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Brief & Memorandum

On the Rights of a Medical School Student with Learning Disabilities

To Receive Reasonable Accommodations

August 23, 2002

by

Curt L. Sytsma

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The Legal Center for Special Education

Brief and Memorandum

Date: August 23, 2002

From: Curt L. Sytsma, Legal Director

The Legal Center for Special Education

The stance currently taken by The Medical School causes our agency considerable concern. Stripped to its essentials, The Medical School's argument is that Polly Student does not have a "mental condition" which qualifies as a "substantial disability" because her general intelligence and ability to learn exceed that of the average individual in the general population. Since no individual would be qualified to attend medical school unless their intelligence and learning ability exceeded average, The Medical School's argument would, if accepted, effectively eviscerate any and all legal requirements for accommodations for medical students with learning disabilities. There are several sound legal reasons why this outcome, and the argument which produces this outcome, cannot be accepted.

The Legal & Factual Foundation for Polly Student's Claim that She is Disabled Within the Meaning of Title III of the ADA & Section 504 of the Rehabilitation Act.

"In any claim of discrimination brought under the Disabilities Act or the Rehabilitation Act, a plaintiff must first establish that he [or she] has a 'disability.'" Pacella v. Tufts University School of Dental Med., 66 F. Supp. 2d 234, 237-38 (D. Mass. 1999) (quoting Tardie v. Rehabilitation Hosp. of Rhode Island, 168 F.3d 538, 541-42 (1st Cir. 1999)); see also, e.g., Olson v. Dubuque Community School District, 137 F.3d 609, 611 (8th Cir. 1998); Jacobsen v. Tillmann, 17 F. Supp. 2d 1018, 1024 (D. Minn. 1998). Accordingly, in order for Polly Student to prevail in her discrimination claim, she must prove a "disability" within the meaning of the law. This issue is of particular importance and will receive extended consideration in this Memorandum because the The Medical School has taken the position that Polly is not protected by the anti-discrimination provisions of the ADA and Section 504. As the University wrote on October 6, 2000, "we do not believe that the documentation which has been submitted by Ms. Student supports the existence of a disability which must be accommodated from a clinical or legal perspective."

Ms. Student’s burden of proving a Section 504/ADA disability is a tripartite burden. “Under both acts, a disability is defined as ‘a physical or mental impairment that substantially limits one or more of the major life activities of such individual.’” Pacella v. Tufts University School of Dental Med., 66 F. Supp. 2d 234, 237-38 (D. Mass. 1999) (quoting 42 U.S.C. § 12102(2)(A), & 29 U.S.C. § 705(20)(B)(i)); see also, e.g., Olson v. Dubuque Community School District, 137 F.3d 609, 611 (8th Cir. 1998); Jacobsen v. Tillmann, 17 F. Supp. 2d 1018, 1024 (D. Minn. 1998); Pottgen v. Missouri State High School Activities Association, 857 F. Supp. 654, 662 (E.D. Mo. 1994). Accordingly, “Plaintiffs’ evidence must satisfy three distinct factors: (1) [the student] has a physical or mental impairment; (2) which affects a major life activity; (3) to a substantial degree.” Bercovitch v. Baldwin School, Inc., 133 F.3d 141, 155 (1st Cir. 1998).

To insure that each of the three essential factors of a “disability” has been fully discussed, this Memorandum will ask and answer three distinct questions: First, does Ms. Student have a “physical or mental impairment”? Second, does Ms. Student’s impairment affect a major life activity? Third and finally, does the impairment “substantially limit” a major life activity?

Part A. Does Ms. Student have a “physical or mental impairment”? A learning disability is, as a matter of law, a “physical or mental impairment” within the meaning of the ADA and Section 504. See, e.g., Meekison v. Voinovich, 17 F. Supp. 2d 725, 731 (1998) (“this Court finds that, as a matter of law, dyslexia qualifies as an ‘impairment’ under the ADA”); Gonzales v. National Bd of Medical Examiners, 225 F.3d 620, 626 (6th Cir. 2000) (noting that the Title III Regulations define “physical or mental impairment” as including “specific learning disabilities”); Jacobsen v. Tillman, 17 F. Supp. 1018, 1024 (D. Minn. 1998) (“Plaintiff’s dyslexia and dyscalculia are learning disabilities within the ADA’s contemplation.”) Accordingly, if Polly Student has a learning disability, she has a “physical or mental impairment” within the meaning of both Section 504 of the Rehabilitation Act of 1973 and Title III of the ADA.

In an April 2000 “Report of Neuropsychological Evaluation and Psychiatric Evaluation,” duly submitted to The Medical School on August 8, 2000, two of the nation’s foremost experts in the field—Mary Coakley-Welch, a Licensed Psychologist and a Clinical Neuropsychologist, and Edward M. Hallowell, M.D—officially diagnosed Polly Student as having a “Learning Disorder,

N.O.S., (DSM-IV Code 315.9).” Their Report was based on a detailed history and records review, an intake interview, and extensive neuropsychological testing. Dr. Coakley-Welch reaffirmed this diagnosis in a letter dated January 18, 2001. If the testimony of experts who specialize in diagnosing learning disabilities is accepted, therefore, Ms. Student has a “physical or mental impairment” within the meaning of the ADA and Section 504 as a matter of law.

The definitions of specific learning disabilities, however, are in serious flux, and different definitions are used by different authorities. As the U.S. Court of Appeals for the Eighth Circuit has recent noted, “[e]ven experts disagree as to the correct definition of the term ‘dyslexia.’” Stern v. University of Osteopathic Medicine and Health Sciences, 220 F.2d 906, 909 (8th Cir. 2000); see also, e.g., Town of Burlington v. Department of Education, 736 F.2d 773, 793 (1st Cir. 1984), aff’d, 471 U.S. 359, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985) (stating that the definition of “dyslexia” is “in flux.”) Accordingly, there may be some authorities who assert that Ms. Student’s impairments do not fit the definition of one of the classically-defined learning disabilities. See, e.g., October 28 and 29, 1999 Reports by Painter, Guyer, & Painter of Marshall University.

As one court has recent noted, however, there is an “imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis.” See Bercovitch v. Baldwin School, Inc., 133 F.2d 141, 155 n.18 (1st Cir. 1998) (quoting DSM-IV at xxii). An impairment, therefore, need not fit one of the classical definitions of a learning disability in order to constitute an “impairment” within the meaning of the ADA and Section 504 of the Rehabilitation Act. McGuinness v. University of New Mexico School of Medicine, 170 F.3d 974, 978 (10th Cir. 1998) (“According to the Supreme Court, an impairment need not appear on a specific list of disorders to constitute a ‘disability’”); see also Bragdon v. Abbott, 524 U.S. 624, 633, 118 S. Ct. 2196, 2202, 141 L. Ed. 2d 540 (1988). Accordingly, **if Ms. Student has a physical or mental impairment that substantially limits one or more of her major life activities, then she has a disability within the meaning of the governing federal laws—and this is true whether or not the impairment is or is not regarded as a classically-defined learning disability.**

On the record before us, Ms. Student has two conditions or characteristics that must be regarded as impairments. First she has a condition that severely affects her ability to engage in rote

memorization activities. According to the WJ-R COG test results reported by Marshall University, Ms. Student's ability to memorize sentences (the ability to memorize concepts with meaning) is in the 81st percentile, but her ability to memorize names (the ability to engage in rote memorization) is in the *second* percentile, meaning that she performs worse than 98 percent of the population. According to the authorities at Marshall University, Ms. Student's ability to engage in rote memorization activities is equivalent to that of a four-year-old child or a grade equivalent of the first month of Kindergarten. These results were confirmed by the additional testing performed by Drs. Coakley-Welch and Hallowell: They concluded that Ms. Student's ability to engage in rote memorization was "moderately to severely *impaired*." (Emphasis supplied). "Memory for the list after a long delay was severely impaired, again with some benefit from categorical cues, improving to the moderately impaired range." Although there may not be a classically defined disability that is labeled a "Rote Memorization Disability," Ms. Student clearly has an impairment that falls with the comprehensive definition contained in both Section 504 and the ADA.

The extensive testing of Ms. Student has revealed a second characteristic or condition that warrants the label of "impairment." This condition severely affects the speed with which Ms. Student can process information through reading. According to the WJ-R COG test results reported by Marshall University, her "processing speed" was in the fifth percentile, which is worse than 95% of the population; this is a grade equivalent, for a post-college medical student, of 5.7! According to the Nelson-Denny Scores also reported by Marshall University, her reading speed was in the 6th percentile. Not surprisingly, this was listed as a "significant weakness." In assessing these test results, Doctors Coakley-Welch and Hallowell specifically stated that Ms. Student was functioning "in the mildly to moderately impaired range." Significantly, no authority who has actually seen Ms. Student or tested her abilities has contradicted either of these findings—either the finding of a condition that affects her rote memorization skills or the finding of a condition that affects her reading processing speed.

As early as 1980, in a landmark case often cited in the ADA and Section 504 literature, the United States District Court for the District of Hawaii observed as follows:

Given the legislative history of the Act, persons of common intelligence should have had fair warning that the term impairment meant "any condition which weakens,

diminishes, restricts, or otherwise damages an individual's health or physical or mental activity." That is a broad, but entirely logical way of viewing the meaning of the term.

E.E. Black, LTD. v. Marshall, 497 F. Supp. 1088, 1098 (D. Hawaii 1980). This definition of "impairment," which is based upon the ordinary and popular meaning of the word and which has never been contradicted or altered by any court, has immediate and conclusive importance on the issue of whether Ms. Student has an impairment.

- The inability to engage in rote memorization activities beyond the Kindergarten level very clearly "weakens, diminishes, restricts, or otherwise damages an individual's . . . mental activity," especially when that individual is a college graduate.
- A reading processing speed worse than more than 90% of the population and equivalent to that mastered by the average fifth grader also, and equally clearly, "weakens, diminishes, restricts, or otherwise damages an individual's . . . mental activity."

In short, the testing conducted by all¹ experts on Ms. Student compels the conclusion that she has "impairments" within the meaning of the ADA and Section 504.

Part B: Does Ms. Student's impairment affect a major life activity? As the Supreme Court of the United States has recently ruled, "The statute is not operative, and the definition not satisfied, unless the impairment affects a major life activity." Bragdon v. Abbott, 524 U.S. 624,

¹ For several important reasons, this Memorandum will not dwell on Dr. Professor's cursory review of the testing records. (1) He has never met Ms. Student or conducted any tests on Ms. Student. (2) In a conversation with the undersigned shortly after the event, Dr. Professor made it clear that he could neither confirm nor deny any diagnosis unless and until he had meet Ms. Student and conducted his own tests. (3) Dr. Professor's review of the records was so incomplete or cursory that he based his final conclusions on allegations that are easily refuted—such as the unsupported and unsupportable allegation that Ms. Student is unusually gifted in rote memorization skills (a characteristic of individuals with nonverbal learning disorders). A more lengthy refutation of Dr. Professor's conjectures regarding a person he has never met was prepared by the Hallowell Center on January 18, 2001 and is attached hereto.

637, 118 S. Ct. 2196, 141 L. Ed. 2d 540 (1988). Learning, of course, is a major life activity within the meaning of the federal laws. Thus, the U.S. Congress has assigned the task of writing the regulations under Title III of the ADA to the Department of Justice. As the U.S. Court of Appeals for the Sixth Circuit has recently noted, “The DOJ’s regulations . . . define ‘major life activities’ as including ‘walking, seeing, hearing, speaking, breathing, **learning**, and working.” Gonzales v. National Board of Medical Examiners, 225 F.3d 620, 626 (6th Cir. 2000) (quoting 28 C.F.R. § 36.104(2)) (emphasis in original); see also Bercovitch v. Baldwin School, Inc., 133 F.3d 141, 155 (1st Cir. 1998) (“We agree that learning is a major life activity.”)

The list of major life activities promulgated by the U.S. Department of Justice is “merely illustrative, not exhaustive.” Gonzales, 225 F.3d at 626; see also Cehr v. Northeast Ohio Alzheimer’s Research Center, 155 F.3d 775, 780-81 (6th Cir. 1998). The courts have included reading as a major life activity within the meaning of the federal anti-discrimination laws. Gonzales, 225 F.3d at 626. Accordingly, both learning and reading are major life activities within the meaning of Section 504 and the ADA.

Part C: Does Ms. Student’s impairment “substantially limit” her major life activities of learning and reading? “On the facts of a specific case, a plaintiff . . . may have a mental impairment within the meaning of the statute. But that impairment must also limit a major life activity to a substantial degree.” Bercovitch v. Baldwin School, Inc., 133 F.3d 141, 155 (1st Cir. 1998); see also Meekison v. Voinovich, 17 F. Supp. 2d 725, 731 (S.D. Ohio 1998). As the Supreme Court of the United States has observed, “The final element of the disability definition . . . is whether [the plaintiff’s impairment] was a substantial limit on the major life activity she asserts.” Bragdon v. Abbott, 524 U.S. 624, 639, 118 S. Ct. 2196, 141 L. Ed. 2d 540 (1988). Several cases have turned on this issue, and it is likely that Polly Student’s claims will turn on this issue as well. See, e.g., Gonzales v. National Board of Medical Examiners, 115 F.3d 620, 626 (6th Cir. 2000) (“this case turns on the key phrase ‘substantially limits.’”)

As a basic proposition, an impairment “substantially limits” a major life activity if it limits that activity to a “considerable” or “large degree.” Sutton v. United Air Lines, Inc., ___ U.S. ___, ___, 119 S. Ct. 2139, 2150 (1999) (“The ADA does not define ‘substantially limits,’ but

‘substantially’ suggests ‘considerable’ or ‘specified to a large degree.’”); see also Gonzales v. National Board of Medical Examiners, 115 F.3d 620, 627 n.12 (6th Cir. 2000) (“The Supreme Court’s review of these definitions confirms that the ADA addresses impairments that limit an individual, not in a trivial or even a moderate manner, but in a major way, to a considerable amount, or to a large degree.”) The Supreme Court of the United States has provided the following additional guidance concerning the meaning of “substantially limits”: “The Act addresses substantial limitations on major life activities, not utter inabilities. . . . **When significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable.**” Bragdon v. Abbott, 524 U.S. 624, 641, 118 S. Ct. 2196, 141 L. Ed. 2d 540 (1988).

These general guidelines notwithstanding, it has been said that a review of case law under Section 504 of the Rehabilitation Act “indicates that courts have not fashioned a manageable interpretation” of the phrase “substantially limits.” Price v. National Board of Medical Examiners, 966 F. Supp. 419, 424 (S.D. W.V. 1997); see also James M. Zappa, Note, The Americans with Disabilities Act of 1990: Improving Judicial Determinations of Whether an Individual is “Substantially Limited”?, 75 Minn. L. Rev. 1303, 1314 (1991) (“Perhaps unsurprisingly, courts have not been able to agree on the parameters of ‘substantially limits.’”)

In the field of impairments affecting learning, including the traditional learning disabilities, there are at least two competing lines of authorities regarding the proper definition of “substantially limits.” The first line of authorities uses an Individualized Inquiry Standard and concludes that an impairment “substantially impairs” learning if it causes a severe discrepancy between achievement and ability. For example, one recent court found that a Plaintiff was disabled within the meaning of the ADA because she “has demonstrated that her impairment, dyslexia, significantly restricted her ability to perform the reading and writing tasks associated with the class of positions available in the psychology field as compared to the average person **with comparable qualifications** in the same job.” Meekison v. Voinovich, 17 F. Supp. 2d 725, 731 (S.D. Ohio 1998) (emphasis supplied).

The second line of authorities uses a Most People Standard and concludes that a person is not disabled within the meaning of the ADA unless their impairment limits a major life activity to a

greater extent than is the case with “most people.” For example, a U.S. District Court from West Virginia recently ruled that “[t]he comparison to ‘most people’ is required to determine whether a learning disability rises to the level of a disability under the ADA.” Price v. National Board of Medical Examiners, 966 F. Supp. 419, 426 (S.D. W.V. 1997). Under the Most People Standard, “in order for an individual to establish that he or she is ‘substantially limited’ in a major life activity, that person must show a limitation in their ability to perform a life function **as compared to most people.**” Id. at 427 (emphasis supplied)

Given this conflict in authorities, this Memorandum will document two alternative reasons why Polly Student has submitted evidence sufficient to satisfy the “substantially limits” prong of the definition of disability. First, we will set forth a series of compelling reasons why the U.S. Court of Appeals for the Eighth Circuit should conclude that the Individualized Inquiry Standard should be adopted over the competing Most People Standard. Second, we will document that, even under the more restrictive Most People Standard, Polly Student’s impairments substantially limit her major life activities of reading and learning.

Although the Eighth Circuit has yet to address the issue, there are several compelling reasons why that Court should reject the Most People Standard in favor of the Individualized Inquiry Standard. The first reason is that both the ADA and Section 504 dictate an individualized inquiry. As Chief Justice Rehnquist stated in 1998, “**It is important to note that whether respondent has a disability covered by the ADA is an individualized inquiry. The Act could not be clearer on this point.**” Bragdon v. Abbott, 524 U.S. 624, 657, 118 S. Ct. 2196, 141 L. Ed. 2d 540 (1988) (Rehnquist, C.J.) (emphasis supplied).

Section 12102(2) [of the ADA] states explicitly that the disability determination must be made “with respect to an individual.” Were this not sufficiently clear, the Act goes on to provide that **the “major life activities: allegedly limited by an impairment must be those “of such individual.”**

Id. (emphasis supplied).

The definition of disability set forth in the ADA was borrowed, virtually verbatim, from the Rehabilitation Act of 1973. “Because of the [Rehabilitation Act’s] prominence, Congress must

have considered both the language of the [Rehabilitation Act] and subsequent case law interpreting the [Rehabilitation Act], in drafting the ADA.” Zappa, *supra*, at 1311; *see also* Lorillard v. Pons, 434 U.S. 575, 580 (1978) (when Congress incorporates language *in haec verba*, it can be presumed that Congress had an awareness of the previous statute and the interpretations of that statute). Significantly, therefore, the landmark case interpreting the phrase “substantially limits” in the Rehabilitation Act prior to the incorporation of that phrase into the ADA’s definition of “disability” was E.E. Black, Ltd v. Marshall, 497 F. Supp. 1088, 1099 (D. Hawaii 1980).²

The Black decision unequivocally embraces and endorses the proposition that the determination of whether an individual has a disability must be an individualized analysis. Thus, a concert pianist who develops arthritis of the hands may well be disabled by the impairment—even if it were true that “most people” would not be disabled by such an impairment. Or to choose an example written by the U.S. District Court in Black, “A person . . . who has obtained a graduate degree in chemistry, and is then turned down for a chemist’s job because of an impairment, is not likely to be heartened by the news that he can still be a streetcar conductor. . . .” E.E. Black, 497 F. Supp. at 1099.

The definitions contained in the Act are personal and must be evaluated by looking at the particular individual . . . It is the impaired individual that must be examined, and not just the impairment in the abstract. . . . [T]he individual himself must be considered. His own job expectations and training must be taken into account.

E.E. Black, Ltd v. Marshall, 497 F. Supp. 1088, 1099, 1101 (D. Hawaii 1980). In short, the ADA and Section 504 require an individualized analysis that is inconsistent with a cookie-cutter “most people” standard.

The second reason why the U.S. Court of Appeals for the Eighth Circuit should adopt the Individualized Inquiry Standard is that the Most People Standard is in conflict with the governing federal regulations, which are the “Postsecondary Education” Regulations set forth in Part E of Part 104 of Chapter 1 of the Regulations promulgated by the Office for Civil Rights of the United States Department of Education. *See* 34 C.F.R. §§ 104.41-47.

² “In the years following Black, several courts have used its formula to interpret ‘substantially limits.’ The Black decision also became part of the ADA’s legislative history.” Zappa, *supra*, at 1320 & n.89.

These long-standing Regulations were promulgated under the authority of Section 504 of the Rehabilitation Act of 1973 and are of particular importance for two reasons: First, they are the only regulations that specifically address and define discrimination in the context of postsecondary schools such as the The Medical School. Second, no less an authority than the Supreme Court of the United States has specifically ruled that the pre-existing regulatory interpretations promulgated by federal agencies pursuant to Section 504 of the Rehabilitation Act are definitive sources regarding the meaning of parallel provisions in the ADA. In the words of Justice Kennedy,

The ADA’s definition of disability is drawn almost verbatim from the definition of ‘handicapped individual’ included in the Rehabilitation Act of 1973 Congress’ repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations.

In this case, Congress did more than suggest this construction; it adopted a specific statutory provision in the ADA directing as follows: “Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 or the regulations issued by Federal agencies pursuant to such title.” **The directive requires us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act.**

Bragdon v. Abbott, 524 U.S. 624, 631-32, 118 S. Ct. 2196, 141 L. Ed. 2d 540 (1988) (quoting 42 U.S.C. § 12201(a)) (emphasis supplied & numerous supporting citations omitted). Lest there be any doubt regarding the Supreme Court’s meaning, Justice Kennedy later repeated that “**the ADA must be construed to be consistent with regulations issued to implement the Rehabilitation Act.**” Id. at 638 (emphasis again supplied).

The regulations pertaining to Postsecondary Education are set forth in 34 C.F.R. Part 100, Subpart E (§§104.41 *et seq.*) The postsecondary education regulations define the academic adjustments that must be made to ensure against discrimination—including the very modifications that Polly Student was denied in the instant case. *See, e.g.*, 34 C.F.R. § 104.44(a) (“Modifications may include changes in the length of time permitted for the completion of degree requirements. . . .”) These regulations are clearly designed to accommodate the needs of students with learning disabilities, and they would be rendered meaningless if The Medical School’s current argument were accepted.

Equally important, in defining learning disabilities for purposes of the anti-discrimination provisions of Section 504, the U.S. Department of Education chose to “interpret the term as it is used in section 602 of the Education of the Handicapped Act, as amended [currently known as the Individuals with Disabilities Education Act, codified at 20 U.S.C. §§ 1400 *et seq.*].” 34 C.F.R. Appendix A at 358 (quoting from 45 F.R. 30936, May 9, 1980, as amended at F.R. 52141, Dec. 19, 1990). **Significantly, under the definition adopted by the U.S. Department of Education in the educational context (including the postsecondary educational context), the existence of a qualifying learning disability must be determined by reference to the existence of a substantial or “severe discrepancy between an individual [student]’s ability and his or her performance level. . . . [U]nderachievement is measured against the student’s own ability, and not against a normative performance standard.”** Thomas Hehir, Director, 23 IDELR 714, 718 (April 5, 1995). A copy of this administrative interpretation is attached to this letter.

All individuals have neurological weaknesses that affect their ability to learn. In the context of anti-discrimination laws, however, those weaknesses do not constitute a qualifying disability unless there is a “severe discrepancy between ability and achievement.” In other words, in the educational context, the very definition of learning disability incorporates and satisfies the “substantial disability” or “substantial impairment of a major life activity” standard. This definition also gives meaning and substance to the postsecondary educational regulations promulgated by the U.S. Department of Education. As the U.S. Supreme Court has recognized, “[w]hen administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.” *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998).

Significantly, in the vast majority of learning disability cases arising in the context of medical schools, the courts have expressly held or implicitly assumed that reasonable accommodations were required for students who had average and above average cognitive abilities, but whose abilities are impaired by learning disabilities. For example,

- In *Wynne v. Tufts University School of Medicine I*, 932 F.2d 19 (1st Cir. 1991) and *Wynne v. Tufts University School of Medicine II*, 976 F.2d 791 (1st Cir. 1991), the Court addressed the

issues of whether the school had offered reasonable accommodations. The First Circuit ruled that “there is a real obligation on the academic institution to seek suitable means of reasonably accommodating” a student with learning disabilities. 932 F.2d at 25.

- In *Ellis v. Morehouse School of Medicine*, 925 F. Supp. 1529 (N.D. Ga. 1996), The Medical School had “accommodated Ellis’s learning disability of dyslexia” by permitting a “decelerated first-year program, which allowed Ellis to complete his first year of medical school over two years.” 925 F. Supp. at 1547. The Court ruled that “Morehouse did not fail to reasonably accommodate Ellis’s disability.” *Id.*
- In *Kaltenberger v. Ohio College of Podiatric Medicine*, 162 F.3d 432 (6th Cir. 1998), the Court upheld a district court finding that “no reasonable trier of fact could conclude that the College failed to reasonably accommodate plaintiff’s disability.” 162 F.3d at 436.
- In *Zukle v. Regents of University of California*, 166 F.3d 1041 (9th Cir. 1999), the Court addressed the needs of a medical student with learning disabilities and ruled that, “under Rehabilitation Act regulations, educational institutions are required to provide a disabled student with reasonable accommodations to ensure that the institution’s requirements do not discriminate on the basis of the student’s disability.” 166 F.3d at 1046. In *Zukle*, The Medical School had offered the student the very accommodations that The Medical School has denied to Ms. Freedman. *Id.* at 1048.
- In *Stern v. University of Osteopathic Medicine and Health Sciences*, 220 F.3d 906 (8th Cir. 2000), the Eighth Circuit ruled that, after a medical student with learning disabilities had made a facial showing of needed accommodations, “The Medical School then had the burden of producing evidence to show why such an accommodation was not offered.” 220 F.3d at 908.

To summarize, in case after case, students with cognitive abilities equal to medical school admission were deemed to be entitled to reasonable accommodations for learning disabilities. This long line of case law cannot be reconciled with The Medical School’s current argument that the

only students entitled to accommodations are those whose cognitive abilities are below average, rendering them unqualified for medical school.

Even if we were to abandon the long-accepted definition of a qualifying learning disability in the educational context, however, **Ms. Student should still prevail under the variant legal standard that she must demonstrate an impairment that affects her learning to a greater degree than the average person.** On the record before us, Ms. Student has two conditions or characteristics that must be regarded as learning disabilities entitling her to reasonable accommodations. First she has a condition that severely affects her ability to engage in rote memorization activities. According to the WJ-R COG test results reported by Marshall University, Ms. Student's ability to memorize sentences (the ability to memorize concepts with meaning) is in the 81st percentile, but her ability to memorize names (the ability to engage in rote memorization) is in the *second* percentile, meaning that she performs worse than 98 percent of the population. According to the authorities at Marshall University, Ms. Student's ability to engage in rote memorization activities is equivalent to that of a four-year-old child or a grade equivalent of the first month of Kindergarten.

These results were confirmed by the additional testing performed by Drs. Coakley-Welch and Hallowell: They concluded that Ms. Student's ability to engage in rote memorization was "moderately to severely *impaired*." (Emphasis supplied). "Memory for the list after a long delay was severely impaired, again with some benefit from categorical cues, improving to the moderately impaired range." Although there may not be a classically defined disability that is labeled a "Rote Memorization Disability," Ms. Student clearly has an impairment that falls with the comprehensive definition contained in Section 504 and reflected in the Iowa Civil Rights Act.

The extensive testing of Ms. Student has revealed a second characteristic or condition that warrants the label of "impairment." This condition severely affects the speed with which Ms. Student can process information through reading. According to the WJ-R COG test results reported by Marshall University, her "processing speed" was in the fifth percentile, which is worse than 95% of the population; this is a grade equivalent, for a post-college medical student, of 5.7! According to the Nelson-Denny Scores also reported by Marshall University, her reading speed was in the 6th

percentile. Not surprisingly, this was listed as a “significant weakness.” In assessing these test results, Doctors Coakley-Welch and Hallowell specifically stated that Ms. Student was functioning “in the mildly to moderately impaired range.”

A case that demonstrates the importance of the facts cited above is *Gonzales v. National Board of Medical Examiners*, 225 F.3d 620 (6th Cir. 2000). In *Gonzales*, the Court addressed professional examinations under Title III of the ADA, not the specific obligations applicable in the educational context. Even so, in addressing whether Mr. Gonzales had a learning disability that qualified him for reasonable accommodations, the Court did not require that he prove that his overall cognitive abilities were below average—only that he had impairments substantially affecting learning. Mr. Gonzales had performed in the “impaired range” in only one area, “memory span.” 225 F.3d at 628. Expert testimony revealed, however, that this one test result was very likely a “chance occurrence,” and that the student “clearly demonstrated average ability in memory span.” *Id.*

No authority has suggested that the specific cognitive impairments identified in the extensive testing of Ms. Student were “chance occurrences,” and no authority has suggested that she has “clearly demonstrated average ability” in rote memorization skills or reading speed. Accordingly, even under the strict *Gonzales* definition alleged to be applicable in non-educational cases, Ms. Student has demonstrated that she has a learning disability and is entitled to reasonable accommodations.