

ACCOMMODATING FACULTY MEMBERS WHO HAVE DISABILITIES

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The report that follows was prepared by a subcommittee of Committee A on Academic Freedom and Tenure and approved for publication by the parent committee.

I. Introduction

In recent years the rights and responsibilities of students who have disabilities have received considerable attention. Professors routinely accommodate students with a front-row seat in class or extended time on an examination. Faculty members who have disabilities have received far less attention. This report from a subcommittee of Committee A on Academic Freedom and Tenure addresses practical and legal issues concerning faculty members who have disabilities.¹

In higher education, as in American society generally, one still often encounters the stereotype that disability necessarily equates with diminished professional competence. With suitable accommodations, a faculty member who has a physical or mental disability may perform equally well as, or even better than, a colleague who does not have a disability. As an expert on these issues observed in 2009, “So far, professional groups have not fully incorporated disability in their diversity agendas.”²

1. The subcommittee was originally created to review Regulation 4(e) of the AAUP’s *Recommended Institutional Regulations on Academic Freedom and Tenure*, “Termination Because of Physical or Mental Disability.” On the basis of the subcommittee’s advice, Committee A voted to withdraw this regulation. It invited the subcommittee to express its views on accommodating faculty members with disabilities, and this report responds to the invitation. Members of the subcommittee express their appreciation to Laura Rothstein (University of Louisville) and Jack Bernard (University of Michigan) for valuable insights and assistance.

2. Carrie G. Basas, “Lawyers with Disabilities Add Critical Diversity to the Profession” (paper presented at the Second National Conference on Lawyers with Disabilities, Washington, DC, June 2009); available at <http://www2.americanbar.org/calendar/2nd-National-Conference-on-Employment-of-Lawyers-with-Disabilities/Pages/AttendeeInformation.aspx>.

In promoting access and success for faculty members with disabilities, the AAUP highlights the significant talents of an important group, promotes a diverse professoriate, and expands role models for students.

A faculty member may have a disabling condition at the time of his or her appointment or may develop a disability later. The onset can be rapid or gradual. A disability may be a physical or mental condition, and a faculty member may have multiple disabilities. Comprehensive data are not readily available on the incidence of disability among the American professoriate.³

Federal, state, and local laws establish basic requirements for the protection of faculty members who have disabilities. Federal laws include the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973. While this report incorporates some core legal principles and expands upon them for the academic setting, it is not a substitute for legal advice tailored to particular situations.

The report presents a general discussion of faculty and disabilities followed by three appendices: (a) ideas for an institutional policy and procedure to address faculty disabilities, (b) guidelines from the Modern Language Association on recruiting faculty members who have disabilities, and (c) a discussion of disability legal issues and faculty performance authored by Laura Rothstein, professor of law at the University of Louisville.

3. The National Science Foundation (NSF) tracks, among other data, the careers of persons with disabilities who hold doctorates in the sciences and engineering. The NSF reported that in 2008, out of 269,400 science and engineering doctorate holders with appointments in higher education, from chancellors to teaching assistants, approximately 19,700 (or 7.3 percent) had a disability (<http://www.nsf.gov/statistics/wmpd/pdf/tab9-22.pdf>). As to the general lack of data, regulations limit the kinds of queries employers may make of applicants regarding disability.

II. Faculty Members Who Have Disabilities

Brief profiles of three prominent professors who have written about their own situations illustrate the rich and important contributions of faculty members with disabilities.

Temple Grandin is a professor of animal science at Colorado State University. Her field of expertise is livestock behavior and handling. She has authored more than three hundred articles and several books. In addition to her academic work, Dr. Grandin consults widely with industry on animal facilities. She has designed half of the livestock-handling facilities in the United States. At the age of three, lacking language, she was diagnosed with autism. Today she describes herself as thinking in nonlinear, associative “photorealistic pictures.” This approach allows her to analyze an animal’s perspectives differently from other experts who might think verbally or in patterns. Among the most notable autistic individuals in the country, Dr. Grandin received an honorary doctorate from the University of Illinois and has been profiled in major media and a feature-length HBO film.⁴

Stephen W. Hawking serves as director of research at the Centre for Theoretical Cosmology at Cambridge University. He has published over 180 scientific papers, and his books include three for popular audiences. Shortly after his twenty-first birthday, Hawking was diagnosed with the incurable motor neuron disease ALS. On his website he describes the early difficulties he and his new bride had in finding suitable housing while he was a fellow at Cambridge. He inquired at several points whether the college could provide assistance and was told none was available. He and his family lived in several homes. One move was necessitated by his loss of the ability to climb stairs:

By this time, the College appreciated me rather more, and there was a different Bursar. They therefore offered us a ground floor flat in a house that they owned. This suited me very well, because it had large rooms and wide doors. It was sufficiently central that I could get to my University department, or the College, in my electric wheel chair. It was also nice for our three children, because it was surrounded by

garden, which was looked after by the College gardeners.⁵

Today Dr. Hawking requires round-the-clock care. He speaks through computer voice synthesis of typed words, spoken at the rate of about fifteen words per minute. By his account the system works well but has an American accent. His medical condition has progressed more slowly than that of many people with similar diseases.

Kay Redfield Jamison is the inaugural Dalio Family Professor in Mood Disorders at the Johns Hopkins University School of Medicine. Her areas of expertise include mood disorders, suicide, the role of mood in artistic and scientific creativity, and the relationships between positive and exuberant mood states and pathological ones. She has received seven honorary degrees and a MacArthur award. In two books she wrote in the 1990s, Dr. Jamison described her personal struggle with manic-depressive illness and her suicide attempt.⁶ As the university’s alumni magazine summarized, “It is in her combination of science, humanism, and personal openness that Jamison has made her mark. She hadn’t planned it that way, but as Roethke said . . . ‘The edge is what I have.’ And in *An Unquiet Mind* she wrote, ‘The Chinese believe that before you can conquer a beast you first must make it beautiful.’”⁷

These three outstanding professors serve merely as proxies for the thousands of faculty members with disabilities who, every day, contribute to advancing higher education. From chemistry professors who are blind to recreation faculty who use wheelchairs, they challenge preconceptions about the limitations created by disabling conditions.⁸

III. Steps in Accommodation

Most institutions have well-developed procedures for managing the needs of students who have

5. “Prof. Stephen Hawking’s Disability Advice,” on Stephen Hawking’s official website, <http://www.hawking.org.uk/index.php/disability/disabilityadvice>.

6. *An Unquiet Mind: A Memoir of Moods and Madness* (New York: Knopf, 1995) and *Night Falls Fast: Understanding Suicide* (New York: Knopf, 1999).

7. Dale Keiger, “Prose Born of Pain,” *Johns Hopkins Magazine* (April 2000), <http://www.jhu.edu/jhumag/0400web/22.html>.

8. Some institutions with strong programs in serving students who have disabilities also attract faculty members who have disabilities. At Gallaudet University, internationally known for educating deaf and hard-of-hearing

4. See “Conversations from Penn State: Temple Grandin,” http://conversations.psu.edu/episodes/temple_grandin/. Dr. Grandin’s web page is located at <http://lamar.colostate.edu/~grandin/>.

disabilities.⁹ Procedures for managing faculty accommodation requests, while used less frequently, are equally important. Sample procedures for handling faculty disability issues appear in Appendix A.

Raising the Issue of Disability. If a faculty member believes that a disabling condition impedes his or her discharge of professional responsibilities, it is incumbent on the individual to bring the matter to the attention of appropriate institutional authorities. Someone who has an obvious disability, such as blindness or a missing limb, need not provide notice. Unless a disability is obvious, the institution must not initiate discussion with an individual about a potential disability. This is a fundamental requirement—that the faculty member alone has the right and responsibility to raise the issue of disability.

Once a faculty member indicates, whether orally or in writing, that he or she has a disability, a structured process involving several steps begins. If it has not already done so, the institution must identify the “essential functions” of the faculty member’s position. The nature and extent of the disability may be examined. Most importantly, the individual and institution must engage in good-faith discussions about how best to accommodate the limiting conditions. The following sections address the steps in accommodation.

Throughout the process, institutional authorities must respect the individual’s privacy interests and confine information about the matter to those with professional responsibility for addressing or resolving it. Under federal law, information about a disability must not be included in the faculty member’s regular personnel file.

students, about half of the total faculty and staff is deaf or hearing impaired.

9. The many ways in which faculty members can support students who have disabilities are beyond the scope of this report. We simply note the option of including a statement on the course syllabus such as the following: “My goal is to make this course accessible to all students. If you think you need an accommodation for a disability, please let [the appropriate party—for example, ‘me,’ ‘the disability services office,’ or ‘the associate dean’] know at your earliest convenience. Some aspects of this course—the assignments, the in-class activities, and the way I teach—may be modified to facilitate your participation and progress. The sooner you make [the appropriate party] aware of your needs, the sooner we can determine appropriate accommodations. I will treat any information you provide about your disability or accommodations with respect.”

This separation limits the possibility that the information might improperly and negatively influence decisions regarding the individual.

A search committee should only raise disability when asking all candidates whether they may need an accommodation in the application or interview process. If the candidate does need accommodation, the institution should be thorough and gracious. One anonymous candidate has described a positive experience:

Interviewed in wheelchair. Perfect interview for disabled candidate. I never experienced this before. Driver who picked me up knew what to do. Hotel was on main street downtown so I could go out. (As opposed to hotels where you are captive in your room as you can only access parking lot.) Room was easy to navigate with enough space to get in bathroom, move around bed, desk. Department made my “accessibility” a non-issue by planning. Lectern for job talk was already at perfect height. Lunch and dinner were easy to get to and wheelchair friendly. Department already knew where accessible toilets were. (The worst is when you ask and they say: Oh, gee, I guess we’ll have to find “one of those” for you!) All around class act. And no, I didn’t get the job.¹⁰

The Modern Language Association’s advice on interviewing candidates with disabilities is reprinted as Appendix B.

Defining Essential Functions. A faculty member who has a disability needs to accomplish the essential functions of his or her position, either with or without an accommodation. Essential elements common to all faculty positions would be requirements such as

- mental agility, including capacity for analysis and evaluation;
- mastery of a complex subject;
- initiative;
- creativity;
- strong communication skills;
- ability to work cooperatively with others; and
- ethical behavior.

If an institution has a standard teaching load, fulfilling the load could be an essential function. Research and service expectations may also be essential functions at many institutions.

Beyond essential functions common to all faculty appointments, a particular position may have its own

10. “Universities to Love,” *Academic Jobs Wiki*, http://academicjobs.wikia.com/wiki/Universities_to_Love.

requirements. The demands of an academic position that involves performing on violin with the music department's faculty string quartet differ from those of a position in theoretical mathematics. Apart from obvious differences in subject matter, the violinist needs the capacity to play in public quartet performances.¹¹ The mathematician, in contrast, might require sophistication in highly specialized computer functions. The hours each devotes to working directly with students would likely differ. Such variations shape the essential functions of particular faculty positions.

At what point should a university define the essential functions of its faculty positions? Some institutions define essential functions for the purpose of, and in the process of, posting and eventually filling open positions. Such institutions routinely include the essential functions in the vacancy announcements, typically listed as "required qualifications." Other institutions have proceeded more comprehensively, establishing essential functions for all faculty positions. But some colleges and universities, perhaps most, have not undertaken to define the essential functions of their faculty positions. We encourage appropriate faculty bodies, including departments and faculty governing bodies, to define the essential functions of faculty positions, subject to review by administrative authorities.

Articulating essential functions provides a useful framework for professional responsibility and reduces for all faculty members the prospect of arbitrary charges of neglect of duties or incompetence.

Nonessential functions are those that may be absorbed by other people. Leading student field trips may, for example, be an essential function for a geology professor. Driving the van, however, may be a nonessential function that someone else could perform. Nonessential functions are also called marginal functions.

A position's essential functions provide the starting point for considering a faculty member's request for

accommodation on the basis of a disability. Briefly stated, an individual who has a disability must perform the essential functions, either with or without an accommodation. If a faculty member requests an accommodation and the institution has not previously defined his or her essential functions, the institution must promptly perform the analysis. The analysis at this point is only of the *position*—what are its core responsibilities, without regard to the individual situation prompting the analysis. That is, the essential functions of a position are independent of any individual who may hold it.

If an institution has defined essential functions of faculty positions before a professor requests an accommodation, the institution avoids possible charges that it manipulated the analysis to the detriment of the individual. Written position descriptions and detailed vacancy announcements provide evidence of essential functions. Faculty members should lead the effort to create fair descriptions of essential functions of faculty positions.

Establishing the Nature and Extent of the Disability.

An individual who has a disability may first raise the issue in a request for leave for medical treatment or rehabilitation. Unless a disability and the limitations it creates are obvious, the institution may need information about the nature and extent of the disability. The goal is an objective analysis of the individual's condition and capacity to fulfill the position's essential functions.

The faculty member typically seeks documentation from his or her own health-care provider or other appropriate professional.¹² The institution may write to the professional to share a description of the essential functions of the individual's position. The institution might solicit from the professional specific information, such as the diagnosis, the expected duration of and prognosis for the disabling condition, the individual's general limitations and specific capacity to perform the essential functions, and suggestions for possible accommodations.

The institution may have an appropriate professional of its choice review the documentation. If after review the institution requires additional information, it may seek further guidance and clarification from the professional who provided the original documentation

11. What if a violin pedagogue, not involved in the faculty string quartet, lost the use of her hands? Her teaching career would not necessarily come to an end. Some professors teach instrumental music using only oral advice to avoid having their sound and interpretation unduly influence their students. As another option, the professor could have an assistant demonstrate on the violin during students' lessons. The issue is whether the faculty member can perform the essential functions of her position in violin instruction, either with a reasonable accommodation or without the assistance of an accommodation.

12. Consider the situation of a faculty member who has attention deficit disorder or attention deficit hyperactivity disorder. She may furnish documentation about her condition from an expert in learning disabilities, although the expert may not be a "health-care provider" as that phrase is commonly understood.

Selected Resources

- Abram, Suzanne. "The Americans with Disabilities Act in Higher Education: The Plight of Disabled Faculty." *Journal of Law and Education* 32 (2003): 1–19. Detailed discussion of cases involving faculty members who won their lawsuits.
- ADA National Network Centers. <http://www.adata.org>. A group of ten regional resource centers providing information and guidance on disability issues for individuals and groups. Funded by the US Department of Education and the National Institute on Disability and Rehabilitation Research.
- American Bar Association Commission on Disability Rights. <http://www.americanbar.org/groups/disabilityrights.html>.
- DiNardo, Lawrence C., John A. Sherrill, and Anna R. Palmer. "Specialized ADR to Settle Faculty Employment Disputes." *Journal of College and University Law* 28 (2001): 129–52.
- Job Accommodation Network. <http://www.askjan.org>. Online and telephone resources for structuring accommodations for many types of disabilities in many employment settings. Sponsored by the US Department of Labor.
- Lee, Barbara A., and Judith A. Malone. "As the Professoriate Ages, Will Colleges Face More Legal Landmines?" *Chronicle of Higher Education* (November 30, 2007): B6–B8.
- Lee, Barbara A., and Peter H. Ruger. *Accommodating Faculty and Staff with Psychiatric Disabilities*. Washington, DC: National Association of College and University Attorneys, 1997.
- Rothstein, Laura. "The Employer's Duty to Accommodate Performance and Conduct Deficiencies of Individuals with Mental Impairments under Disability Discrimination Law." *Syracuse Law Review* 47 (1997): 931–86.
- . "Higher Education and Disability Discrimination: A Fifty-Year Retrospective." *Journal of College and University Law* 36 (2010): 843–74. Primarily addresses student disability.
- Rothstein, Laura, and Julia Rothstein. *Disabilities and the Law*. Eagan, MN: Thomson West, 2009. Section 3.26.
- US Department of Justice. "Americans with Disabilities Act ADA Home Page." <http://www.ada.gov>.
- US Equal Employment Opportunity Commission. "The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities." <http://www.eeoc.gov/facts/performance-conduct.html#alcohol>. Discussion of alcoholism and illegal use of drugs.
- . "Disability Discrimination." <http://www.eeoc.gov/laws/types/disability.cfm>.
- US Office of Personnel Management. *Alcoholism in the Workplace: A Handbook for Supervisors*. http://www.opm.gov/employment_and_benefits/worklife/officialdocuments/handbookguides/alcohol/index.asp.

for the faculty member. In unusual situations, central issues may remain unresolved even after further exchange with this professional. The institution may take the final step of arranging for a health-care provider or other appropriate professional of its choice to evaluate the faculty member's capacity to fulfill the position's essential responsibilities. The faculty member should not bear any expense for an evaluation by a health-care provider or other appropriate professional selected by the institution.

It is useful to bear in mind that the term disability has a technical, legal meaning. It does not cover all limiting conditions.¹³ A bad cold and a broken leg are not disabilities because they are transitory and typically last fewer than six months. A disability is a long-term physical or mental impairment that significantly impedes an individual in performing an activity that is of central importance to life.¹⁴ Central activities include

13. Questions often arise on the legal status of alcohol abuse and illegal drug use. Federal law covers past or current alcoholism as a disability. Illegal drug use is not a covered disability. Federal law, however, protects individuals undergoing treatment for drug addiction. An institution may prohibit faculty and staff from consuming or possessing alcohol or illegal drugs on campus. It may also prohibit faculty and staff from arriving at work impaired by alcohol or illegal drugs. See, for example, the Drug-Free Schools and Communities Act of 1989, 20 US Code §1011(I).

14. Here is the statutory definition:

Sec. 12102. Definition of disability. As used in this chapter:

- (1) Disability. The term "disability" means, with respect to an individual
- (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
 - (B) a record of such an impairment; or
 - (C) being regarded as having such an impairment (as described in paragraph (3)).
- (2) Major Life Activities
- (A) In general. For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
 - (B) Major bodily functions. For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited

sleeping and eating, for example, and also bodily processes such as function of the immune system and normal cell growth. A disability may be continuous, episodic, or intermittent. Intermittent disability would include cancer in remission, if when active the disease would be an impairment. The statute, regulations, and case law all elaborate on the definition. Appendix C offers additional insight on the issue of who is disabled.

The Americans with Disabilities Act protects a person *without* a disability if the employer treats him or her as impaired. This is informally known as the statute’s “regarded as” clause. Caution requires that we avoid making comments suggesting that faculty members or others have a mental or physical problem.

Discussing Accommodation. Once a faculty member has raised a disability issue, the essential functions of the position have been identified, and the nature and extent of the disabling condition have been established, the process of discussing and structuring accommodations begins. Federal law mandates an interactive process. The faculty member and the department are typically well informed about possible adjustments that would permit the individual to succeed in meeting the essential functions. Experts from a campus disability-support office or human resources often provide valuable assistance. They may have considerable experience in translating diagnoses into pragmatic considerations and suggesting accommodations.

An experimental scientist with a disabling back condition might need higher laboratory countertops. A professor who loses his eyesight might need a reader and a specially equipped computer. The options are nearly infinite, and a reasonable solution should be selected to fit the circumstances. The essence of the interactive process is that each party solicits and considers the other’s suggestions. The solution must be effective and reasonable, and the institution must be prepared to defray reasonable expenses.¹⁵

Sometimes persons who have disabilities privately and quietly bear the burden of making their own

to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

(3) Regarded as having such an impairment.

15. As Appendix C discusses, feasibility, cost, and effect of program adjustments are related factors. The institution must reach a reasonable, justifiable conclusion in balancing competing considerations.

accommodations. They should, however, be encouraged to avail themselves of the institution’s resources, to which they have a legal right.

Hope Lewis, professor of international law at Northeastern University, has stressed the value of dialogue between employers and people who have disabilities: “In addition to technical compliance with the law, employers and providers of public accommodations should talk with vendors, colleagues, disability professionals—and most importantly, people with disabilities themselves—about ways to make work and social environments accessible and inclusive for all.”

Professor Lewis is severely visually impaired. She uses large-format bold-faced notes for lectures and presentations. Her research tools include computer speech software, specially adapted handheld devices, and a scanner.¹⁶

Sue Titus Reid is a noted criminologist and professor of public administration at Florida State University. She has mobility impairments resulting from a degenerative condition exacerbated by several car accidents. Dr. Reid uses a special type of chair in her office and classroom and receives accommodations in course assignments, class size, and class schedules.¹⁷ She disclosed her condition at the time of her appointment to FSU and was, by her account, reassured that it would pose no problem. After changes in both administrative personnel and her need for accommodation, she resorted to the courts to enforce her rights.

A law professor who is profoundly deaf works with an interpreter in interacting with his students and colleagues. The professor, Michael A. Schwartz, has explained, “The interpreter is not my interpreter. He is OUR interpreter. He belongs to all of us!”¹⁸

16. American Bar Association, Commission on Mental and Physical Disability Law, “Lawyer Spotlight: Professor Hope Lewis” (December 2010); available at <http://www2.americanbar.org/disability/Lists/Lawyer%20Spotlights/Previous%20Spotlight.aspx>.

17. American Bar Association, Commission on Mental and Physical Disability Law, “Lawyer Spotlight: Professor Sue Titus Reid” (August 2010); available at <http://www2.americanbar.org/disability/Lists/Lawyer%20Spotlights/Previous%20Spotlight.aspx>.

18. American Bar Association, Commission on Mental and Physical Disability Law, “Lawyer Spotlight: Professor Michael A. Schwartz” (February 2008); available at <http://www2.americanbar.org/disability/Lists/Lawyer%20Spotlights/Previous%20Spotlight.aspx>.

Some accommodation requests may be inherently unreasonable. These might include, for example,

- demand for the creation of a part-time position with a full-time salary,
- refusal to serve on committees with specific individuals,
- removal of the department chair,
- refusal to teach undergraduates, or
- refusal to participate in department meetings.

Even some of these requests, though, should be evaluated in the context of the position's essential functions. If travel to campus for meetings is problematic, perhaps a faculty member could participate remotely. If attendance at department meetings is not an essential function, then an individual might be excused entirely.

The US Department of Labor sponsors the Job Accommodation Network, which provides online resources and telephone advice on workplace accommodations.¹⁹ Structuring reasonable accommodations calls for creativity, flexibility, and open dialogue. A successful accommodation redounds to the mutual benefit of the institution and the faculty member.

Addressing Evaluation and Performance Issues. In past decades, the first female or minority professor in a department may not have received effective mentoring and evaluations.²⁰ Faculty members who have disabilities should not suffer the same fate. They should be evaluated on the same schedule and basis as their colleagues who are not disabled.²¹ Those responsible for the evaluation should take care to be candid and to avoid paternalism. Evaluators should not assume a faculty member's disability is the cause of any performance problems. Like any other faculty member, a faculty member who has a disability may fail to fulfill professional responsibilities. The basis for discipline or dismissal must be the individual's performance. Institutions must avoid speculating on medical causes for performance problems. If a faculty

member appears to be exhibiting mild dementia, for example, the evaluation should address the problematic behavior and its consequences. Such an evaluation might appropriately state: "You did not meet your class three times last semester and did not provide an explanation. Students report that your lectures are disorganized. You failed to turn in grades by the deadline. These problems harm current students and impede the department's efforts to attract more students to the major."

While some might criticize such an approach as insensitive, it focuses on performance and addresses core institutional concerns. Were the evaluation to suggest, for example, that "some early-stage dementia may be contributing to your problems," it could constitute disability discrimination. Were the evaluation to urge the individual to consider retirement, it would likely run afoul of age discrimination laws.

To protect the dignity of faculty members unable to fulfill their professional responsibilities, institutions are well advised to seek negotiated resolutions.²² Failing a mutually satisfactory resolution, in serious cases the institution should proceed under Regulation 5 of the Association's *Recommended Institutional Regulations on Academic Freedom and Tenure*.

A faculty member who has a disability is entitled to the same due-process protections as a faculty member who does not have a disability. Equity requires use of the standard criteria and procedures. In special circumstances, however, an institution might wish to offer an abbreviated process on a voluntary basis. This could be appropriate if, for example, the subject matter of the proceeding were of a highly sensitive personal nature. An abbreviated process might involve a representative standing in for the individual or mutually agreed-upon stipulations of facts about the faculty member's performance. The choice between the full process and an abbreviated one must be left entirely to the individual.

Conceivably, a faculty member facing dismissal might for the first time indicate that he or she has a disability and might request an accommodation. In its discretion, the institution may proceed as discussed above, obtaining

19. See <http://askjan.org>.

20. See, for example, *Kunda v. Mublenberg College*, 621 F.2d 532 (3d Cir. 1980), a case involving a female faculty member who was not advised about requirement of advanced degree.

21. For sound faculty evaluation guidelines, see *Good Practice in Tenure Evaluation: Advice for Faculty, Department Chairs, and Academic Administrators* (Washington, DC: American Council on Education, American Association of University Professors, and United Educators Insurance, 2000); available at <http://www.acenet.edu/bookstore/pdf/tenure-evaluation.pdf>.

22. In severe situations, an institution may require a faculty member to undergo a fitness-for-duty medical evaluation. The health-care provider performing the evaluation should receive information about the essential functions of the individual's position. Merely requiring such an evaluation does not, as a matter of federal law, constitute discrimination on the basis of disability. State laws may also bear on such examinations.

an objective opinion from the individual’s health-care provider or other appropriate professional about the nature and extent of the disability. The information may form the basis for discussion of accommodations that would allow the faculty member better to fulfill his or her professional responsibilities, thus postponing or eliminating the need for dismissal proceedings. But an institution bears no legal obligation to accommodate retroactively a disability of which it was unaware. The faculty member who first raises a disability issue during a dismissal proceeding may be entitled to a reasonable accommodation in order to participate effectively in the proceeding itself.²³ Appendix C offers a fuller legal analysis of the dismissal of faculty members with disabilities.

An institution must avoid requiring psychological counseling or medical treatment as a condition for a faculty member with a disability to retain his or her position. Mandatory counseling or treatment is inconsistent with using performance as the sole basis for judging professional fitness.

23. Students facing disciplinary procedures sometimes raise an issue of disability for the first time during the discipline process. Should the same pattern occur for a faculty member facing dismissal or other severe sanction, the institution might examine how it has handled comparable student disability accommodation requests.

IV. Conclusion

A final cautionary note is in order. It is important to avoid casual use of words such as “disabled” or “handicapped” unless circumstances warrant the technical application of such terms. Similarly, the speculative or pejorative labeling of an individual as having a mental or physical challenge perpetuates negative stereotypes and may even create a presumption that the speaker regards the individual as having a disability.

The academy welcomes and supports qualified faculty members with disabilities, who deserve the same opportunities and protections as their colleagues who are not disabled. ■

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Appendix A: ADA Policy for Faculty Members Who Have Disabilities

Institutions are well advised to develop policies explaining the rights and responsibilities of faculty members who have disabilities. Useful elements in an institutional policy might include

1. the need for a faculty member to identify himself or herself as having a disability, unless the disability is obvious, such as blindness or a missing limb;
2. the officer to whom a faculty member should provide notice of a disability;
3. the faculty member’s responsibility to provide documentation from an appropriate professional and the institution’s right to review the documentation, interact with the professional, and, in rare situations, request another examination;

4. the determination of essential functions of faculty positions;
5. the interactive process for identifying an effective, reasonable accommodation;
6. the designated officer who makes the decision on accommodation;
7. how and where records are maintained (with no medical information in the personnel file); and
8. the appropriate internal route, if any, for the faculty member to challenge the accommodation decision.

The following policy is adapted from one developed at Indiana University. It is offered merely for purposes of illustration.

Policy and Procedures for Accommodating Faculty Who Have Disabilities

The Americans with Disabilities Act (ADA), the [state] Civil Rights Act, and [name of institution] policy prohibit discrimination in employment and educational programs against qualified individuals with disabilities. It is the policy of [institution] to provide reasonable accommodations or academic adjustments when necessary. These accommodations and adjustments must be made in a timely manner and on an individualized and flexible basis.

It is the responsibility of the individual student, staff member, or faculty member to identify himself or herself as an individual with a disability when seeking an accommodation or adjustment. The individual bears the responsibility to document his or her disability with an opinion from an appropriately licensed professional. The individual must also demonstrate how the disability limits his or her ability to complete the essential job functions or limits participation in the university’s programs or services. Medical documentation will be kept confidential.

Students, staff, and faculty members must maintain institutional standards of performance.

Faculty and Academic Appointee Accommodation Request Procedures

1. To receive an accommodation under the ADA, a faculty member must file an application with the [role and contact information of designated officer—for example, “provost,” “dean of faculty,” “human resources director,” “director of disability support services”]. The faculty member should include documentation of his or her functional limitations.
2. After reviewing the documentation and the facts of each request, the [designated officer] will determine

if the faculty member is eligible for accommodations under the ADA.

3. The [designated officer] will then meet with the faculty member and his or her chair or dean to develop a plan of reasonable accommodation. Through discussion the participants will seek to
 - a. identify the essential and marginal functions of the position (if not already done);
 - b. discuss the faculty member’s specific physical or mental abilities or limitations as they relate to the essential functions along with potential accommodations; and
 - c. identify the accommodation that best serves the needs of the faculty member, his or her students, and the university.
4. The [designated officer] may require the faculty member to provide medical documentation in order to verify a condition or to provide further information that will assist in identifying reasonable accommodations. In most cases documentation is necessary to determine the appropriate accommodation. The [designated officer] may seek advice from third-party experts when necessary.
5. It is the responsibility of the [designated officer] to determine the reasonable accommodation in a particular case.
6. The reasonable accommodation shall be documented by placing a copy of the accommodation plan in the faculty member’s personnel file and in the Office of the [designated officer]. To the extent necessary, this documentation should include a long-term plan for dealing with changes in the faculty member’s limitations over time. Medical documentation shall be retained only by the [designated officer] and shall be kept confidential and separate from the faculty member’s personnel file.

**Appendix B:
Disability and Hiring: Guidelines for Departmental Search Committees**

The guidelines below are reprinted with permission from the Modern Language Association (MLA). These guidelines may be useful in faculty recruitment and also in hosting visiting lecturers or other academics who have disabilities. The guidelines are available on the MLA’s website at http://www.mla.org/dis_hiring_guidelines.

The diverse, talented, and well-qualified group of job seekers includes some candidates with disabilities. Disabled people are still significantly underrepresented in higher edu-

cation. Disability is a positive value that can add to intellectual and cultural diversity on campus. Further, disabled faculty members provide valuable role models for students.

You may find the following guidelines helpful when you are filling positions in your department.

1. Construct job advertisements that actively welcome applications from all candidates, including candidates with disabilities.
2. Treat all job candidates with dignity and respect.
 - Disability includes a wide range of people: wheelchair users, deaf people, blind people, and many others, such as people with HIV/AIDS, cancer, depression, diabetes, and chronic pain.
 - Keep in mind that many disabilities are not visible.
3. Affirm that faculty members should be protected from discrimination and are entitled to reasonable accommodation in places of employment.
 - You should familiarize yourself with the Americans with Disabilities Act (ADA) and the Canadian Charter of Rights and Freedoms.
 - You should not make any pre-employment inquiries about a disability or the nature or severity of a disability. Without referring to disability in particular, you may ask questions about a candidate's approach to performing specific job functions (see guideline 7).
4. Address requests for sign language interpreters or other accommodations for the interview. Many accommodations are inexpensive and easy to provide; many are free.
 - Interviews should be conducted in accessible space.
 - For interviews that occur at the MLA Job Information Center, the MLA will provide interpreters or other accommodations. To make a request for access, the candidate should contact the MLA convention office.
 - For interviews away from the conference site—this includes hotel rooms or suites at the convention—or on your campus, your school is encouraged to provide interpreters or other accommodations. Procedures vary by school; ideally the costs and arrangements will be handled by an official outside your department. Some of the units and individuals that might be involved in this conversation include your institution's ADA Compliance Officer, Equal Employment Opportunity Officer, Human Resources Officer, or disability services office.
5. All candidates should be provided beforehand the names of all the people who will be present at the interview.
6. At the interview, strive to make the candidate feel welcome.
 - Establish a collegial atmosphere by introducing interviewers to the candidate and to any support personnel (sign language interpreters or personal assistants). For interviews at the convention, wear your MLA badge.
 - Offer to shake hands. Shaking with the left hand is okay. For those who may prefer not to shake hands, a welcoming touch on the shoulder or elbow is acceptable.
 - Give the candidate a few moments to determine a comfortable setup. A visually impaired person may appreciate a verbal description of the layout, including where people are sitting in relation to the candidate. A wheelchair user may want to transfer to a chair.
 - If a candidate has a sign language interpreter, he or she will want the interpreter to be clearly visible and positioned near the interviewer.
 - Address the candidate directly, even if sign language interpreters or personal assistants are present.
 - If the candidate has trouble understanding you, enunciate clearly, but do not shout.
 - If the candidate uses a wheelchair, do not lean on the wheelchair when talking to her or him. The wheelchair is part of the candidate's personal space.
 - If the candidate has a service animal, do not touch the animal or make noises to it without permission.
 - It is fine to offer assistance, but be prepared to have that offer declined.
7. When conducting the interview:
 - Follow the same basic format with all candidates, recognizing that some candidates may require additional time.
 - Encourage candidates to demonstrate their expertise, achievements, and individuality.
 - Identify yourself when speaking. This is particularly helpful for candidates with visual impairments.
 - Communication styles may differ. For example, candidates with speech impairments should be given time to complete their thoughts.
 - It is illegal to ask about the nature or severity of a candidate's disability or the accommodations he or she would require in the workplace. Some candidates may make the choice to discuss their disability status. The negotiation of specific

- workplace accommodations is not part of a job interview.
- All job candidates should be given an opportunity to discuss their pedagogical and research strategies.
8. When organizing itineraries of campus visits:
- All candidates appreciate campus visits being designed humanely.
 - Take into account the rigors of travel.
 - Plan the schedule with adequate time for breaks and a good night's rest.
 - Keep in mind that some people have difficulty walking up steep hills or over long distances. Plan transportation options accordingly.
 - If you entertain the candidate off campus, be sure that restaurants and their bathrooms are accessible.
9. When scheduling interviews on campus:
- Know the location of the following: disabled parking spaces; ramps and other accessible entrances; accessible restrooms, water fountains, and telephones; elevators. Ensure that the interview rooms are accessible. It is important for wheelchair users to be able to get into the room and to be able to move around.
 - If the candidate is to teach a class, make sure such features of the classroom as its technology, platforms, blackboards, and lecture podiums are accessible. Some candidates sit while teaching or lecturing.
10. Advocacy
- Many schools are centralizing disability services; consider suggesting this to your provost in the interest of creating a more welcoming and just academic community. Be prepared to provide information on disability resources for faculty members.

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Appendix C: Litigation over Dismissal of Faculty with Disabilities

BY LAURA ROTHSTEIN

The first three paragraphs below are adapted and updated from Laura Rothstein, "Disability Law and Higher Education: A Road Map for Where We've Been and Where We May Be Heading," Maryland Law Review 63 (2004): 101, 107, 122 (footnote references omitted). They are reprinted with Professor Rothstein's permission and are followed by her further analysis prepared for this subcommittee report.

The elimination of mandatory retirement, the difficulty of measuring performance for higher education faculty, and a shaky economy have combined to create an increasing number of challenges by faculty members claiming discrimination on the basis of disability. Faculty members have brought challenges in the context of employment and tenure, as well as promotion decisions. Although this development is part of a larger societal issue, the uniqueness of employment in an academic setting has required institutions and the courts to address these issues in an unusual context.

Factors requiring attention include the elimination of mandatory retirement and the challenges in measuring and documenting performance deficiencies. Uncertainties about the economy and whether retirement benefits will be sufficient have caused more people to delay retirement. The higher education setting gives aging faculty members

the opportunity to remain connected to a community of colleagues. This opportunity is particularly compelling considering the benefits of having an office and access to support services, such as long-distance telecommunications, clerical support, technology support, computer upgrades, and even travel funding.

An increasing number of cases involve faculty claiming disability discrimination. In these cases, the institution of higher education generally has prevailed because of its ability to prove that the adverse employment decision was a result of factors other than the disability. These cases illustrate, however, the importance of establishing essential functions and fundamental requirements for a program at the outset, and documenting deficiencies on a careful and ongoing basis. Although many institutions of higher education have improved their faculty evaluation procedures and

practices, those that have not may find themselves in messy and lengthy disputes.

It is not only faculty members reaching retirement who raise disability issues. The faculty member who becomes depressed, develops substance abuse problems, has cancer, or has some other condition that either affects (or is perceived potentially to affect) performance may raise concerns regardless of the seniority of the individual.

WHO IS “DISABLED”?

To be protected under disability discrimination law, the individual must be substantially limited in one or more major life activities, have a record of such a limitation, or be regarded as having such a limitation. The ADA Amendments Act of 2008 and the 2011 Equal Employment Opportunity Commission Regulations make it clear that the definition of who is covered is to be broadly interpreted. The result is that in most cases, a dispute about discriminatory treatment should not focus on whether the faculty member meets the definition of “having a disability.” Instead, the focus should be on whether the institution has established the essential requirements of the program and whether the faculty member is otherwise qualified to carry those out. This assessment should take into account reasonable accommodation and should involve an interactive process.

The case of *Wynne v. Tufts University School of Medicine* provides guidance about judicial deference. Although the case is in the context of an accommodation for a student, its reasoning is relevant to faculty settings as well. The court held that in cases involving modifications and accommodation, the burden is on the institution to demonstrate that relevant officials within the institution considered alternative means; weighed their feasibility, cost, and effect on the program; and came to a rationally justifiable conclusion that the alternatives would either lower standards or require substantial program alteration.

WHEN WILL MISCONDUCT OR DEFICIENCIES BE IN QUESTION?

For both tenure-track and contract faculty members, an annual evaluation process can raise issues of misconduct and deficiencies. These issues can also arise when granting raises, sabbaticals, or research support. Post-tenure review, more common on campuses today, may also highlight concerns. And, of course, promotion and tenure decisions are occasions for evaluation of performance. A termination for cause at any point may result from claimed misconduct or deficiencies.

Deficiencies that may raise concern could include the inability to teach a full load. Student evaluations (even with their limitations) might raise concerns about the faculty member’s performance in class. For example, several students might comment that the faculty member seemed frequently impaired in the classroom—perhaps by a controlled substance or perhaps because of a psychological or health condition. The faculty member may not turn in grades in a timely manner or meet with students according to expected norms. The faculty member may not meet publication or other scholarship and productivity expectations. Or there may be off-the-job conduct, such as drunk driving or inappropriate behavior, that reflects poorly on the institution. A faculty member may simply not be able to interact with other colleagues in required committee and other service responsibilities.

Whenever there is a deficiency (or perceived deficiency), one of the questions that must be answered is whether the expectations were clearly stated in terms of employment or whether they were implied. Does the faculty member’s appointment letter state what is required in terms of teaching, research, and service? If not, what documents are incorporated by reference? Did the faculty member have reasonable notice of deficiencies? These questions are important for establishing the “essential functions” of the position.

REASONABLE ACCOMMODATIONS

The reported judicial decisions involving faculty members generally present fact patterns where the faculty member’s performance was deficient, and the courts rarely discuss whether reasonable accommodations might have been provided. The types of accommodations that should be considered in appropriate cases, however, might include adjustments in teaching times, leaves of absence (paid or unpaid, depending on institutional policy), extension of the “tenure clock,” reduction in committee responsibilities for a semester, and other adjustments.

The challenge in finding good guidance on appropriate accommodations is that faculty members do not produce widgets, and establishing the exact requirements, expectations, and norms is quite challenging. While institutions have improved in developing consistent policies and expectations, faculty members may have been appointed, tenured, renewed, and promoted under old rules that have been changed.

WHAT OTHER LEGAL ISSUES MUST BE CONSIDERED?

In addition to disability discrimination requirements under the Americans with Disabilities Act, the Rehabilitation

Act, and state law, several other laws must be considered when looking at faculty performance deficiencies that might be related to health or disabling conditions. The Family and Medical Leave Act provides for leave if certain conditions are met. Privacy policies under the Health Insurance Portability and Accountability Act allow faculty members to protect certain information, although the faculty member may need to waive that privacy (at least for limited purposes) in a dispute where the faculty member is claiming discrimination or claiming that the deficiency was related to the disability. And, of course, university internal personnel policies, including all faculty review procedures, must be followed.

The faculty member who can show that policies were followed inconsistently may have a claim of discrimination. For example, routinely granting extended leaves or special teaching accommodations for faculty members who do not have disabilities, but not for those who do, could be a violation of discrimination laws.

FACULTY DISMISSAL

In the context of a faculty dismissal process where there may be an issue of disability, while it is humane to take into account the potential stigma and privacy issues of a faculty member, it would probably violate the Americans with Disabilities Act and the Rehabilitation Act to have a mandatory process for termination based on a health or disability issue. While it might be appropriate to provide a faculty member an option of addressing the issue outside of the ordinary termination process, it is problematic to require it.

The increasing number of faculty members with disability issues should highlight for institutions the importance of developing consistent and appropriate procedures for termination and for addressing disability issues in other employment decision making. ■