-10.

¹³³ *Id.* at 412-13.

¹³⁴ *Id.* at 414.

¹³⁵ *See, e.g., Doherty v. Southern College of Optometry*, 862 F.2d 570, 575 (6th Cir. 1988).

aid of reasonable modifications by the school, meets the required standards of the school's program.¹³⁶ The Sixth Circuit announced that it could no longer literally accept the *Davis* interpretation of "otherwise qualified" that a handicapped student must be able to meet all of a school's requirements despite the handicap.¹³⁷ The *Doherty* court reasoned that under *Davis*, only those who could fulfill a program's requirements without any reasonable accommodations were "otherwise qualified," and concluded that this outcome was paradoxical.¹³⁸ Thus, the *Doherty* court established that in determining whether a student is "otherwise qualified" for section 504 purposes, a court must examine whether reasonable accommodations exist that would enable the student to meet a program's requirements.¹³⁹

In *Doherty*, the plaintiff, an optometry student, had a neurological condition that impaired his motor skills and manual coordination.¹⁴⁰ During *Doherty*'s first year at optometry school, the school established a new requirement: a clinical proficiency test in which students had to perform techniques with certain optometric instruments. Because of his disability, *Doherty* could not pass the proficiency exam. As a result, the school refused to confer a degree upon *Doherty*.¹⁴¹

In concluding that it could not take the *Davis* interpretation of "otherwise qualified" literally, the *Doherty* court reasoned that if the term "otherwise qualified" included only those handicapped students who could satisfy all of a program's requirements despite their handicaps, the term referred only to those students already capable of satisfying all of the program's requirements.¹⁴² But, if the term "otherwise qualified" included only those who were already capable of meeting a program's requirements, the *Doherty* court reasoned, schools would never have to modify their requirements because a student would have to be able to meet the requirement without modification in order to be "otherwise qualified."¹⁴³ Thus, the *Doherty* court concluded that the *Davis* interpretation created a paradox and could not be taken literally.¹⁴⁴

¹³⁶ *See id.*

¹³⁷ *Id.* at 575.

¹³⁸ *Id.*

¹³⁹ *See id.*

¹⁴⁰ *Id.* at 572.

¹⁴¹ *Id.* at 573.

¹⁴² *Id.* at 574-75.

¹⁴³ *See id.* at 575.

¹⁴⁴ *Id.*

The *Doherty* court responded to this paradox by adopting a balancing approach in determining whether a handicapped student is "otherwise qualified" under section 504.¹⁴⁵ Under this balancing approach, a court must ask whether any reasonable accommodations exist that could satisfy the interests of the school and the handicapped student by enabling the student to perform the requirements. Thus, the *Doherty* court established that under section 504, an "otherwise qualified" handicapped student is one who, with the provision of reasonable accommodations by the school, can satisfy the school's academic requirements.¹⁴⁶

B. Reasonable Accommodations

1. The Status of Knowledge of Students' Disabilities as a Prerequisite to Providing Reasonable Accommodations

Another substantive issue of section 504 relates to the extent of a school's obligation to provide reasonable accommodations to "otherwise qualified" handicapped students.¹⁴⁷ Specifically, there is concern about whether a university must have knowledge of a student's learning disability before it must provide the modifications that section 504 mandates.¹⁴⁸ Although the issue has arisen in a few cases, courts have not conclusively decided it.

The knowledge issue was present in the 1985 case of *Salvador v. Bell*, in which the United States District Court for the Northern District of Illinois held that a student did not have a section 504 claim against the Secretary of Education.¹⁴⁹ In *Salvador*, a learning disabled student claimed that the school he was attending for a master's degree had failed to modify its academic program for him in violation of section 504.¹⁵⁰ Thus, Salvador sued the Secretary of the Department of Education, alleging that the Secretary had failed to investigate his complaints that the university had discriminated against him in violation of section 504.

The *Salvador* court indicated that the school had no knowledge of Salvador's disability. The court did not, however, specifically

¹⁴⁵ See *id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Salvador v. Bell*, 622 F. Supp. 438, 439 (N.D. Ill. 1985).

¹⁴⁸ *Aloia v. New York Law School*, No. 88 Civ. 3184, 1988 U.S. Dist. LEXIS 7769 (S.D.N.Y. July 27, 1988); *Salvador*, 622 F. Supp. at 439.

¹⁴⁹ 622 F. Supp. at 439. See *supra* note 108 and accompanying text for a discussion of the issue on which the case was decided.

¹⁵⁰ 622 F. Supp. at 439.

determine whether a school must know of a student's handicap before a court can hold it in violation of section 504 because it procedurally dismissed the case.¹⁵¹ Nonetheless, although not deciding whether knowledge is required in judicial proceedings, the *Salvador* opinion acknowledged that the Office of Civil Rights had concluded that a school only incurs an obligation to provide reasonable accommodations when it is aware of a student's disability.¹⁵² Consequently, according to the *Salvador* court, where a student pursues an administrative course of action against a school, the student must show that the school did know of the disability.¹⁵³

More recently, in 1988, the United States District Court for the Southern District of New York, in *Aloia v. New York Law School*, examined in dicta whether a school's knowledge of a student's disability is a prerequisite to a section 504 claim when it held that a student was not "otherwise qualified" under section 504.¹⁵⁴ In *Aloia*, a law student claimed that New York Law School had discriminated against him in violation of section 504 solely because of his neurological disability.¹⁵⁵ In determining whether the school had discriminated against Aloia solely because of his handicap, the district court found the issue of the school's knowledge of the disability determinative.¹⁵⁶ The court reasoned that, unless the school had known of the student's disability, it could not have discriminated against the student solely because of the handicap.¹⁵⁷ The court, however, refused to rule on whether the school actually had knowledge of the student's disability.¹⁵⁸

In *Aloia*, the plaintiff's grade point average ("GPA") had fallen below the school's required minimum of 2.0 during his third year of law school.¹⁵⁹ As a result, the school's academic status committee met to discuss his academic difficulties. In his report to the academic status committee, Aloia did not mention that he had a disability.¹⁶⁰

¹⁵¹ *Id.* at 442-43. See *supra* note 108 and accompanying text for a discussion of the procedural issue on which the court decided the case.

¹⁵² 622 F. Supp. at 439.

¹⁵³ See *id.*

¹⁵⁴ No. 88 Civ. 3184, 1988 U.S. Dist. LEXIS 7769, at *17-18 (S.D.N.Y. July 27, 1988). See *infra* notes 211-13 and accompanying text for a discussion of the issue on which the court ultimately decided the case.

¹⁵⁵ No. 88 Civ. 3184, 1988 U.S. Dist. LEXIS, at *14.

¹⁵⁶ See *id.* at 17-20.

¹⁵⁷ *Id.* at 17-18.

¹⁵⁸ *Id.* at 20-21.

¹⁵⁹ *Id.* at 3.

¹⁶⁰ *Id.* at 4-5.

After the meeting, the academic status committee voted to dismiss Aloia from the law school for his inability to maintain the school's academic standards.¹⁶¹ After his dismissal, Aloia presented the academic status committee chairperson with a doctor's letter certifying that Aloia suffered from a central nervous system disorder that had adversely affected his performance in law school.¹⁶²

Upon its review, the *Aloia* court reasoned that if the school had no knowledge of Aloia's disability, the school could not have excluded him solely on the basis of his handicap.¹⁶³ The *Aloia* court did not, however, decide whether Aloia's claim had survived summary judgment on the knowledge issue because it granted summary judgment on another issue.¹⁶⁴ Thus, although suggesting that a school must have knowledge of a handicapped student's disability before it can be held in violation of section 504, the *Aloia* court did not decide whether mere manifestations of a handicapped student's disabling symptoms could put a school on notice of a student's disability.¹⁶⁵

2. Schools' Use of Financial Needs Tests to Avoid the Costs of Providing Accommodations

Case law has also developed regarding the cost concerns of schools with respect to section 504 compliance.¹⁶⁶ Specifically, many schools are concerned about the large potential expenses that they can incur in providing reasonable accommodations such as auxiliary aids.¹⁶⁷ Consequently, courts have had to determine to what extent a university can use cost as a valid defense against not complying with section 504's reasonable accommodation requirement.¹⁶⁸ During the passage of the 1978 amendments, Congress adopted an amendment allowing courts to take cost into account when determining the reasonable accommodations that employers must provide to disabled employees.¹⁶⁹ Although the amendment applies

¹⁶¹ *Id.* at 5.

¹⁶² *Id.* at 6.

¹⁶³ *See id.* at 17-18.

¹⁶⁴ *See infra* notes 211-25 and accompanying text for a discussion of the issue on which the court decided *Aloia*.

¹⁶⁵ No. 88 Civ. 3184, 1988 U.S. Dist. LEXIS, at *18-20.

¹⁶⁶ *See, e.g.,* *United States v. Board of Trustees for Univ. of Ala.*, 908 F.2d 740, 742 (11th Cir. 1990); *University of Texas v. Camenisch*, 616 F.2d 127, 129 (5th Cir. 1980), *rev'd and remanded on other grounds*, 451 U.S. 390 (1981).

¹⁶⁷ *See, e.g.,* 45 C.F.R. § 84 App. A (31) (1989).

¹⁶⁸ *See, e.g., Board of Trustees for Univ. of Ala.*, 908 F.2d at 742.

¹⁶⁹ 29 U.S.C. § 794a(a)(1) (1988).

only to discrimination against employees and not students, commentators have argued that this legislative concern over cost of compliance indicates that courts should apply a similar cost analysis to section 504 claims.¹⁷⁰

A few courts have discussed the cost analysis issue.¹⁷¹ Specifically, courts have considered the validity of universities' "financial needs" tests.¹⁷² Under these tests, a handicapped student must show financial inability to pay for the necessary auxiliary aids before the universities will pay for any such aids.¹⁷³

For example, in 1980, the United States Court of Appeals for the Fifth Circuit, in *University of Texas v. Camenisch*, considered whether a university had to pay for a student's necessary auxiliary aid even though the student did not meet the university's "financial needs" test, and held that the defendant had to provide the handicapped student with an interpreter.¹⁷⁴ In support of its holding, the *Camenisch* court reasoned that a HEW regulation requires colleges and universities to provide auxiliary aids in order to accommodate handicapped students.¹⁷⁵ Thus, the *Camenisch* court established that because a HEW regulation mandates the provision of auxiliary aids, universities must pay for the necessary auxiliary aids of handicapped students regardless of the students' financial situation.¹⁷⁶

In *Camenisch*, the defendant university had established a "financial needs" test, whereby a handicapped student had to meet the university's established criteria for financial assistance before the school would provide him or her with any auxiliary aids.¹⁷⁷ Camenisch was a deaf graduate student at the university. Although he needed an interpreter to complete his master's degree, the university failed to provide him with one. The university based its decision not to pay for Camenisch's interpreter on the ground that he failed to meet the school's "financial needs" test.¹⁷⁸

In determining that the school had to provide interpreters to deaf students such as Camenisch, the *Camenisch* court noted that

¹⁷⁰ See Note, *supra* note 84, at 900.

¹⁷¹ See, e.g., *Board of Trustees for Univ. of Ala.*, 908 F.2d at 746-48.

¹⁷² See, e.g., *Board of Trustees for Univ. of Ala.*, 908 F.2d at 742; *University of Texas v. Camenisch*, 616 F.2d 127, 129 (5th Cir. 1980).

¹⁷³ See *Board of Trustees for Univ. of Ala.*, 908 F.2d at 742.

¹⁷⁴ See 616 F.2d at 129.

¹⁷⁵ *Id.* at 133.

¹⁷⁶ *Id.* at 129, 133.

¹⁷⁷ *Id.* at 129.

¹⁷⁸ *Id.*

the HEW regulations do not require schools to provide extensive "individual attention" services to handicapped students.¹⁷⁹ Because the HEW regulations specifically mention interpreters under the auxiliary aids section, however, the court reasoned that a sign language interpreter fell within the category of services that schools must provide for their handicapped students. Thus, the *Camenisch* court held that the defendant university had to pay for Camenisch's sign language interpreter, thereby establishing that, under section 504, universities must provide auxiliary aids to their handicapped students regardless of the students' financial needs.¹⁸⁰

A subsequent case also struck down the validity of a university's use of "financial needs" tests in determining whether to provide a handicapped student with auxiliary aids.¹⁸¹ In 1990, the United States Court of Appeals for the Eleventh Circuit, in *United States v. Board of Trustees for the University of Alabama*, held that a university could not impose a "financial needs" test as a means of precluding the provision of auxiliary aids to handicapped students.¹⁸² In *Board of Trustees*, the United States brought an action against the University of Alabama for refusing to comply with HEW's regulation prohibiting the use of "financial needs" tests in determining whether a handicapped student or the university must pay for auxiliary aids.¹⁸³ In support of its holding, the Eleventh Circuit reasoned that the Department of Education's prohibition of "financial needs" tests was entitled to conclusive weight because the department's position on the meaning of the regulation pertaining to auxiliary aids was consistent with the language of the regulation itself.¹⁸⁴ Thus, the *Board of Trustees* court established that a university must provide its handicapped students with auxiliary aids regardless of financial need.¹⁸⁵

In *Board of Trustees*, the University of Alabama had developed an auxiliary aids policy under which it provided aids, such as transcriptions of class lectures and note-takers, to handicapped students.¹⁸⁶ The university, however, only provided handicapped stu-

¹⁷⁹ *Id.* at 133.

¹⁸⁰ *See id.* at 129.

¹⁸¹ *See United States v. Board of Trustees for the Univ. of Ala.*, 908 F.2d 740, 752' (11th Cir. 1990).

¹⁸² *See id.*

¹⁸³ *See id.* at 742-43.

¹⁸⁴ *Id.* at 746, 749.

¹⁸⁵ *Board of Trustees for the Univ. of Ala.*, 908 F.2d at 752.

¹⁸⁶ *Id.* at 742.

dents with more costly aids, such as interpreters, in limited circumstances. Before providing interpreters, the university first required a handicapped student to seek free interpreter services from the state Vocational Rehabilitation Service. If the student could not procure an interpreter through this service, the university then required that the student demonstrate that he or she could not pay for an interpreter before the school provided one.¹⁸⁷

In striking down the university's "financial needs" test, the *Board of Trustees* court relied on the HEW regulation that mandates that schools provide auxiliary aids.¹⁸⁸ Based on the language of this provision, the court concluded that section 504 requires universities to provide auxiliary aids to their handicapped students regardless of the students' financial need.¹⁸⁹ Furthermore, the court emphasized that schools will not, for the most part, incur excessive expense in providing aids to handicapped students because they can use existing resources, such as outside rehabilitation agencies and volunteer students, to provide the aids.¹⁹⁰ In addition, the court reasoned that because the cost of providing auxiliary aids would not impose a severe financial burden on the university, the provision of the aids constituted a reasonable accommodation under section 504.¹⁹¹ Thus, while recognizing universities' valid cost concerns over providing aids, the Eleventh Circuit, in *Board of Trustees*, established that where outside rehabilitation agencies cannot provide such aids, schools must, under section 504, provide necessary auxiliary aids to their handicapped students.¹⁹²

Thus, the case law has established that universities cannot use "financial needs" tests to avoid complying with the HEW regulation requiring schools to provide necessary auxiliary aids to their handicapped students.¹⁹³ Moreover, although recognizing schools' concerns over the cost of providing auxiliary aids, courts have concluded that because the provision of these aids would generally not impose an undue financial strain on schools, the HEW regulation constitutes a reasonable accommodation under section 504.¹⁹⁴ Thus, commentators have noted that the reasoning of cases like *Camenisch*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 744.

¹⁸⁹ *Id.* at 752.

¹⁹⁰ *Id.* at 745.

¹⁹¹ *Id.* at 748.

¹⁹² *Id.* at 749 n.5, 752.

¹⁹³ *Id.* at 752.

¹⁹⁴ *E.g., id.* at 748.

and *Board of Trustees for University of Alabama* implies that a school would have to prove that the provision of auxiliary aids would make a program economically non-viable before it could assert the financial burden defense.¹⁹⁵

3. The Role of Academic Deference in Determining Reasonable Accommodations

Another substantive issue that courts have addressed under section 504 is the determination of whether an accommodation for a learning disabled student is reasonable or would fundamentally alter a school's program.¹⁹⁶ Under the HEW regulations, schools must make reasonable modifications to their program requirements for their handicapped students unless the schools can prove that their program requirement is essential to their program.¹⁹⁷ Courts have noted that the rationale behind this regulation is that schools should not have to alter or lower their academic standards substantially in complying with section 504.¹⁹⁸ The regulations, however, do not provide for any standards regarding the school's burden of proof in using the "essential to the program" defense in noncompliance with section 504.¹⁹⁹

The United States Supreme Court has noted that the judiciary has afforded academic decisions of institutions of higher education substantial deference.²⁰⁰ The Court has also noted that this deference is based on the Court's commitment to protecting academic

¹⁹⁵ See Note, *supra* note 84, at 903.

¹⁹⁶ See *Wynne v. Tufts Univ. School of Med.*, 932 F.2d 19, 26 (1st Cir. 1991); *Doherty v. Southern College of Optometry*, 862 F.2d 570, 575 (6th Cir. 1988).

¹⁹⁷ 45 C.F.R. § 84.44(a) (1989).

¹⁹⁸ See, e.g., *Aloia v. New York Law School*, No. 88 Civ. 3184, 1988 U.S. Dist. LEXIS 7769 (S.D.N.Y. July 27, 1988); *Doherty*, 862 F.2d at 574.

¹⁹⁹ See 45 C.F.R. § 84.44(a).

²⁰⁰ *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985). In reversing the United States Court of Appeals for the Sixth Circuit's holding in favor of Ewing, the Supreme Court deferred to the school's academic decision to dismiss Ewing from its six-year joint undergraduate and medical degree program based on his failure of a required examination and general poor academic performance. *Id.* at 215, 227-28. The Court reasoned that courts should respect a faculty's academic decisions because a federal court is not suited to evaluate the substance of purely academic decisions. *Id.* at 226. Rather than a section 504 claim, Ewing based his claim on the allegation that because he had a property interest in his enrollment in the program, the school's arbitrary decision to dismiss him violated his substantive due process rights under the fourteenth amendment. *Id.* at 217. The Court determined that in reviewing this case under a substantive due process standard, it would show great deference to the school's academic decisions. *Id.* at 225. Thus, the Court held that a court may not override a school's purely academic decision unless it is a substantial departure from academic norms. *Id.*

freedom.²⁰¹ In academic freedom cases, the Supreme Court has reasoned that there is a first amendment right of academic institutions to decide what they will teach, how they will teach and who they will admit into their academic programs.²⁰² Furthermore, the Court has recognized that the determination of substantive academic decisions requires the expert evaluation of educators, and thus, it is not easily adaptable to judicial decision-making.²⁰³ Although the academic freedom cases are not specifically related to section 504 claims, courts have noted that the issue of academic deference is relevant in such litigation because courts must decide whether the doctrine precludes them from questioning the validity of a school's decision that an academic requirement is essential to its program and thus, that the school does not have to modify it to accommodate the handicapped student.²⁰⁴

In 1988, the United States Court of Appeals for the Seventh Circuit upheld the doctrine of deferring to the academic judgment of university faculties in *Anderson v. University of Wisconsin*.²⁰⁵ In *Anderson*, the Seventh Circuit affirmed the district court's holding that the University of Wisconsin Law School's decision not to readmit a handicapped law student did not violate section 504.²⁰⁶ In *Anderson*, the law school had based its refusal to readmit Anderson on his failure to maintain an average grade above the school's

²⁰¹ *Keyishian v. Board of Regents of Univ. of State of New York*, 385 U.S. 589, 603 (1967). In this case, the United States Supreme Court, in reversing a lower court decision, held that a New York State plan that required faculty to sign certificates that they were not communists and that also required removal of faculty members who lecture about "seditious" acts was unconstitutional. *Id.* at 592, 604. In *Keyishian*, the Court announced the importance of safeguarding academic freedom. *Id.* at 603. The Court reasoned that it is essential to the development of our nation that students and teachers be free to inquire fully into and study the many different principles of the social sciences. Thus, the *Keyishian* Court established that academic freedom is a special concern of the first amendment, and that regulations that violate that freedom are unconstitutional. *Id.* at 603-04.

²⁰² See *Sweezy v. New Hampshire*, 354 U.S. 234, 236 (1957) (Frankfurter, J., concurring) (quoting a statement made by South African scholars). In this academic freedom case, the Supreme Court reversed the New Hampshire Supreme Court's affirmation of a college professor's contempt conviction for refusal to answer questions by the New Hampshire attorney general regarding the substance of the professor's lectures and his political party affiliations. *Id.* at 238-45, 255. The Court reasoned that academic freedom is necessary for the advancement and development of knowledge. *Id.* at 250. Thus, the Court held that the professor's contempt conviction, which violated the doctrine of academic freedom, was unconstitutional. *Id.* at 255.

²⁰³ See *Ewing*, 475 U.S. at 226.

²⁰⁴ See *Wynne v. Tufts Univ. School of Med.*, 932 F.2d 19, 25 (1st Cir. 1991).

²⁰⁵ See 841 F.2d 737, 741 (7th Cir. 1988).

²⁰⁶ See *id.* at 740, 742. Anderson was an alcoholic—a handicap under section 504. *Id.* at 740.

required minimum of 77.²⁰⁷ The *Anderson* court did not examine whether reasonable modifications would have helped to increase Anderson's average up to at least the required minimum. Rather, the court reasoned that the law school could set standards for itself.²⁰⁸ Specifically, the court noted that a school may determine through its academic standards whether a student qualifies for its program, and jurors are not in a position to make such academic decisions more accurately than the university faculty.²⁰⁹ Consequently, the Seventh Circuit agreed with the district court's reasoning that Anderson's failure to maintain the school's minimum academic standards was sufficient proof that he was not "otherwise qualified" under section 504.²¹⁰

In 1988, the United States District Court for the Southern District of New York also adhered to the doctrine of academic deference when it held, in *Aloia v. New York Law School*, that a student was not "otherwise qualified" under section 504.²¹¹ The *Aloia* court reasoned that because Aloia could not maintain the school's reasonable academic standards, he was not "otherwise qualified" within the meaning of section 504.²¹² As in *Anderson*, the *Aloia* court did not examine whether reasonable accommodations would have enabled Aloia to maintain a grade point average above 2.0. Rather, the *Aloia* court deferred to the school's judgment regarding its academic standards. Consequently, the *Aloia* court established that courts will afford schools substantial deference with respect to academic standards, such as admittance requirements and minimum grades.²¹³

In 1988, the United States Court of Appeals for the Sixth Circuit also acknowledged the importance of the academic deference doctrine in *Doherty v. Southern College of Optometry*.²¹⁴ The *Doherty* court held that a school's proficiency requirement that tested a student's use of optometry instruments was essential to its academic program and thus, that the school did not have to modify the

²⁰⁷ *Id.* at 739-40.

²⁰⁸ *Id.* at 741.

²⁰⁹ *Id.*

²¹⁰ *See id.* at 740.

²¹¹ *See Aloia v. New York Law School*, No. 88 Civ. 3184, 1988 U.S. Dist. LEXIS 7769 (S.D.N.Y. July 27, 1988). *See supra* notes 160-63 and accompanying text for a discussion of the facts of the case.

²¹² *Aloia*, No. 88 Civ. 3184, 1988 U.S. Dist. LEXIS 7769, at *24 (S.D.N.Y. July 27, 1988).

²¹³ *Id.*

²¹⁴ 862 F.2d 570, 576 (6th Cir. 1988). *See supra* notes 140-42 and accompanying text for a discussion of the facts surrounding this case.

requirement.²¹⁵ The court reasoned that because optometrists are using these instruments more frequently, proficiency in their use is essential to the safe practice of optometry.²¹⁶ Consequently, the Sixth Circuit, in affirming the district court's dismissal of Doherty's section 504 claim, held that the school's course requirement was reasonably necessary to the degree sought, and thus, elimination of the proficiency requirement would not be a reasonable accommodation under section 504.²¹⁷

Nevertheless, the *Doherty* court, although noting in general the importance of academic deference and ultimately deciding in the school's favor, did not just defer to the school's decision regarding the reasonableness of the school's standards.²¹⁸ Rather, the court stressed the need to use a balancing test, taking into account the legitimate interests of both the school and the handicapped student to determine whether reasonable accommodations exist.²¹⁹ Thus, the Sixth Circuit balanced the school's interests, such as the use of the instruments by optometrists, and the need for patient safety, with the student's interest in practicing as an optometrist.²²⁰ The court reasoned that because the use of such devices is becoming more common among optometrists and proper use is essential to patients' safety, the school's requirement was reasonably necessary, and consequently outweighed the student's interests. Thus, the *Doherty* court established that courts will not necessarily defer to a school's academic decisions in deciding section 504 claims.²²¹

In 1981, the United States District Court for the District of Colorado, in *Pushkin v. Regents of the University of Colorado*, also refused to defer to a school's academic decision to deny admission to a handicapped student.²²² In *Pushkin*, the defendant medical school denied the plaintiff, a medical doctor, admission to its psychiatric residency program.²²³ Because he had multiple sclerosis, a condition that confined him to a wheelchair and disabled his motor coordination skills, the *Pushkin* court reasoned that Pushkin was handicapped under section 504.²²⁴

²¹⁵ 862 F.2d at 574-75.

²¹⁶ *Doherty*, 862 F.2d at 574.

²¹⁷ *Id.* at 575.

²¹⁸ *Id.* at 575-76.

²¹⁹ *Id.* at 575.

²²⁰ *Id.* at 574-75.

²²¹ *Id.* at 575.

²²² 504 F. Supp. 1292, 1299 (D. Colo. 1981).

²²³ *Id.* at 1293.

²²⁴ *Id.*

Instead of deferring to the faculty's decision not to admit Pushkin based on their determination that he was not "otherwise qualified," the court reasoned that Pushkin was "otherwise qualified" because he could complete the program with reasonable accommodation by the school.²²⁵ The *Pushkin* court also reasoned that the modifications in the residency program that Pushkin needed, such as a part-time course load, modified curriculum schedule, and reduced night call duty, were reasonable and that they would not substantially alter the integrity of the school's program. Moreover, the court noted that the school had made the adjustments Pushkin needed for other handicapped students in the past, and thus, the school's past practices further indicated that the accommodations were reasonable. Thus, by refusing to follow the academic deference doctrine, the *Pushkin* court established that where the provision of reasonable accommodations will enable a handicapped student to meet the requirements of a program, that student is "otherwise qualified" under section 504.²²⁶

Following *Pushkin*, in the 1991 case of *Wynne v. Tufts University School of Medicine*, the United States Court of Appeals for the First Circuit also refused to adhere strictly to the doctrine of academic deference.²²⁷ In *Wynne*, the court held that a factual dispute remained concerning whether a dyslexic medical student was "otherwise qualified" for medical school under section 504 even though the defendant medical school had made an academic decision that the student was not qualified for its program of study.²²⁸ In support of its holding, the *Wynne* court reasoned that section 504 requires courts to examine a school's academic decisions to determine if they amount to discrimination.²²⁹ Thus, the *Wynne* court established that a court must not merely defer to a school's academic decisions in section 504 claims.²³⁰

Wynne, a medical student with dyslexia, claimed that Tufts Medical School had violated section 504 when it refused to modify its testing methods to accommodate his learning disability.²³¹ In *Wynne's* first year of medical school, he failed eight of fifteen

²²⁵ *Id.* at 1295.

²²⁶ *See id.* at 1295, 1299.

²²⁷ *Wynne v. Tufts Univ. School of Med.*, 932 F.2d 19, 25-26 (1st Cir. 1991).

²²⁸ *Id.* at 27-28.

²²⁹ *Id.* at 26.

²³⁰ *Id.* at 25-26.

²³¹ *Id.* at 22.

courses.²³² Tufts allowed him to retake the eight failed classes under a specialized study program that the school had designed.²³³ This program provided Wynne with academic tutors and note-takers for the classes he was retaking. The school, however, refused to substitute its multiple choice tests with the oral ones that Wynne had requested.²³⁴ Under the special study program, Wynne still failed two courses.²³⁵ Tufts allowed Wynne to retake the two examinations, but Wynne still failed one of the exams. Upon the last failure, Tufts expelled Wynne from the Medical School.

Wynne based his section 504 claim on Tufts' failure to provide him with an alternate test format in place of the existing multiple choice format.²³⁶ Wynne alleged that, in light of his learning disability, such an accommodation was reasonable and that the school's refusal to provide the alternate test format for him amounted to discrimination under section 504. Conversely, Tufts maintained that its multiple choice tests were substantive in nature because they measured a student's ability to absorb, interpret and analyze complex data.²³⁷ Furthermore, Tufts argued, these abilities are necessary for a practicing doctor, and thus, multiple choice exams were essential to Tufts' medical school program.²³⁸ Requiring the modification of such an essential test format, Tufts insisted, is beyond the requirements of section 504.²³⁹ Tufts therefore argued that, under the HEW regulations allowing the "essential to the program" exception, it did not have to modify this essential requirement.²⁴⁰ Moreover, Tufts contended that under the doctrine of academic deference, the First Circuit should defer to Tufts' purely academic determination that the multiple choice test format was substantive and essential to its program.²⁴¹

The First Circuit rejected Tufts' argument for absolute deference to its academic decision that multiple choice tests were essential to its program.²⁴² The First Circuit, although recognizing the principle of academic deference, stated that section 504 requires a court

²³² *Id.* at 21.

²³³ *Id.*

²³⁴ *Id.* at 22.

²³⁵ *Id.* at 21.

²³⁶ *Id.* at 22.

²³⁷ *Id.* at 27.

²³⁸ *Id.*

²³⁹ Brief for Appellee at 14, *Wynne*, 932 F.2d at 19.

²⁴⁰ *Wynne*, 932 F.2d at 27.

²⁴¹ Brief for Appellee at 21.

²⁴² *Wynne*, 932 F.2d at 25.

to scrutinize academic decisions to ensure that they do not amount to discrimination against the handicapped, intentionally or unintentionally.²⁴³ Moreover, the court reasoned that a trial court could find that the multiple choice test format was not essential to the school's program, and that alternate test formats that would make Wynne "otherwise qualified" were reasonable accommodations mandated by section 504.²⁴⁴

Consequently, because Tufts failed to prove that multiple choice examinations were essential to its medical school program, the First Circuit overturned the district court's grant of summary judgment in favor of Tufts.²⁴⁵ The First Circuit held in *Wynne* that because a dispute still existed over whether Tufts could make accommodations for Wynne that would allow him to satisfy the school's academic requirements, a question of fact remained as to whether Wynne was "otherwise qualified" under section 504.²⁴⁶ Thus, although the *Wynne* court did not determine whether Wynne was "otherwise qualified," it did establish that some courts refuse to apply literally the academic deference doctrine.²⁴⁷

In sum, the definition of "otherwise qualified" has evolved to refer to a handicapped student who, with the aid of reasonable accommodations, can meet the academic requirements of a school's program.²⁴⁸ Furthermore, in determining what constitutes reasonable accommodations, courts have addressed issues regarding the necessity of a school's knowledge of a student's disability, schools' cost concerns regarding the provision of accommodations, and the extent to which academic deference plays a part in a court's determination of reasonable accommodations.²⁴⁹

With respect to the knowledge issue, courts have suggested that, to bring a section 504 suit against a university, a handicapped student must prove that the school had known of the student's disability.²⁵⁰ Courts have reasoned that otherwise, the school could not

²⁴³ *Id.*

²⁴⁴ *Id.* at 27.

²⁴⁵ *Id.* at 28.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 25.

²⁴⁸ See *supra* notes 121-40 and accompanying text for a discussion of the development of the definition of "otherwise qualified."

²⁴⁹ See *supra* notes 148-247 and accompanying text for a discussion of the substantive issues arising under section 504.

²⁵⁰ See *supra* notes 159-68 and accompanying text for a discussion of the *Aloia* court's discussion of knowledge issues arising under section 504.

have excluded the student solely because of the student's handicap, a necessary element under section 504.²⁵¹

With respect to schools' cost concerns, courts have recognized the validity of schools' concerns over the cost of providing disabled students with reasonable accommodations, such as auxiliary aids.²⁵² Courts, however, have held that colleges and universities cannot impose "financial needs" tests to avoid providing aids to handicapped students.²⁵³ Courts have reasoned that because schools have flexibility in determining how to provide auxiliary aids, they must provide them to all of their handicapped students in need of such aids.²⁵⁴ Thus, schools must provide needed auxiliary aids to their handicapped students regardless of the students' financial needs.

In addition, courts have also addressed schools' concerns over the judiciary's treatment of the doctrine of academic deference in section 504 claims.²⁵⁵ A few courts have recognized the importance of deferring to the academic judgments of schools and consequently, have deferred to a school's determination that an academic requirement is essential to its program, and thus, that it need not be modified under section 504.²⁵⁶ Other courts, however, while acknowledging the doctrine of academic deference, have reasoned that section 504 requires the judiciary to examine closely academic requirements of schools to determine whether schools' requirements are discriminatory towards handicapped students and if the requirements could reasonably be modified to prevent the discrimination.²⁵⁷ Thus, despite the historical academic deference doctrine, some courts have refused to defer absolutely to the academic decisions of schools in section 504 claims.²⁵⁸

²⁵¹ See *supra* note 166 and accompanying text for a discussion of the relationship of a school's knowledge of a student's disability with respect to the third element of a section 504 claim.

²⁵² See *supra* notes 185-95 and accompanying text for a discussion of schools' cost concerns with respect to providing reasonable accommodations.

²⁵³ See *supra* notes 184-97 and accompanying text for a discussion of the invalidity of financial needs tests with respect to the provision of auxiliary aids.

²⁵⁴ See *supra* note 193 and accompanying text for a discussion of the flexibility that schools have in complying with section 504's auxiliary aids requirement.

²⁵⁵ See *supra* notes 202-48 and accompanying text for a discussion of courts' treatment of the doctrine of academic deference.

²⁵⁶ See, e.g., *Aloia v. New York Law School*, No. 88 Civ. 3184, 1988 U.S. Dist. LEXIS 7769, at *23-24 (S.D.N.Y. July 27, 1988); *Anderson v. University of Wis.*, 841 F.2d 737, 741 (7th Cir. 1988).

²⁵⁷ See, e.g., *Wynne v. Tufts Univ. School of Med.*, 932 F.2d 19, 25-26 (1st Cir. 1991); *Pushkin v. Regents of Univ. of Colo.*, 504 F. Supp. 1292, 1299 (D. Colo. 1981).

²⁵⁸ See *supra* notes 217-48 and accompanying text for a discussion of the doctrine of academic deference.

III. ANALYSIS OF REASONABLE ACCOMMODATIONS SCHOOLS MUST PROVIDE FOR HANDICAPPED STUDENTS

The legislative and regulatory history of section 504 demonstrates that it is a broad civil rights act designed to ensure equal opportunities for "otherwise qualified" handicapped students in higher education.²⁵⁹ Furthermore, the courts and HEW regulations have established that, when necessary, schools must provide reasonable accommodations for their handicapped students.²⁶⁰ Courts, however, have left many related issues unanswered. For example, although courts have suggested that a school must have knowledge of a handicapped student's disability before a school can be held in violation of section 504, courts have not addressed what type of knowledge is sufficient and how schools may validly obtain this knowledge.²⁶¹ Part A of this section will analyze the relevant case law on these issues to determine the amount of knowledge that courts are likely to require schools to have in section 504 claims.²⁶²

Courts have also left unanswered the question of the extent to which a school can use excessive cost as a defense to failing to provide modifications, such as auxiliary aids, to handicapped students.²⁶³ Because this issue of cost concerns many schools, part B of this section will examine the validity of this defense based on legislative intent and case law.²⁶⁴ After determining the likely scope of the excessive cost defense, part B will suggest when schools could probably use such a defense.

Finally, courts have not yet reached a consensus on the role that academic deference should play in section 504 litigation.²⁶⁵ This issue concerns learning disabled students who need modifications of schools' academic programs in order to succeed in school, as well as schools who do not want to lower their academic standards. After

²⁵⁹ See *supra* notes 40-43 and accompanying text for a summary of the legislative and regulatory history of section 504.

²⁶⁰ See *supra* notes 135-98 and accompanying text for a discussion of the types of reasonable accommodations that schools must provide under section 504.

²⁶¹ See *supra* notes 148-68 and accompanying text for a discussion of knowledge issues arising under section 504.

²⁶² See *supra* notes 250-59 and accompanying text for an analysis of the knowledge issues arising under section 504.

²⁶³ See *supra* notes 196-98 and accompanying text for a discussion of the cost issues under section 504.

²⁶⁴ See *infra* notes 308-33 and accompanying text for an analysis of the extent to which schools will likely be able to use cost as a defense to noncompliance with section 504.

²⁶⁵ See *supra* notes 199-248 and accompanying text for a discussion of the conflict among courts with respect to the role of academic deference in section 504 litigation.

analyzing the conflicting case law in this area, part C of this section will propose a treatment of the academic deference doctrine that attempts to satisfy the needs of both handicapped students and schools.²⁶⁶

A. *The Necessity of Providing Schools with Full Documentation of Students' Disabilities*

As more and more learning disabled students are entering postsecondary institutions each year, both learning disabled students and universities are concerned with the amount and type of knowledge that a school must have of a student's learning disability before the school must provide accommodations under section 504. Learning disabilities are often misunderstood, and are sometimes not detected at all.²⁶⁷ Even when specialists detect these disabilities, learning disabled students have been labeled as uneducable or underachievers.²⁶⁸ Only recently have specialists begun to understand learning disabilities and recognize them as true handicaps.²⁶⁹ Thus, because more and more learning disabled students are attending postsecondary institutions and because it appears that a school must have knowledge of a student's handicap before it has to comply with section 504, it is of paramount importance that universities receive sufficient knowledge about their students' learning disabilities in order to comply fully with section 504.

As a result of the increased medical research in the area of diagnosis and the success of programs that the EAHCA has implemented in detecting learning disabled students, more learning disabled students are aware of their handicaps and have sufficient documentation of their handicaps to furnish to universities.²⁷⁰ Nonetheless, schools do not always receive comprehensive documentation of students' learning disabilities. For example, this situation can arise when the students have not yet realized that they are learning disabled when they enroll at their universities. Also, schools may not receive documentation from students who know that they have learning disabilities, but validly fear that their uni-

²⁶⁶ See *infra* notes 334-56 for an analysis of courts' use of academic deference in section 504 claims. See *infra* notes 357-62 and accompanying text for a proposed treatment of the academic deference doctrine in section 504 litigation.

²⁶⁷ See, e.g., LEARNING DISABILITIES ASSOCIATION OF AMERICA (LDA), *TAKING THE FIRST STEP TO SOLVE LEARNING DISABILITIES* (1990).

²⁶⁸ See *id.*

²⁶⁹ See *id.*; see also Sears, *supra* note 1, at 62.

²⁷⁰ See Rothstein, *supra* note 7, at 236.

versities will misunderstand their learning disabilities and label them as uneducable. Although courts have indicated that some knowledge of a handicap is necessary, questions arise in these situations as to the extent to which a school must be informed of a student's disability before it can be subject to section 504 compliance.²⁷¹

1. The Validity of a Knowledge Requirement

Based on the 1988 case of *Aloia v. New York Law School*, a school apparently must have knowledge of a student's disability before it can violate section 504.²⁷² This requirement makes sense in terms of the third element of a section 504 claim: that the school must have excluded the person from the program solely because of the person's disability.²⁷³ Without knowledge of the student's handicap, a school cannot discriminate against the student solely because of the student's handicap.

This knowledge requirement is not only reasonable, but it also brings case law in line with administrative law in this area, thereby providing consistency in section 504 claims.²⁷⁴ Specifically, the Office of Civil Rights, which has provided administrative remedies under section 504, held as early as 1985 that a school's obligation to provide accommodations only arises when the university either knows or is made aware of the student's handicap.²⁷⁵ This consistency will discourage students from forum shopping between judicial and administrative proceedings based on whether the school had knowledge of the student's disability. As the standard is now the same in both forums, the results should be more consistent. Having one standard will aid the schools in determining their obligations under section 504 regardless of whether the action against them is administrative or judicial. Thus, schools that have knowledge of a student's disability must comply with section 504.

2. The Unsuitability of the Manifestations of a Disability Standard

Although the *Aloia* court indicated that a school must know of a student's disability before section 504 mandates compliance, it left

²⁷¹ See *Aloia v. New York Law School*, No. 88 Civ. 3184, 1988 U.S. Dist. LEXIS 7769, at *17-18 (S.D.N.Y. July 27, 1988); see also Rothstein, *supra* note 7, at 236-37.

²⁷² See No. 88 Civ. 3184, 1988 U.S. Dist. LEXIS 7769, at *17 (S.D.N.Y. July 27, 1988).

²⁷³ *Id.* at 16.

²⁷⁴ See, e.g., *Salvador v. Bell*, 622 F. Supp. 438, 439 (N.D. Ill. 1985) (in administrative proceedings, obligation to provide accommodations arises only when university knows about student's handicap).

²⁷⁵ See *id.*

many other knowledge-related issues open for interpretation. Most importantly, the *Aloia* decision left open the issue of what constitutes sufficient knowledge on the part of the school. For example, the district court in *Aloia* concluded that the student did not formally disclose his disability to the school.²⁷⁶ Nevertheless, the court implied in dicta that because the student occasionally manifested symptoms of his neurological disability during class, a genuine issue of fact might exist as to whether the school had knowledge of the disability and, as a result, had to comply with section 504.²⁷⁷ Thus, *Aloia* implied that mere manifestations of a disability may be sufficient to put a school on notice of a student's disability, and thereby to compel the school to make reasonable accommodations for the student under section 504.

Learning disabled students, however, should not regard the *Aloia* court's comments on knowledge as precedential. Although the *Aloia* court did not grant the defendant school's motion for summary judgment on the knowledge issue, it did not explicitly hold that the plaintiff student survived the motion.²⁷⁸ Because the court in *Aloia* granted summary judgment on another issue, it may not have been as concerned with the merits of the knowledge issue.²⁷⁹ Thus, the court's refusal to hold explicitly that the school did not have knowledge of *Aloia*'s disability does not establish that mere manifestations of a disability are sufficient to hold a school to knowledge of that disability.

Moreover, imputing knowledge to a school of a student's disability based on manifestations of disabling symptoms is an unworkable standard, especially with regard to learning disabilities. That is, the medical field has only recently begun to understand and recognize learning disabilities.²⁸⁰ Thus, it would be unduly burdensome to expect professors to diagnose a student's learning disability based on these manifestations in class.

Furthermore, manifestations of learning disabilities are complex and misunderstood.²⁸¹ Learning disabilities are misunderstood, in part, because their symptoms often make the student appear inept and unable to learn.²⁸² In reality, learning disabled students

²⁷⁶ *Id.* at 5.

²⁷⁷ *Id.* at 17-20.

²⁷⁸ *Id.* at 20.

²⁷⁹ *Id.* at 24.

²⁸⁰ See LDA, *supra* note 267, at 2; see also Sears, *supra* note 1, at 62.

²⁸¹ See Rothstein, *supra* note 7, at 235.

²⁸² UNIVERSITY OF KENTUCKY, ALTERNATIVES FOR TEACHING DISABLED STUDENTS ON A COLLEGE CAMPUS ("Alternatives"), 28 (1984).

are usually of average or above average intelligence.²⁸³ Furthermore, the perceptual deficiencies of learning disabled students usually are limited to one or just a few areas, and, thus, the deficits generally are inconsistent with the individual's general level of functioning.²⁸⁴ Problems occur when the learning disabled student's deficiency happens to be in the area in which the disabled student is predominantly evaluated. In such cases, it will appear that the student is unable to master the work. It would be unfair to expect faculty to distinguish correctly those students who are not performing well because of a learning disability from those who are not qualified. As the court in *Aloia* correctly noted, the law school faculty "while learned in the law are lay persons in the field of medicine."²⁸⁵ As lay persons in the field of learning disabilities, it is simply too difficult for professors to diagnose a student who has a learning disability.

In addition, it would be inconsistent with the scope of section 504 to hold that a student's manifestations of complex and misunderstood handicaps, such as learning disabilities, can subject schools to section 504 compliance. One could argue that the expansive nature of section 504 indicates that a broad view of what constitutes knowledge of a student's disability may be consistent with the scope of section 504.²⁸⁶ The legislative history of section 504 stresses that the scope of section 504 was meant to be expansive.²⁸⁷ Thus, one could maintain that any manifestation of a student's disability while in school puts a school on notice of the disability and thus, fulfills the knowledge requirement.

The broad scope that the legislative history outlines, however, is mostly in terms of who is protected under section 504.²⁸⁸ This legislative history indicates that Congress enacted section 504 to ensure that no individuals would be excluded from academic programs because their handicap appeared to be too severe.²⁸⁹ Thus, the legislative history illustrates that Congress intended section 504

²⁸³ *Id.*; see also HEATH RESOURCE CENTER, *supra* note 61, at 4.

²⁸⁴ See Sears, *supra* note 1, at 65.

²⁸⁵ *Aloia v. New York Law School*, No. 88 Civ. 3184, 1988 U.S. Dist. LEXIS 7769, at *18 (S.D.N.Y. July 27, 1988).

²⁸⁶ See *supra* notes 40-43 and accompanying text for a discussion of the scope of section 504.

²⁸⁷ *Id.*

²⁸⁸ See *supra* notes 33-43 and accompanying text for a discussion of section 504's legislative history.

²⁸⁹ S. REP. NO. 318, 93d Cong., 1st Sess. 119, reprinted in 1973 U.S. CODE CONG. & ADMIN. NEWS, 2076, 2079.

to be expansive only in the sense that it applies to all types of handicapped persons.²⁹⁰

Furthermore, although the Act is broad in that it includes all types of handicaps within the scope of section 504, the HEW regulations demonstrate the somewhat limited scope of section 504 in terms of the obligations that it places on universities.²⁹¹ Most importantly, these regulations emphasize section 504's purpose of equal opportunity.²⁹² Thus, under section 504, schools must provide only equal access to higher education for handicapped students.

Moreover, although the regulations mandate that schools provide reasonable accommodations to ensure that handicapped students receive equal access to higher education, this obligation is limited in various sections of the HEW regulations. For example, although a university may have to provide an alternate test format for a disabled student, the HEW regulations have limited this obligation by providing that schools do not have to perform a "global search" for suitable alternate test formats.²⁹³ Instead, HEW places this burden on the Director of the Office of Civil Rights.²⁹⁴ Thus, just as a university does not have to search extensively for alternate test formats, it is equally unlikely that the scope of section 504 requires a school to conduct in-depth searches within the classroom for learning disabled students.

Another limitation that the HEW regulations place on a university's obligation to comply with section 504 is the "essential to the program" exception.²⁹⁵ Under this exception, a school does not have to modify an academic requirement to accommodate a handicapped student if the requirement is essential to a school's program of study.²⁹⁶ The judicially developed reasoning behind this exception is that schools should not have to alter fundamentally their programs or lower their standards to comply with section 504.²⁹⁷ Putting a burden on professors to diagnose learning disabled students in their classes could substantially diminish the quality of a school's academic program. Professors will be distracted from their

²⁹⁰ See *supra* notes 33-43 and accompanying text for a discussion of section 504's legislative history.

²⁹¹ See, e.g., 45 C.F.R. §§ 84.4(b)(2), 84.44(a),(d)(2) (1989).

²⁹² *Id.* § 84.4(b)(2).

²⁹³ *Id.* § 84 App. A, Subpart E (29).

²⁹⁴ *Id.*

²⁹⁵ *Id.* § 84.44(a).

²⁹⁶ *Id.*

²⁹⁷ See, e.g., *Doherty v. Southern College of Optometry*, 862 F.2d 570, 574 (6th Cir. 1988).

teaching if they must be on the lookout for possible manifestations of disabilities to which they will be held accountable if the student later sues under section 504. Thus, schools could validly argue that placing this knowledge burden on professors is beyond the scope of section 504 because it would fundamentally alter a school's academic programs.

In sum, although the manifestation standard implied in *Aloia* may be effective for students with obvious handicaps, such as physical disabilities, one cannot feasibly apply it to students with learning disabilities. Thus, learning disabled students should inform their university of their disabilities as soon as possible, preferably before admission. Once informed, the school must provide these students with reasonable accommodations under section 504. Those students who are not aware of their disabilities when they enroll in postsecondary education, and then suspect that they may have a learning disability, should get tested as soon as possible. If testing reveals a learning disability, the students should then inform their school immediately to ensure section 504 protection.

B. *The Discriminatory Nature of Flagging*

Another knowledge-related issue that courts have left unanswered is the appropriateness of flagging in light of section 504. Under current practices, the Department of Education allows standardized testing services to flag or mark the tests of students who received special modifications in test formats while taking standardized tests.²⁹⁸ Serious questions surround the validity of flagging in standardized admissions tests because the HEW regulations prohibit schools from making pre-admission inquiries into an applicant's disabilities.²⁹⁹ One problem is that the procedure indirectly gives a school knowledge of an applicant's disability prior to acceptance. Therefore, flagging allows a school to do indirectly what it is specifically prohibited from doing.³⁰⁰ Nevertheless, as standardized testing services generally are not subject to section 504 because they do not receive federal financial assistance, they apparently can lawfully continue to flag their tests.

Flagging may also extend to schools' course examinations and students' records. This use of flagging has many insidious implica-

²⁹⁸ See Rothstein, *supra* note 7, at 245.

²⁹⁹ 45 C.F.R. § 84.42(b)(4).

³⁰⁰ See Rothstein, *supra* note 7, at 253.

tions. Consequently, flagging is very problematic, especially when universities use the practice to mark course examinations and handicapped students' records.

The most insidious implication of flagging course examinations is that the schools may regard the marked tests as less valid because the students received accommodations. For example, a professor may grade a flagged exam lower than an unflagged exam simply because the professor may feel that the accommodation that the student received provided that student with a competitive edge in taking the examination. Thus, flagging has the potential to discriminate against handicapped students, which is exactly what section 504 prohibits.³⁰¹ Consequently, flagging within the context of a university's course examinations and student records should be prohibited because of this implicit discrimination.

Furthermore, this implication that schools should treat flagged tests as less valid than unflagged tests conflicts with the equal opportunity purpose behind section 504.³⁰² The HEW regulations regarding section 504 state that schools must provide examination formats that represent students' abilities rather than their disabilities.³⁰³ The modifications that schools provide to a disabled student must merely be a means of more accurately measuring the student's abilities. They must not be a means of giving the student a competitive advantage. If universities follow this provision, the substantive nature of tests will be the same for both handicapped and non-handicapped students. Thus, there is no justification for viewing the test results differently. If a modified test accurately measures a student's abilities, flagging will unfairly prejudice the handicapped student.³⁰⁴ Hence, flagging is unnecessary and discriminates against handicapped persons.

Some universities, however, may argue that flagging students' records is necessary to maintain overall consistency. As some professors are likely to provide more modifications than other professors, flagging allows these differences to be taken into account when evaluating a disabled student's academic record. Flagging students'

³⁰¹ See, e.g., 29 U.S.C. § 794 (1988). See *supra* notes 23-38 and accompanying text for a discussion of the legislative history that stresses the anti-discrimination purpose of section 504.

³⁰² See *supra* notes 23-38 and accompanying text for a discussion of the equal opportunity purpose of section 504.

³⁰³ 45 C.F.R. § 84.44(c) (1989).

³⁰⁴ See Rothstein, *supra* note 7, at 254.

records, however, is an inadequate means of providing consistency because it is, by nature, inconsistent. When a school official reviews a student's marked academic record, it will be within the sole discretion of that particular person to decide how much weight should be given to each modification. Furthermore, when outside sources, such as prospective employers who do not understand the validity of modifications, evaluate a handicapped student's academic record, a record of accommodations may adversely prejudice the employers' attitude towards the student's capabilities.

Therefore, instead of flagging, schools should use less prejudicial methods for ensuring consistency and equality among handicapped and non-handicapped students. For example, a university could organize a faculty resource guide that details acceptable modifications that teachers can use in evaluating disabled students.³⁰⁵ Such a resource guide should provide faculty with information about section 504 requirements, campus disability services, and list various disabilities and the possible accommodations that instructors could make for each disability.³⁰⁶ It should also encourage professors to discuss specific modifications about which they are unsure with the campus disability center.

Providing this type of general framework within which the instructor has some options helps ensure consistent accommodations while allowing for modifications that meet the specific needs of different disabilities. Furthermore, a university, by listing valid accommodations in a resource guide, will help ease some of its instructors' understandable doubts concerning the validity of these modifications.³⁰⁷ Thus, if universities establish fair and consistent programs for providing modifications, flagging is unnecessary.

In sum, courts should hold that flagging violates section 504 because it amounts to implicit discrimination against the students whose tests are marked. As long as schools follow the HEW regulations and only provide handicapped students with exam modifications that more accurately measure the students' abilities, flagging is unnecessary because the students will not receive a competitive advantage. Furthermore, to provide the necessary consistency in modifications, schools should establish guidelines for professors indicating what types of modifications they may provide.

³⁰⁵ See, e.g., *ALTERNATIVES*, *supra* note 282, at 28-29.

³⁰⁶ See, e.g., *id.*

³⁰⁷ See *SMITH*, *supra* note 65, at 12.

C. *The Limited Cost Defense Under Section 504*

Under section 504, schools must provide reasonable accommodations for their handicapped students to help ensure equal opportunities for these students.³⁰⁸ An issue regarding this reasonable accommodations requirement is the extent to which cost plays a role in a school's obligation to provide accommodations.³⁰⁹ Specifically, universities have expressed concerns over the costs involved in HEW's regulatory provision mandating that universities provide learning disabled students with necessary auxiliary aids.³¹⁰ Although HEW responded to universities' cost concerns in an appendix to the regulations, it did not explicitly state whether a university could ever use excessive cost as a defense to noncompliance with section 504.³¹¹

Based on what HEW did state, it appears that courts would interpret such a defense narrowly, if they allowed it at all. HEW, although recognizing cost as a legitimate concern of schools in terms of the auxiliary aids requirement, emphasized that colleges and universities usually will not have to pay for auxiliary aids because outside sources, such as rehabilitation agencies and charitable organizations, will help the schools in providing aids.³¹² Furthermore, even where universities will have to provide auxiliary aids themselves, HEW stressed that the regulations give universities great flexibility in meeting the requirement.³¹³ Thus, HEW's position appears to be that although it recognizes cost as a problem, it views discrimination as the greater problem. Consequently, although schools can first look to outside agencies and volunteers for help in providing auxiliary aids, if those avenues fail, universities must provide the aids themselves. Thus, it appears unlikely that HEW intended a cost defense under the regulations.

1. *The Unsuitability of Applying Employers' Statutory Cost Defense to Schools*

Section 504 itself does not provide universities with an explicit cost defense. A 1978 amendment to the Rehabilitation Act, however,

³⁰⁸ See 45 C.F.R. §§ 84.4(b)(2), 84.44(a) (1989).

³⁰⁹ *Id.* § 84 App. A (31).

³¹⁰ *Id.*

³¹¹ See *id.*

³¹² *Id.* See *supra* notes 191-94 and accompanying text for a discussion of resources that schools can use in providing auxiliary aids to their handicapped students.

³¹³ 45 C.F.R. § 84 App. A (31).

allows courts to consider cost in determining the extent to which employers must provide accommodations for their handicapped employees.³¹⁴ One commentator has argued that this amendment should also be applicable to schools.³¹⁵ He argues that otherwise, section 504 would be too unreasonable because cost compliance could be severe in some instances. For example, if many handicapped students required an expensive auxiliary aid that outside agencies could not provide, a school would have to incur the costs of providing the expensive aid to all of its handicapped students who needed it. For a school without adequate financial resources, this cost could threaten the economic viability of the school's programs. Thus, this commentator argues that an undue financial burden defense should be allowed for colleges and universities in section 504 claims.³¹⁶

This defense, however, should not and need not rest on the statutory amendment relating to employers. Under section 504 claims, the statutory interpretation doctrine of *expressio unius* should apply. Under this doctrine, the expression of one thing in a statute implies the exclusion of another thing not so mentioned.³¹⁷ If the legislature had wanted institutions of higher education to perform a cost/benefit analysis in every situation where accommodation is necessary, it would have specifically provided for such analysis as it did for employers.³¹⁸ Consequently, as the amendment explicitly provides for cost analysis in employment, but not academic, situations, the legislature must have intended that different cost analyses apply for the different situations.

Moreover, the broad cost defense standard that the amendment articulates for employers should not apply to universities because a university will usually incur a much lower cost risk in admitting a disabled student than an employer in hiring a handicapped employee.³¹⁹ For example, if a handicapped student is unable to complete a school's academic program, even after provision of accommodations, only the student generally is adversely affected in the form of failing grades. Conversely, in the employment situation, if accommodations for a disabled employee do not succeed and the

³¹⁴ 29 U.S.C. § 794a(a)(1) (1990). See Note, *supra* note 84, at 900.

³¹⁵ See Note, *supra* note 84, at 900.

³¹⁶ *Id.*

³¹⁷ BLACK'S LAW DICTIONARY 581 (6th ed. 1990).

³¹⁸ See, e.g., 29 U.S.C. § 794a(a)(1) (1990).

³¹⁹ See Rothstein, *supra* note 7, at 250.

employee is unable to master the work, this outcome results in direct costs to the employer in lost productivity. Although in both situations, the university and the employer incur costs of providing the accommodations, only the employer incurs the additional cost of lost profits. It seems fair to provide a broader cost defense to employers than to universities.

Furthermore, universities that have students majoring in special education have at their fingertips a vast resource of possible volunteers to help in providing aids. For example, universities can provide course credits to those persons majoring in special education who serve as interpreters and note-takers. Employers do not have this luxury. Thus, because universities are more likely than employers to incur lower costs in providing accommodations, the undue financial burden defense for employers should not apply to schools.

2. The Judicially Developed Undue Financial Burden Defense

Institutions of higher education need not rely on the amendment pertaining to employers for a cost defense because courts have developed an undue financial burden analysis to deal with the issue of schools' costs in providing reasonable accommodations to learning disabled students.³²⁰ Under this analysis, it appears that the courts will interpret the cost defense very narrowly. For example, in 1990, the United States Court of Appeals for the Eleventh Circuit, in *United States v. Board of Trustees for University of Alabama*, indicated that section 504 did not require schools to make program modifications that would cause them to experience an "undue financial burden."³²¹ Thus, a school might be able to use cost as a defense to noncompliance with section 504's requirement that schools provide reasonable accommodations for their handicapped students when it can show an undue financial burden.

The source of this defense appears to derive from the reasoning behind the "essential to the program" exception found in the regulations.³²² This reasoning suggests that in complying with sec-

³²⁰ *United States v. Board of Trustees for Univ. of Ala.*, 908 F.2d 740, 748 (1990). See *supra* notes 196-98 and accompanying text for a discussion of the likely narrow scope of an undue financial burden test in section 504 litigation.

³²¹ See 908 F.2d at 748.

³²² 45 C.F.R. § 84.44(a) (1989).

tion 504, schools should not have to provide accommodations that would fundamentally alter or lower the standards of their academic programs.³²³ It appears that only where the cost of accommodations are so great that provision of them would fundamentally alter the program could a school validly assert the cost defense.

In *Board of Trustees for University of Alabama*, the court upheld this narrow interpretation of the undue cost defense when it held that financial needs tests violated section 504.³²⁴ In order to cut costs, the defendant school had instituted financial needs tests whereby it would not provide handicapped students with auxiliary aids unless the students could show that they were financially unable to provide the aids themselves.³²⁵ The *Board of Trustees* court, in applying a strict cost defense standard, reasoned that because the school had not proven that providing the auxiliary aids would unduly burden it financially, the school had to provide the aids in compliance with section 504.³²⁶ Thus, it appears that only when the provision of aids would make a program economically unfeasible may a school effectively use the undue cost defense.³²⁷

Moreover, the *Board of Trustees* court stressed the many alternatives available to the school in providing auxiliary aids, such as using rehabilitation agencies' aids and recruiting volunteer students to act as note-takers and readers.³²⁸ The *Board of Trustees* court's recognition of the flexibility of a school in providing accommodations affirms HEW's stance that, although cost is a legitimate concern, providing handicapped students with equal access to higher education is a far greater concern.³²⁹ Consequently, courts will likely interpret the excessive cost defense very narrowly.

This narrow interpretation of the cost defense is also consistent with the legislative history of section 504. In enacting section 504, Congress stressed that one of its purposes was to provide equal access to higher education for handicapped students.³³⁰ For the hearing-impaired student in *Board of Trustees*, an interpreter was the only way to get equal access to the academic programs of the

³²³ *Doherty v. Southern College of Optometry*, 862 F.2d 570, 574 (6th Cir. 1988).

³²⁴ 908 F.2d at 752.

³²⁵ *Id.* at 742.

³²⁶ *Id.* at 748.

³²⁷ *See id.*; see also Note, *supra* note 84, at 903.

³²⁸ 908 F.2d at 745, 749 n.5.

³²⁹ *See, e.g.*, 45 C.F.R. § 84 App. A (31) (1989).

³³⁰ 118 CONG. REC. 525 (1972).

school.³³¹ If the courts broadly construe the cost defense for universities, it will be too easy for schools to deny handicapped students access to academic programs. Conversely, the strict undue financial burden standard for the cost defense will rarely allow a university to deny handicapped students equal access. This strict standard forces institutions of higher education to become more knowledgeable about the vast resources available to them in providing aids.³³²

3. Suggestions for Schools to Ease the Financial Burden of Providing Reasonable Accommodations

If universities organize their disability services programs effectively, the costs for providing aids can be kept to a minimum. To provide cost-efficient accommodations for disabled students, schools should set up a disability center on campus. This center should be responsible for directing students to rehabilitation agencies and charitable organizations that will provide necessary auxiliary aids to handicapped students. The staff of the center should also develop friendly relationships with staff from other universities' disability centers in order to keep abreast of innovative and inexpensive programs that other schools have developed. If a university implements an effective program, it should publish a handbook detailing the program for other universities. Universities should also develop working relationships with handicapped organizations such as HEATH, a national clearinghouse on postsecondary education for handicapped individuals. Such organizations can provide invaluable information on providing effective accommodations at low costs.³³³

In sum, although section 504 and its regulations make no explicit mention of the availability of a cost defense, courts have implied that where a school's provision of accommodations for their handicapped students would impose an undue financial burden on a school, a school can use excessive cost as a valid defense to non-compliance with section 504. It appears, however, that courts will interpret this cost defense narrowly. Thus, universities must make full use of existing resources, such as charitable and rehabilitation agencies, volunteer students, and other schools to help provide the

³³¹ 908 F.2d at 748.

³³² For example, HEATH (Higher Education and the Handicapped) and AHSSPPE (Association of Handicapped Student Service Programs in Postsecondary Education) are organizations that can furnish schools with information about providing aids.

³³³ See, e.g., 7 HEATH RESOURCE CENTER, INFORMATION FROM HEATH, No. 2, at 7 (1988).

accommodations that handicapped students need, and that section 504 mandates.

D. The Limited Role of Academic Deference in Determining Reasonable Accommodations

Another issue related to schools' duty to provide reasonable accommodations for handicapped students concerns HEW's "essential to the program" regulation.³³⁴ Under this regulation, schools do not have to modify any academic requirements that are essential to their programs of study. Some commentators are concerned over the extent to which universities can claim a requirement is essential to their program in order to avoid modifying the requirement for handicapped students. Specifically, courts are in conflict as to what extent they should defer to a school's academic decision that a requirement is essential.³³⁵ Upon analyzing the underlying reasoning and the specific academic requirements at issue in the conflicting decisions, however, one can establish a workable standard for courts to use that will more fairly balance the legitimate interests of both the school and the handicapped student in deciding section 504 claims.

This conflict regarding the role of academic deference in section 504 litigation exists in part because of the ambiguous language of the HEW regulations.³³⁶ In particular, the provision of the regulations that requires schools to make academic modifications to prevent discrimination allows for an exception to this requirement where a school can demonstrate that the academic requirement is essential. The regulations, however, do not detail the school's burden of proof in demonstrating that the academic requirement is essential to its program of study. Thus, Congress left the judiciary to develop this area with little guidance from the regulations. Courts, however, have further muddled the issue of essential academic requirements by employing, to various degrees, the doctrine of academic deference, a doctrine that has historically required courts to defer to purely academic decisions that university faculty make.³³⁷

³³⁴ 45 C.F.R. § 84.44(a) (1989).

³³⁵ Compare *Wynne v. Tufts Univ. School of Med.*, 932 F.2d 19, 27 (1st Cir. 1991) with *Aloia v. New York Law School*, No. 88 Civ. 3184, 1988 U.S. Dist. LEXIS 7769, at *23-24 (S.D.N.Y. July 27, 1988).

³³⁶ See 45 C.F.R. § 84.44(a) (1989).

³³⁷ E.g., *Regents of Univ. of Mich. v. Ewing*, 475 U.S. 214, 225-26 (1985). See *supra* notes 199-248 and accompanying text for a discussion of the doctrine of academic deference.

1. Attempts to Balance the Doctrine of Academic Deference with Section 504's Reasonable Accommodations Requirement

Courts have disagreed over how much weight they should give the doctrine of academic deference in resolving section 504 claims.³³⁸ For example, the Court of Appeals for the Sixth Circuit, in *Doherty v. Southern College of Optometry*, illustrated the importance of academic deference when it held that the defendant optometry school did not have to waive a course requirement for a handicapped student.³³⁹ In *Doherty*, the court noted that judicial deference to a faculty's academic decisions is important because the judiciary is usually unsuited to evaluate such decisions.³⁴⁰ Although the court agreed with the school's contention that the course requirement was essential, it did not, however, absolutely defer to the academic judgment of the school.³⁴¹ Instead, the *Doherty* court analyzed whether the course requirement was essential to the program. The court discerned that the optometry program's proficiency requirement was reasonably necessary to the program because of safety reasons and because, in practice, optometrists often used the instruments.³⁴² Thus, although acknowledging academic deference, the *Doherty* court implicitly reasoned that the school still had to demonstrate that the requirement was reasonably necessary to its program.

The *Doherty* court then applied a balancing test in which it examined the legitimate interests of the school in maintaining academic standards and the interests of the student in receiving the program degree.³⁴³ In balancing these interests, the court implicitly examined whether possible accommodations could serve the needs of both the school and the student, but concluded that no such accommodations existed.³⁴⁴ In essence, the *Doherty* court implicitly reasoned that although a faculty's decision that an academic re-

³³⁸ Compare *Wynne*, 932 F.2d at 25-26 (stressing judicial responsibility to scrutinize academic decisions in section 504 claims) with *Aloia*, No. 88 Civ. 3184, 1988 U.S. Dist. LEXIS 7769, at *24 (S.D.N.Y. July 27, 1988) (stressing substantial judicial deference to purely academic decisions).

³³⁹ 862 F.2d 570, 574-76 (6th Cir. 1988).

³⁴⁰ *Id.* at 576.

³⁴¹ See *id.* at 574-75.

³⁴² *Id.* at 574.

³⁴³ See *id.* at 575.

³⁴⁴ See *id.* As the necessary skill that the requirement tested was a hands-on, technical skill, the only possible accommodation that the school could have provided would have been a waiver of the requirement. Because the *Doherty* court reasoned that the requirement was reasonably necessary to the degree sought, it concluded that a waiver would constitute an unreasonable accommodation and consequently, it was not required under section 504.

quirement is essential should receive some amount of academic deference, a court may still inquire into whether possible accommodations may enable a disabled student to meet the essential requirement. Thus, with respect to section 504 claims, courts will not necessarily strictly adhere to the doctrine of academic deference.

The *Pushkin v. Regents of the University of Colorado* decision used a similar analysis when the court held that the defendant school violated section 504 when it refused to admit a student with multiple sclerosis into its psychiatric residency program.³⁴⁵ Although acknowledging that it is difficult to second-guess educators about academic judgments, the court stated that it is sometimes necessary to do so under section 504.³⁴⁶ In *Pushkin*, the court, as in *Doherty*, deferred to the general academic standards of the school using the reasonably necessary standard, emphasizing that a school has a valid interest in maintaining academic standards.³⁴⁷ In examining the second step of the analysis, the *Pushkin* court reasoned that because the university had previously provided the accommodations needed by the handicapped student to other students, such accommodations were reasonable and, therefore, were required under section 504.³⁴⁸ Thus, the underlying reasoning in both *Doherty* and *Pushkin* illustrates that the courts, while acknowledging the doctrine of academic deference, will still examine whether reasonable accommodations exist that will enable the student to meet the school's academic standards.

2. Strict Adherence to Academic Deference: An Incorrect Standard Under Section 504

Other courts, however, have interpreted academic deference more strictly in section 504 litigation, thus further muddling the issue of determining whether academic requirements are essential. For example, in both *Anderson v. University of Wisconsin* and *Aloia v. New York Law School*, the courts also deferred to the schools' determination of the necessity of maintaining academic standards, and upheld the essential nature of maintaining minimum grade stan-

³⁴⁵ 504 F. Supp. 1292, 1299 (D. Colo. 1981).

³⁴⁶ *Id.* The *Pushkin* court applied the two-step analysis implicit in *Doherty*: first, in light of the doctrine of academic deference, are the school's requirements reasonably necessary?; and second, if the requirements are necessary, are there any reasonable accommodations available whereby the student can meet the essential requirements in a way that will not fundamentally alter the requirement?

³⁴⁷ *See id.*

³⁴⁸ *See id.* at 1295.

dards.³⁴⁹ *Anderson* and *Aloia*, however, then deviated from the decisions in *Pushkin* and *Doherty*. The *Anderson* and *Aloia* courts failed to apply the second step of the analysis—the inquiry into whether reasonable accommodations would enable a handicapped student to satisfy a school's requirements. Consequently, the courts in *Anderson* and *Aloia* did not inquire into the existence of possible reasonable accommodations that the schools could make so the students could meet the schools' essential minimum grade requirements. Rather, those courts ended their analysis when they deferred to the schools' academic requirement of minimum grade standards. Thus, the *Anderson* and *Aloia* courts adhered to the doctrine of academic deference.

Recognizing that a school has a valid interest in maintaining academic standards, however, does not necessarily imply that a school does not have to provide reasonable accommodations that will enable a handicapped student to meet the academic standards of the school. For example, if learning disabled students are not provided with reasonable modifications, such as alternate test formats, that more accurately reflect their abilities rather than their disabilities, many of these students will be unable to maintain a school's minimum required GPA. Without the necessary accommodations, learning disabled students' GPAs will not reflect their true abilities. Rather, their grades will more likely reflect their disabilities because many traditional exam formats inherently discriminate against learning disabled students in that they measure learning disabled students' disabilities, not their abilities.

For example, a written essay examination will only reflect the learning disability of a student who has difficulty in processing and sending handwritten information.³⁵⁰ On the other hand, if a school provided that student with an alternate method of recording the answers, such as taping or typing, the answers would reflect the student's abilities. Thus, when schools provide their learning disabled students with reasonable accommodations to ensure nondiscrimination, the students are better able to meet the schools' academic requirements. Consequently, although the doctrine of academic deference is relevant, section 504 mandates that a court not end its analysis when it determines that a requirement is essential because otherwise, discrimination is likely.

³⁴⁹ *Aloia v. New York Law School*, No. 88 Civ. 3184, 1988 U.S. Dist. LEXIS 7769, at *23-24 (S.D.N.Y. July 27, 1988); *Anderson v. University of Wis.*, 841 F.2d 737, 741 (7th Cir. 1988).

³⁵⁰ See generally HEATH RESOURCE CENTER, *supra* note 61, at 1, 4.

3. Limiting the Role of Academic Deference in Section 504 Litigation: The Correct Standard

Although the *Aloia* and *Anderson* courts applied strict deference to schools' academic decisions, in the 1991 case of *Wynne v. Tufts University School of Medicine*, the United States Court of Appeals for the First Circuit refused to apply the academic deference doctrine strictly.³⁵¹ The *Wynne* court explicitly applied the standard implicitly found in *Doherty* and *Pushkin*.³⁵² Consequently, the *Wynne* court correctly balanced the doctrine of academic deference with the policies behind section 504.

The court in *Wynne* did acknowledge the doctrine of academic deference in considering whether it should defer to the defendant medical school's decision that multiple choice tests were essential to its program.³⁵³ This reasoning of the *Wynne* court is in line with the *Anderson* and *Aloia* courts in that it upholds the right of schools to set academic standards for their programs of study.³⁵⁴ The court in *Wynne*, however, did not defer to Tufts' conclusion that multiple choice tests are the only mechanism for evaluating the ability to process complex information.³⁵⁵ The court determined that if reasonable accommodations are available that will enable a disabled student to meet the required academic standard, a school's failure to provide such accommodations to disabled students violates section 504. Thus, although the *Wynne* court deferred to the general academic standard that Tufts had an interest in maintaining, the court then examined whether reasonable accommodations might be available that would allow Wynne to meet the school's required academic standard. As a result, because the *Wynne* court concluded that reasonable accommodations might be available, it reversed the lower court's grant of summary judgment for Tufts.³⁵⁶

This two-step analysis of the *Wynne* court effectively balances the doctrine of academic deference and the policies behind section 504. In deferring to Tufts' academic standards, the court recognized that such academic decisions require a faculty's expert evaluation. Furthermore, the court acknowledged the importance of academic

³⁵¹ 932 F.2d 19, 25-26 (1st Cir. 1991).

³⁵² See *id.*

³⁵³ *Id.*

³⁵⁴ See *id.* at 26-27; *Aloia v. New York Law School*, No. 88 Civ. 3184, 1988 U.S. Dist. LEXIS 7769, at *24 (S.D.N.Y. July 27, 1988); *Anderson v. University of Wis.*, 841 F.2d 737, 741 (7th Cir. 1988).

³⁵⁵ *Wynne v. Tufts Univ. School of Med.*, 932 F.2d at 27-28.

³⁵⁶ *Id.*

autonomy.³⁵⁷ This deference with respect to general academic standards is consistent with the judicial determination that in complying with section 504, universities do not have to lower their standards or make fundamental changes to their programs.³⁵⁸ Thus, the *Wynne* court, while acknowledging the academic deference doctrine, emphasized that section 504 requires courts to examine academic decisions to ensure that schools do not discriminate against handicapped students.

Moreover, strict adherence to academic deference, as found in *Anderson*, is inappropriate because the legislative history of section 504 stresses the importance of equal opportunity. One of the purposes of section 504 is to provide handicapped students with equal access to higher education.³⁵⁹ In order to effectuate this purpose, the HEW regulations specifically mandate that universities provide learning disabled students with reasonable accommodations where necessary to prevent discrimination.³⁶⁰ If courts apply a standard of strict deference to any academic decision that universities make, schools could easily circumvent the regulatory requirements by merely deciding that any given requirement is so essential that it cannot be modified at all. Basically, the schools would be the sole determiners of whether an accommodation is reasonable in a given situation. If the courts had to defer to such academic decisions, they could not enforce section 504.

Therefore, under section 504, courts should scrutinize academic decisions that conclude that no accommodations would be reasonable for an academic requirement. This scrutiny would not detract from a school's right to set its own academic standards. That is, because the regulations provide that a school does not have to modify the requirements that it proves are essential, a school can still maintain the integrity of its program.

Judicial scrutiny of academic requirements to determine whether there are reasonable accommodations that will enable a student to fulfill a school program's essential requirements also furthers the policy of section 504. Section 504 forces universities to become more knowledgeable about students' learning disabilities.

³⁵⁷ See *id.* at 26.

³⁵⁸ See *id.* at 27-28; see also *Doherty v. Southern College of Optometry*, 862 F.2d 570, 574 (6th Cir. 1988).

³⁵⁹ See *supra* notes 33-35 and accompanying text for a discussion of the legislative history announcing the equal opportunity purpose behind section 504.

³⁶⁰ See, e.g., 45 C.F.R. § 84.44 (1989).

As a result, the historical suspicions and misunderstandings surrounding learning disabilities will decline, and universities will be better able to provide effective and equitable accommodations. Consequently, schools will be less likely to claim that a requirement is essential to its program, and more likely to seek reasonable accommodations for their handicapped students to enable them to satisfy schools' academic requirements.

The *Wynne* analysis will also be helpful as other issues arise in learning disabled students' section 504 claims. One academic concern is that learning disabled students will begin to demand alternate forms of instruction.³⁶¹ Thus, the same arguments that the parties advanced in *Wynne* will probably arise: schools will claim that the demand for alternate forms of instruction is a violation of academic freedom, whereas learning disabled students will contend that such a demand is a reasonable accommodation. As in *Wynne*, the courts should balance the interests of schools in maintaining academic standards with the interests of learning disabled students in receiving equal opportunities in higher education.

In sum, although courts have disagreed over the role that academic deference should play in section 504 litigation, future courts should follow the analysis that the court articulated in *Wynne*. Under this analysis, courts must scrutinize a school's decision that an academic standard is essential to its program to determine if that standard is essential or if it instead amounts to discrimination against handicapped students. In this determination, courts should require the school to prove affirmatively that its regulation is essential. In addition, the *Wynne* analysis mandates that courts inquire into the existence of reasonable accommodations that would enable a handicapped student to satisfy the requirement at issue.³⁶² If such accommodations exist, courts must require schools to provide them for their handicapped students. This approach more fairly balances the legitimate interests of schools in maintaining valid academic standards and the academic interests of handicapped students. Thus, a required inquiry into reasonable accommodations helps ensure that handicapped students receive equal opportunities to pursue higher education.

³⁶¹ Telephone interview with Karen Muncaster, Director of Learning Disabilities Office, Middlesex Community College (Sept. 20, 1990).

³⁶² See *Wynne v. Tufts Univ. School of Med.*, 932 F.2d 19, 27-28 (1st Cir. 1991).

IV. CONCLUSION

Although there are still some unresolved questions regarding knowledge, cost and academic deference in section 504 claims, courts have provided guidance for both disabled students and institutions of higher education. With regard to knowledge, the burden is clearly on the student to provide sufficient knowledge of a learning disability to the school. To receive the full benefits of section 504, learning disabled students should provide the documentation as early as possible in their academic careers. The documentation should also be as complete as possible, including physicians' reports, past history of the disability, if available, and possible accommodations that would benefit the handicapped student. Although the law is not clear on how much documentation is sufficient to trigger section 504 coverage, the more information that the student provides about the disability, the more likely the school will be subject to section 504. Moreover, a court will more likely examine reasonable accommodations in deciding whether the school violated section 504 if documentation is provided.

Although students should give schools documentation of their disabilities, schools should not use this knowledge to flag disabled students' tests. Flagging is discriminatory in nature. It assumes that the modified tests that learning disabled students take are less valid than those tests of non-disabled students. The HEW regulations require schools to provide only the modifications that will make tests equal in substance. Thus, if schools follow this regulation, flagging will be unnecessary as the substantive nature of the tests will be the same. Even if the modified tests provide a competitive advantage to the handicapped students, there is still no reason for flagging. Instead, the school should find modifications that provide an equal playing field for handicapped and non-handicapped students alike. These modifications avoid the discrimination that flagging encourages.

With regard to cost issues, under the regulations, schools must pay for necessary and reasonable accommodations such as auxiliary aids. Thus, with respect to the reasonable accommodations that HEW requires schools to provide, it appears that courts will only allow a narrow cost defense. Consequently, in order to use effectively a cost defense to the provision of aids, schools must prove that the provision of the aids threatens the economic feasibility of the program. This burden of proof furthers the policies of section 504, ensuring equal access to higher education for disabled individuals.

Although conflict exists among the courts as to how much weight they should give to a school's determination that an academic requirement is necessary, the *Wynne* court provided a workable standard by balancing the interests of a school in maintaining academic standards and the interests of a handicapped student in receiving equal access to higher education. By deferring to general academic standards, such as the minimum grade requirements, courts can preserve the freedom of universities to establish academic standards. Yet, by inquiring into the possibility of reasonable accommodations that would enable a disabled student to meet an academic standard, courts can, at the same time, fulfill section 504's purpose of equal opportunity. As different types of academic standards and accommodations will be involved in future cases, the judiciary should perform a case-by-case determination of whether reasonable accommodations exist by applying the *Wynne* court's analysis of scrutinizing academic requirements to determine if they are essential to a school's program and examining whether reasonable accommodations exist that would enable a handicapped student to meet the requirements at issue.

Most importantly, both schools and learning disabled students must understand the scope of section 504. Although section 504 affords learning disabled students protection against unfair discrimination, these students must remember that section 504 is a civil rights act that calls only for equal opportunity. Schools must realize that providing equal access may, in some instances, require the provision of accommodations. As schools and learning disabled students more clearly understand their rights and obligations under section 504, they will be better able to work together to dispel, forever, the myth that learning disabled students are uneducable.

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