How Would Blackstone Teach Today's Law Students With Learning Disabilities?: A Proposal

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Abstract

Although Sir William Blackstone would not have known if he had been lecturing to students with learning disabilities, today's law professors are. Law schools are legally required to accommodate students with learning disabilities unless the requested accommodation would alter the fundamental nature of the program. Courts give great deference to academic institutions in their determinations of what would alter the fundamental nature of the program; however, courts do expect law schools to deliberate and consider alternatives to the program requirements and to reach a rationally justifiable conclusion that the available alternative will either result in lower academic standards or require substantial alteration of the program.

Law faculty who clearly articulate the goals and objectives of each of their courses will be better prepared to meet this legal test. Moreover, they will be better prepared to accommodate requests of students. Those who are deliberate about their goals are able to consider alternative means of helping students learn the material and alternative means of assessing student performance. In this way, these faculty members will avoid law suits. Law schools should institute institutional incentives to encourage faculty members to do just that. Law school administrators must educate faculty members and others about the legal requirements and types of disabilities to be accommodation. Further, they might adopts such incentives as financial rewards and released time for faculty who are interested in more clearly defining their educational goals and methods.

I. Introduction

William Blackstone would not have known if he had been lecturing to students with learning disabilities, but students with learning disabilities are in today's law school classrooms. In too many cases, however, legal educators might well be in the age of Blackstone, because they are unprepared to respond to the needs of these students. While courts are willing to defer to the academic expertise of institutions such as law schools, courts do expect law schools to carefully respond to the requests of these students.[1] This paper will discuss the need for institutions and faculty to act.

Part II of this paper explores Blackstone's views on legal education and some views applicable to this issue. It also provides background concerning students with learning disabilities and their impact on law schools. Part III offers the legal background to the issue, including the deliberative process courts expect of postgraduate institutions. Part IV explores

[1] For a criticism of the amount of deference courts are according to higher education, see Douglas K. Rush, *Through the Looking Glass: Judicial Deference to Academic Decision-Makers*, IX U. RICH. J. L. PUB. POL'Y. __ (2006).

that deliberative process as applied to typical requests for law school accommodations. Part V proposes two tracks for law faculty and law schools to better prepare them for law students with disabilities.

II. Background

A. Blackstone on Legal Education

When William Blackstone was preparing to lecture at Oxford, the two major means of legal education were apprenticeships and Inns of Court. Blackstone criticized apprenticeships as emphasizing the practical at the expense of basic legal principles and criticized the Inns of Court for failing to provide sufficient supervision or guidance.[2] Blackstone proposed to place the study of law in the University. He offered a series of lectures to lay out a "general map of the law," stating the fundamental principles of law.[3] His goal was "to render the whole [of law] intelligible to the uninformed minds of beginners." [4] Blackstone's approach was "so ubiquitous and readable that he made it appear easy to learn law. … It was the very lucidity and conciseness of Blackstone that concerned advocates of more comprehensive legal education" in nineteenth century America.[5]

Blackstone argued for a fairly inclusive approach to legal education. A basic understanding of the law was necessary to those with considerable property, those who wrote their own wills, those who would serve as jurors, magistrates, judges, or legislators, those who conducted business, the nobility, clergy, physicians and those engaged in foreign commerce.[6]

Blackstone also showed some understanding of what we today would call psychology and learning theory. He understood that a novice to the study of law, overwhelmed at the beginning of his study by too much detail, would either "desert his studies or will carry

[2] William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND * 25-6, 32. *See also*, Brian J. Moline, *Early American Legal Education*, 42 WASHBURN L. J. 775 at 792 (2004). Blackstone's criticism of Inns is that they "had denigrated into little more than living and dining clubs where the student 'occasionally recited some meaningless exercises.' " *Id*. at 792.
[3] Blackstone * 27, 35.
[4] *Id.* * 35.
[5] Moline, *supra* note 2, at 791.
[6] Blackstone, *supra* note 2 * 7-15.

[them] heavily" resulting in despondence.[7] Thus, he opted to introduce students to the study of law by presenting the "general map of the law."[8]

B. Legal education Today and Learning Disabled Students

Blackstone may have had students with learning disabilities but he would not have known the concept. Today students with learning disabilities enter law school. The Law Student Admission Council reports a 100% increase in testing accommodations requests between 1990 and 1993, with 62% of those requests based on learning disability.[9] A 1995 study indicated that law schools had received almost 600 requests for accommodations from students with learning disabilities.[10] Likewise, bar examiners regularly report receiving requests for accommodations on the bar examination based on learning disabilities.[11] If anything, because of the fear of stereotyping, the numbers of students who request accommodations is understated.[12]

C. How Learning Disabilities Impact Law Students

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[7] *Id.* * 35.
[8] *Id.*
[9] Linda F. Wightman, Test Takers with Disabilities: A Summary of Data from Special Administrations of the LSAT. LSAC Research Report Series. (1993).
[10] A 1995 study of 80 law schools indicated that they had received 1187 requests for accommodations, with 54%, or almost 600, of them coming from learning disabled students. Donald H. Stone, *The Impact of the Americans with Disabilities Act on Legal Education and Academic Modifications for Disabled Law Students: An Empirical Study*, 44 U KAN. L. REV. 567 at Appendix A (1995). Earlier, in 1989-90, 147 law schools identified 725 disabled students, of whom 235 were learning disabled. M. Kay Runyan & Joseph F. Smith, Jr. *Identifying and Accommodating Learning Disabled Law School Students*, 41 J. LEGAL EDUC. 317 at 320 (1991). The increase between those years and the on-going increase is explained by Dean Laura Rothstein as resulting from the "special education mandates, a greater awareness of rights of individuals, and increased research and understanding about learning disabilities." Laura F. Rothstein, *Higher Education and the Future of Disability Policy*, 52 ALA. L. REV. 241 at 249 (2000). A University of Washington on-line faculty resource on disabilities reports that there are 428,000 postsecondary undergraduates who identify themselves as disabled, with 45% of those identifying as learning disabled, www.washington.edu/doit/Faculty/Strategies/Disability (last visited May 9, 2006).
[11] A student may request an accommodation for the Multi-state Professional Responsibility Exam. (See National Conference of Bar Examiners, MPRE 2006 Information Booklet, 2006, www.ncbex.org (last visited May 9, 2006). A student may request accommodations for other portions of the exam by contacting the bar admission offices of the applicable jurisdiction.
[12] Alfreda A. Sellers Diamond, L.D. Law: The Learning Disabled Law Student as Part of A Diverse Law School Environment, 22 S.U.L. REV. 69 at 80-82 (1994).

A person with a learning disability experiences a discrepancy between his intellectual ability and actual performance in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematics comprehension, or mathematic reasoning.[13] In persons who do not have a learning disability and are of above average intelligence, all parts of the system by which parts of the brain communicate with each other and with sense and speech organs and other relevant body parts function particularly well.[14] In students with learning disabilities, one or more parts of the system do not function as efficiently or effectively as the other parts, likely due to a central nervous system dysfunction. Disorders included in the term learning disabilities include: "perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia."[15]

For example, a law student with dyslexia[16] may have high overall intelligence, but may be significantly limited in his ability to input information. He may take a long time to read but be able to perform adequately in class discussions. Conversely, a law student with aphasia[17] may have difficulty comprehending verbal information and her inability to follow and participate in class may be mistakenly viewed as unprepared, even though she is quite bright and well-prepared.

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[13] 20 U.S.C. § 1401 a (30) (2000). See also Kevin H. Smith, *Disabilities, Law Schools, and Law Students: A Proactive and Holistic Approach*, 32 AKRON L. REV. 1 at 13-19 (1999). Specific learning disability means a "disorder in [1] or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations."

[13] 20 U.S.C. § 1401 a (30) (2000).

[14] Kevin H. Smith, Disabilities, Law Schools, and Law Students: A Proactive and Holistic Approach, 32 AKRON L. REV. 1 at 16-17 (1999).

[15] 20 U.S.C. § 1401 a (30) (2000). The term learning disability does not include "a learning problem that is primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage." *Id.*

[16] Dyslexia is a learning disability in which an individual has "an impaired ability to read or understand what is read, aloud or silently, difficulty processing written or oral language and difficulty in sequencing and organizing information." Sellers, *supra* n. 12 at n. 14.

[17] Aphasia is a learning disability in which individuals "experience an inability to understand the meaning of spoken words and may not be able to give meaning to words heard." *Id.*

D. Can Learning Disabled Students Succeed in Law School and Law Practice?

Judge Jeff Gallet has written of his struggles through law school, without being diagnosed as learning disabled. After passing the bar, he learned that he had dyslexia, dysgraphia,[18] and dyscalculia.[19] Yet he has had a successful law practice, serves as a judge, has written five books, forty articles, and 30 published opinions, lectures and teaches law.[20] As Gallet says, "[a]lthough I read differently than you, I read very efficiently."[21] Likewise, "I write very efficiently. But I am always going to be a little different from the rest of you. Not better, not worse -- different."[22]

Other stories are reported in the literature including a lawyer who learned he was dyslexic after failing the bar.[23] Once diagnosed and accommodated, he passed the bar and earned a master's in law degree with a 3.9 grade point average.[24] He credits his success to working in advance of deadlines and expending more time in preparation.[25] Another law student was diagnosed and accommodated while in law school and earned a position as an associate at a prestigious law firm in Los Angeles.[26] He puts in long hours because he is a slow reader. He also stays well-organized in order to make the time he needs for reading.[27]

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[18] Dysgraphia is difficulty with handwriting. David Engel & Judge Jeffry Gallet, *The Judge Who Could Not Tell His Right From His Left and Other Tales of Learning Disabilities*, 37 BUFFALO L. REV. 739 at 743 (1998-99). See also, Sellers *supra* note 16.

[19] Dyscalculia refers to the inability do "do math in my head." Engel & Gallet, *supra* note 16. Diamond, *supra* note 12.

[20] Engel & Gallet, *supra* note 18. Gallet attributes his completing law school to a roommate who liked to discuss the material. *Id.* at 749 Through listening to the discussion, he learned the material. Gallet also states that he learned to write after graduation, thanks to another lawyer. He also uses a computer, calculator and Dictaphone to compensate for some of his disabilities. *Id.* at 750. Gallet notes that Albert Einstein, Thomas Edison, Nelson Rockefeller, Winston Churchill had learning disabilities. *Id*. at 744.

[21] *Id*. at 742.

[22] *Id.*

[23] Runyan, *supra* n. 10, at 335-337.

[24] *Id.* at 335-337.

[25] *Id.* at 335-337.

[26] *Id*. at 338-340.

[27] *Id.* at 338-340.

The literature has no longitudinal studies of the careers of law graduates with learning disabilities. Nor is there yet good data on the number of such lawyers.[28] There are sufficient lawyers with disabilities, including learning disabilities, that the American Bar Association Commission on Mental & Physical Disability Law has a Mentor Program for law students with disabilities.[29]

III. Meeting the Legal Challenge to Accommodate Students With Learning Disabilities

A. What the law requires

Law students with disabilities, including learning disabilities, are protected by either of two acts. Section 504 of the Rehabilitation Act of 1973[30] requires institutions of higher education to admit qualified handicapped persons and permit them to participate in the educational program. A qualified handicapped person under this Act is one who meets the academic and technical standards requisite to admission or participation in the education program or activity.[31] The university must operate the educational program in the most integrated setting appropriate.[32] A disability under the Rehabilitation Act refers to a physical or mental impairment substantially limiting one or more major life activity, including learning.[33] A learning disability is one type of disability under the Act.[34]

[28] The National Association for Legal Career Professionals reports that law firms do not collect information on lawyers with disabilities. www.nalp.org/content/index.php?pid=151 last visited May 9, 2006.
[29] An attorney with a disability may seek a mentor through the American Bar Association program. See www.abanet.org/disability/home.html (last visited May 9, 2006).
[30] 29 U.S.C. § 794(b)(A) (2000); 34 C.F.R. § 104.3(k)(2)(i) (2004). The Rehabilitation Act applies to programs receiving financial assistance, including universities, other postsecondary institutions, or a public system of higher education. *Id.*
[31] 34 C.F.R. § 104.3(1).
[32] 34 C.F.R. § 104.43(d).
[33] 29 U.S.C. § 794(a) (2000); 28 C.F.R. § 41.31(b)(2). (2004).
[34] 28 C.F.R. § 35.104(1)(i)(B).

The second act is the Americans with Disabilities Act (ADA).[35] Under Title II of the ADA, a person protected by the Act is one with a disability who with or without modification meets the essential eligibility requirements for participation in the program provided by the public entity.[36] Title III of the ADA requires postgraduate institutions to provide reasonable modifications in policies, practices or procedures, when such modifications are necessary unless the institution can demonstrate that making such modifications would fundamentally alter the nature of the program.[37] A person protected by the ADA has a physical or mental impairment that substantially limits one or more of the major life activities.[38] A disability has been defined as any mental or psychological disorder such as a specific learning disability.[39]

B. The Impact of the Law on Law Schools

Law schools have received requests for accommodation, pursuant to one or both of these Acts, including a waiver of a course required for graduation,[40] permission to attend law school on a part-time status, [41] extra time on exams or other assignments,[42] a lowering of the minimum grade point average required for graduation or good standing,[43] tape recorded lectures,[44] and tutoring, practice exams, and note-takers.[45] Bar examiners have granted examinees extra time[46] and quiet rooms without distractions. [47]

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[35] 42 U.S.C. § 12187 (2000). The Americans with Disabilities Act applies to law schools through its Title II which applies to public programs, including public colleges and universities. 42 U.S.C. § 12181 (2000). Title III of the ADA applies to places of public accommodation including private post-graduate educational programs. 42 U.S.C. § 12131 (2000).
[36] 42 U.S.C. § 12181.
[37] 42 U.S.C. § 12182(b)(2)(A)(ii).
[38] 42 U.S.C. § 12102(2)(A).
[39] 28 C.F.R. §104(2)(2004).
[40] Spychalsky v. Sullivan, 2003 WL 22071602 (E.D.N.Y. 2003).
[41] McGregor v. Louisiana University Board of Supervisors, 3 F.3 850 (5th Cir. 1993).
[42] *Id.*
[43] Aloia v. N.Y. Law Sch. 1988 Lexis 7769 (S.D.N.Y. 1988); Gill v. Franklin Pierce Law Ctr., 899 F.Supp. 850 (D.N.H.).
[44] In re DePaul University, 4 NDLR P 157 (1993).

C. No Fundamental Alterations in the Educational Program Required

A law school must not discriminate against a law student who is disabled by denying a reasonable request for an accommodation, unless granting that accommodation would fundamentally alter the nature of the academic program.[48] Courts and the U. S. Department of Education Office of Civil Rights[49] grant a great deal of deference to the academic decisions of institutions of higher learning concerning what constitutes a fundamental alteration of the program.[50]

The test for granting deference to academic institutions was defined in the *Wynne* case. [51] Steven Wynne, a medical student, failed eight of fifteen courses during his first year of medical school at Tufts University School of Medicine. Although he was dismissed, the Dean permitted him to repeat the first year.[52] The medical school paid for him to undergo a neuropsychological evaluation that showed Wynne had difficulties with multiple choice tests. During his second year, Wynne received several accommodations, including tutors, counselors, note-takers, and extended time on exams.[53] Wynne passed all but two courses, and on make-up exams, passed one of those. Due to his failure on the Biochemistry re-take exam, he was again dismissed.[54] Wynne sued Tufts, alleging that Tufts failed to provide a

[45] In re Hastings College of Law, 4 NDLR P 226 (1993).
[46] Bartlett v. N.Y. State Bd. Of Law Exam'rs, 2001 U.S.Dist Lexis. 1926 (S.D.N.Y. 2001); Rothberg v. Law Sch. Admissions Council, Inc., 300 F.Supp.2d 1093 (D.C.Col. 2004).
[47] Rothberg v. Law Sch. Admissions Council, Inc., 300 F.Supp.2d 1093 (D.C.Col. 2004).
[48] Wong v. The Regents of the Univ. of Cal., 192 F.3d 807, 818 (9th Cir. 1999).
[49] The Office of Civil Rights in the U. S. Department of Education is responsible for enforcing Section 504 of the Rehabilitation Act of 1973. 29. U.S.C. § 794. The Office conducts investigations of charges of discrimination under the Act and issues findings.
[50] Wong v. The Regents of the Univ. of Cal., 192 F.3d 807, 818 (9th Cir. 1999).
[51] *Id*.
[52] *Id.*
[53] *Id.*, 21.
[54] *Id*., 21-22.

reasonable accommodation under the Rehabilitation Act of 1973, as well as a state law claim.[55]

The trial court granted summary judgment to Tufts, based in part on the affidavit of the medical school dean. The dean stated in part: "The particular type and form of written multiple choice (Type K) examinations administered to … all first year Tufts students is expressly designed to measure a student's ability not only to memorize complicated material, but also to understand and assimilate it."[56] The Dean further stated that:

> in the judgment of the professional medical educators who are responsible for determining medical testing procedures at Tufts, written multiple choice (type K) examinations are important as a matter of substance, not merely of form. In our view, the ability to assimilate, interpret and analyze complex written material is necessary for the safe and responsible practice of modern medicine.[57]

The Dean explained that often physicians are called upon to "make choices and decisions based on a quick reading, understanding and interpretation" of complex medical resources, often under stressful conditions.[58] The Dean concluded that "it is the judgment of the medical educators who set Tufts' academic standards and requirements that this and other important aspects of medical training and education are best tested and evaluated by written, multiple choice examinations of the type given to Mr. Wynne and all of his peers."[59]

The appellate court found the affidavit conclusory. "There is no mention of any consideration of possible alternatives, nor reference to any discussion of the unique qualities of multiple choice examinations. There is no indication of who took part in the decision or

[55] *Id*., 22.
[56] *Id*., 30.
[57] *Id*.
[58] Id.
[59] *Id.*

when it was made."[60] The grant of summary judgment in favor of Tufts was set aside and remanded.[61]

On remand, Tufts again moved for summary judgment and submitted supporting documentation, including six affidavits. The record now showed that "Tufts not only documented the importance of biochemistry in a medical school curriculum, but explained why 'the multiple choice format provides the fairest way to test the students' mastery of the subject matter of biochemistry."[62] Tufts "likewise explained what thought it had given to different methods of testing … and why it eschewed alternatives to multiple choice testing, particularly with respect to make-up examinations."[63] Tufts explained the unique qualities of multiple-choice examinations for biochemistry and offered a historical record to support the use of those tests. "Tufts demythologized the institutional thought processes leading to its determination that it could not deviate from its wonted format to accommodate Wynne's professed disability."[64] In other words, Tufts presented a record that demonstrated "it reached a rationally justifiable conclusion that accommodating plaintiff would lower academic standards or otherwise unduly affect its program." [65]

The goal of judicial review is not to determine whether the decision of the university is right or wrong. "Such absolutes rarely apply in the context of subjective decision-making, particularly in a scholastic setting. The point is that Tufts, after undertaking a diligent assessment of the available options, felt itself obliged to make a 'professional, academic judgment'" that reasonable accommodations were not available.[66]

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[60] *Id.*
[61] Id.
[62] Wynne v. Tufts Univ. Sch. of Med., 976 F.2d 791, 794 (1st Cir. 1992). (hereinafter Wynne II)
[63] *Id.*
[64] *Id.*
[65] *Id.*, 793 (1st Cir. 1992).
[66] Id.

Such deference is not automatic. Courts must determine that schools are not disguising truly discriminatory requirements as academic requirements.[67] Further, simple conclusory statements by the head of an institution are insufficient to support the court's deference to the institution.[68] The university must articulate its reasoning.

An examination of Judge (now Justice) Breyer's dissent in *Wynne* demonstrates the burden on the university to be explicit about its deliberative process. Judge Breyer found the Dean's affidavit sufficient to meet the standard for academic deference. He interpreted the "judgment of medical educators" that the demands of medicine are "best tested" by a multiple-choice exam to indicate that alternatives had been considered but multiple choice exams were found to be the best.[69] The affidavit also satisfied Judge Breyer that the unique qualities of multiple choice exams had been considered and were designed to measure the student's ability not only to memorize but also to understand and assimilate the material.[70] Nevertheless, the majority was not convinced that the affidavit deserved deference.

Relying on the *Wynne* test, the *Guckenberger* court reviewed a university decision to determine whether there was: (1) an "indication of who took part in the decision [and] when it was made;" (2) a "discussion of the unique qualities" of the … requirement as it now stands; and (3) "a consideration of possible alternatives" to the requirement.[71]

The *Guckenberger* court, in an earlier proceeding, had ordered Boston University to convene a committee of faculty to consider the students' request that disabled students substitute a different course (such as cultural courses) for the required foreign language

[67] Wong, 192 F.3d at 817.
[68] Wynne I, 932 F.2d at 28.
[69] *Id.* at 30
[70] Id.
[71] Guckenberger v. Boston Univ., 8 F.Supp.3d 82, 87 (D. MA. 1998).

course.[72] The Dean's Advisory Committee met seven times over three months, taking minutes for the court's review, invited student input, considered alternatives, and produced an 8-page report with accompanying data, justifying the foreign language requirement.[73] The court found the report sufficient to earn the court's deference because it involved distinguished professors in a deliberative process in which they discussed the unique qualities of the requirement under challenge and considered alternatives.[74] While insisting on the foreign language requirement, the University did provide the learning disabled students with tutoring, extra time on the exam, distraction-free testing, distribution of lecture notes before class, and replacement of the written exam with an oral exam.[75]

Likewise, the *Wong* court, relying on the *Wynne* test, refused to grant deference to a medical school based on the dean's affidavit.[76] Wong, a medical student, had received several accommodations before the dean denied further accommodations.[77] The court overturned the grant of summary judgment on favor of the medical school because it found the dean's justification lacking. The dean, who had testified in a deposition that the Disability Resource Center made decisions regarding accommodations, failed to discuss the requested accommodation with the student and with any of the "professionals who had worked with Wong to pinpoint his disability and help him develop skills to cope with it."[78]

The Ninth Circuit explained that the institution has a "duty to make itself of the nature of the student's disability; explore alternatives for accommodating the student; and to exercise professional judgment in deciding whether the modifications under consideration

[72] Guckenberger v. Boston Univ., 10 N.D.L.R 277 (1997).
[73] Guckenberger, 8 F.Supp.3d at 86-87.
[74] *Id.* at 88 (D. MA. 1998).
[75] *Id.* at 89 (D. MA. 1998).
[76] Wong, 192 F. 2d at 811-816.
[77] Wong, 192 F.2d at 818-819.
[78] Wong, 192 F.2d at 819.

would give the student the opportunity to complete the program without fundamentally or substantiality modifying the school's standards." [79]

IV. Law Schools Need To Prepare For Learning Disabled Students

A. Applying the *Wynne* Test

The *Wynne* test requires law schools facing a request for an accommodation to convene:

> relevant officials
> to deliberate and consider alternates to the requirement
> considering the feasibility, costs and effect of those means
> and reach a rationally justifiable conclusion
> that the available alternatives will either result in lower academic standards or require substantial alteration in the program.[80]

Based on the cases arising from law schools as well as from other academic units, the relevant officials involve more than an administrator such as a provost or dean.[81] Rather, relevant officials must be persons with knowledge of the requirement and capable of considering alternatives. These may be faculty who teach the course in question or have made the requirement in question, curriculum committee members, directors of programs such as the clinic or legal writing program, or a cross-section of faculty. The *Wong* case suggests that the relevant officials must educate themselves about the student's learning disabilities and their effect on student performance.[82]

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[79] Wong, 192 F.2d at 818.
[80] Wynne II, 976 F.2d at 793.
[81] *Id.*
[82] Wong, 192 F.2d at 818. Compare this behavior to the *Spychalsky* case in which the associate dean reviewed the report from the disabilities center, but also consulted with the disabilities center director and followed his advice. The court deferred to the law school in *Spychalsky*. Spychalsky v. Sullivan, 2003 WL 22071602 (E.D.N.Y. 2003).

Second, the relevant officials must consider the request made by the particular student, and not rely on past decisions. As described earlier, in *Guckenberger,*[83] the court inspected the committee's minutes to satisfy itself that the committee had indeed considered the alternatives to the foreign language requirement under challenge in that case. Reliance on policies that do not permit exceptions will not meet the standard. Likewise, reliance on an American Bar Association standard is not sufficient to challenge a school's requirement or to support the requirement itself.[84]

One issue not explicit in the court's test is that of the timeline in which the deliberative process is to be conducted. The concept of deliberation implies taking the time necessary to consider the issues at hand. On the other hand, especially in the law school context where first year, and even first semester, grades are so critical,[85] a court might well expect the law school to act expeditiously. Failure to act fairly expeditiously may well moot the request for the student but invite a law suit.[86]

Disabilities scholar Dean Rothstein urges universities to have in place a method of resolving disputes concerning accommodations.[87] She recommends that the faculty member

[83] Guckenberger v. Boston Univ., 10 N.D.L.R 277 (1997).
[84] The Fifth Circuit has ruled that ABA accreditation is not determinative of reasonableness. McGregor v. La. Univ. Bd. of Supervisors, 3 F.3 850 (5th Cir. 1993). American Bar Association, Standards for Approval of Law Schools, www.abanet.org (last visited May 9, 2006). The accrediting standard regarding students with disabilities is similar to the requirements under WYNNE I. Standard 212 requires law schools to "provide full opportunities" for the study of law to "qualified disabled individuals." In interpreting this standard, the ABA has said that: "[t]he essence of proper service to individuals with disabilities is individualization and reasonable accommodation. Each individual shall be individually evaluated to determine if he or she meets the academic standards requisite to admission and participation in the law school program. *Id.* The ABA further clarifies that the term qualified requires "a careful and thorough consideration of each applicant and each applicant's qualifications in light of reasonable accommodation." *Id.*
[85] First year grades are critical to decisions of good standing in law school, entry into law journal and other opportunities, and entry into interviews among firms looking for the top of the class.
[86] If a student's request for an accommodation is not granted and the student fails as a result, the student may well believe he or she has nothing to lose by not challenging the law school's decision in court or by a complaint to the Office of Civil Rights.
[87] Laura F. Rothstein, DISABILITIES AND THE LAW, at 234 (2d ed. 1997).

involved be consulted but not be the decider.[88] Rather, an administrator or panel should have clear authority to make decisions after considering the disability expert's input and the faculty member's concerns regarding a fundamental alteration in the program.[89]

B. Applying the Deliberative Process to Commonly Requested Accommodations

One of the most commonly requested, and granted, accommodations is extra time for assignments or on exams. Suppose, however, that a faculty member or administrator denies that accommodation, arguing that a timed test is part of the fundamental nature of the program. What would a law school do to defend the decision denying the requested accommodation?

The relevant officials, presumably the faculty member denying the request, and some others, perhaps the associate dean, the curriculum or other committee, or some group of faculty would meet and consider whether time on the exam is essential. Ideally, the decision makers would consult the faculty member involved,[90] the student,[91] and an expert on the specific learning disability at issue, such as the University disabilities services director,[92] and would reach a decision in a timely manner.[93]

Although the decision reached need not be the "right" decision, they must engage in a deliberation that includes consideration of the alternatives. Because there are law professors offering exams with no time limits or very generous time limits as well as others using

[88] *Id*. at 248-350. Involvement in accommodation decisions raises the issue of confidentiality. However, the faculty member can often be involved without identifying the student requesting the accommodation. In some cases, however, the accommodation will necessarily identify the student. *Id*.
[89] *Id*. at 234.
[90] This suggestion follows Rothstein's advice. *Id.* at 234.
[91] This suggestions follows the practice in *Guckenberger*. Guckenberger, 8 F.Supp. at 86.
[92] This suggestion follows the Rothstein's advice and perhaps eliminates the need for faculty to be ADA experts. Rothstein, *supra* note 87 at 234.
[93] Reaching a decision in a timely manner allows for deliberation but might avoid an accusation that the delay is designed to be discriminatory.

stringent time limits, arguments can be made for each.[94] The officials considering the request must consider the unique qualities of timed exams as well as the alternatives and then present a reasoned explanation why, in light of potential alternatives, only timed tests meet the fundamental requirements of the program.

That process should be in place for almost any accommodation request that is challenged. Concerning other typical requests for accommodation, the deliberations will be similar but particularized to the request made. For example, occasionally, a law student has requested a waiver of a required course.[95] If such a request was denied and challenged, the curriculum committee or a similar committee would need to convene and consider the effect of waiving the requirement on the overall program. The committee could consult but not rely solely on past policy statements or reports. It must consider the alternatives, including whether another course might satisfy purpose of the requirement without presenting the challenge to the learning disabled student that the requirement presents.

For example, a law school might require a tax course to expose students to a statutory and regulatory course, but such a course might be a challenge to a student with a disability relating to mathematical calculations.[96] There may be other courses, without a math component, that meet the goal of offering exposure to statutory and regulatory schemes. Alternatively, if having a fundamental understanding of the tax code is the goal of the requirement, it is likely that the committee would not grant the accommodation.

But the conclusion to uphold the requirement might not end the discussion. The same tax course might be taught by different professors, using different approaches. For example,

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[94] R. Randall Kelso, Reflections on the Learning-Disabled Lawyer: Or On the Importance of Being Swift -- A Modest Proposal, 42 S. TEX. L. REV. 119 at 121-23 (2000).
[95] Spychalsky v. Sullivan, 2003 WL 22071602 (E.D.N.Y. 2003). Requests to waive required courses are seldom made. Stone, *supra* note 10 at Appendix A (1995).
[96] *See, e.g.,* Spychalsky v. Sullivan, 2003 WL 22071602 (E.D.N.Y. 2003).

one professor might focus on solving tax problems, using calculations, and another on tax policy, with almost no mathematical calculations. If such a case exists, will the law student with a math disability be permitted to choose which tax course satisfies the requirement or be given preference in enrolling in the preferred section? Will the student be permitted to take a course at another law school, during the summer perhaps, and meet the tax requirement, even though it is taught in a fashion different from that of the host school?

Taking another example, a learning disabled student might request a change in the format of the exam, from an essay exam to a multiple choice exam or vice versa. Again, a committee or other council should meet, discuss the reason for the type of exam used, consider the alternatives, consult the student and an expert on disabilities, and arrive at a reasoned decision.

In each of these examples, the law school could very well demonstrate that the requested accommodation would fundamentally alter the nature of the program. However, these arguments assume that the law school or the law professor has considered the goals of the course, the means of meeting those goals, and the means of assessing student achievement of those goals, and is able to articulate why those means meet the goals. These arguments also assume that when confronted with a request for accommodation, the faculty member could judge it in light of the course goals, methods of achieving those goals and means of assessing performance.

C. Some Helpful Resources for Law Schools

In conducting this deliberation, several resources, already available to law schools and faculty, offer helpful starting points, but only starting points.

First, the ABA accreditation standards for law schools provide some basic guidance to law school faculties about the law school curriculum. Standard 301 provides that:

> [a] law school shall maintain an educational program that prepares its students for admission to the bar and effective and responsible participation in the legal profession.[97]

Law schools are required to provide each student with substantial instruction in the substantive law, legal analysis and reasoning, legal research, problem solving, oral communication, writing in the legal context, and other professional skills necessary for the legal profession.[98] Further, law schools must instruct in the history, goals, values, and rules of the legal profession.[99] Law schools are warned not to continue the enrollment of a student who is unlikely to succeed in law school. They are required to develop academic standards for good standing and graduation and to monitor students' academic progress.[100]

Another resource, the McCrate Report, recommends that law schools should expose students to education in skills and values.[101] The skills and values identified in the Report offer further guidance to faculties. Third, some state bar examiners or bar associations have drafted standards describing the essential skills law graduates should possess to enter practice.[102]

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[97] American Bar Association, ABA Standard 301, www.abanet.org (last visited May 9, 2006). But reliance on ABA standards by themselves is not enough. *McGregor*, 3 F.3 at 850.
[98] American Bar Association, ABA Standard 302(a)(1), (2), (3), and (4), www.abanet.org (last visited May 9, 2006).
[99] American Bar Association, ABA Standard 302(a)(5), www.abanet.org (last visited May 9, 2006).
[100] American Bar Association, ABA Standard 301, www.abanet.org (last visited May 9, 2006).
[101] American Bar Association Task Force on Law Schools and the Profession, Legal Education and Professional Development -- An Education Continuum (Robert McCrate, Chair, 1992) (hereinafter McCrate Report). For example, one skill states that law students should be familiar with identifying and formulating legal issues. Skill 2.2. Another states that a lawyer should be familiar with the skills in conducing a negotiation session. Skill 7.2.
[102] For example, the Minnesota Board of Bar Examiners states that applicants should be able to "reason, recall complex factual information and integrate that information with complex legal theories." Patrick J. Shannon, *Who Is An "Otherwise Qualified" Law Student? A Need for Law Schools to Develop Technical Standards*, 10 U. FLA. J. L. & P. POL'Y 57 at Appendix C (1998). See also *Id*. Appendices B and D (for similar standards from Florida and Ohio).

Fourth, every ABA accredited law school assesses itself every seven years on several measures, one of which is curriculum and another of which is student life.[103] That self-study offers faculty the opportunity to reflect on the curricular requirements and the reasons for the requirements. Additional sources of guidance are the reports of curriculum committees or task forces that may provide some rationale for curriculum decisions to guide officials facing accommodations request.

Common to each of these resources is a consensus about generally defined criteria without any guidance as to how law students gain those skills and how are they tested. None of these standards addresses how students learn, how they are to be taught or how they are to be monitored. The general nature of these standards permits the greatest freedom among faculty to define the curriculum and the content and methodology of their classes. Yet this very freedom and generality fails to address the questions are implicit in the deliberative process required by *Wynne*.[104]

D. More Clarification Proposed

To help law schools prepare to address accommodation requests or legal challenges, many scholars have suggested that faculty engage in efforts to define the fundamental requirements of law school. One law school administrator and disabilities scholar recommended that faculty define the technical standards as well as the academic standards of performance expected of law students.[105] Another scholar recommended that faculty draft a

[103] American Bar Association, Standard for Approval of Law Schools Rules of Procedure. Rule 2, www.abanet.org (last visited May 9, 2006).
[104] Wynne II, 976 F.2d at 793.
[105] Patrick J. Shannon, *Who Is An "Otherwise Qualified" Law Student? A Need for Law Schools to Develop Technical Standards*, 10 U. FLA. J. L. & P. POL'Y 57 (1998). For example, he proposed this standard regarding communication: "A candidate must be able to effectively communicate. A candidate must be able to communicate candidly and civilly with others. A candidate must be able to memorialize and organization information in an accessible form." *Id*. at 76.

job description, such as business would, as to what a law student is expected to do.[106] Still another scholar proposed that law schools design Individualized Accommodation Plans for students.[107] Although there has been some interest shown in these proposals, none have been accomplished.[108]

V. A Proposal: What Law Faculty and Law Schools Should Do

Although law schools have faced issues related to disabled students for almost 20 years, they have failed to define the fundamental nature of the law school program. Law faculty are likely to shirk from tasks such as drafting the job description of a law student or defining the technical standards of good performance in law school. The task is daunting by itself and even more so, when faced with the need to reach consensus within their faculty. Perhaps it is time to cease those efforts and try something else.

At the risk of adding another proposal that will not reach fruition, I propose a different approach, one that has two tracks, one for individual faculty and one for law schools. The value of these two tracks is that they can operate independently or together. Faculty interested in meaningful clarification of the nature of their own classes may proceed regardless of what their colleagues are doing and without waiting for institutional sanction. At the same time, the law school can implement policies that will advance its ability to engage in the *Wynne* deliberative process, when needed, even if its entire faculty is not in agreement.

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[106] Michelle Morgan Ketchum, Academic Decision Making: Law Schools' Discretion Under the Americans with Disabilities Act, 62 UMKC L. REV. 209 (1993)
[107] Smith, *supra* n. 14, at 87.
[108] I conducted an e-mail discussion with Assistant Dean Shannon who proposed that schools draft technical standards. He reported that he knew of no law school, including his own, that had completed the task of drafting standards. I also placed a query on the Academic Support List Serve, asking if schools had attempted to define the fundamental requirements of law school. I received only six responses, but none of them reported completing such standards.

A. Track one: What Legal Educators Should Do

The first track is to encourage faculty to define the essentials of performance in their own courses. Certainly every faculty member will not be interested or willing or able to undertake such a task. As those interested faculty share their work, other faculty may be interested.

The interested law professor should define the goals and objectives for each course taught, consider the best means of achieving those goals and objectives with some consideration of alternative means of reaching those ends, and determine the best means of monitoring student performance toward those goals. For example, the goal of a given course might be "practical lawyering skills" or "basic knowledge" related to a given subject or "the examination of [the] perception of justice and tort law, particularly as it relates to race, ethnicity and gender," or some combination of several goals.[109] The professor should then write several objectives to meet each goal of each course. An objective in torts might be " [w]hen given a problem, students will correctly identify and analyze issues relevant to the theory of negligence" or "students will understand the difference between the concept of negligence and strict liability."[110] Either objective gives meaning to the goal that "students will gain a basic knowledge of tort law."[111] Clarifying the objectives would help the faculty determine the topics to be covered and the degree of mastery of coverage for each topic. This examination would help focus their teaching. Sharing these objectives with students would help students focus their preparation.

[109] Vernelia Randall, Planning for Legal Education, www.udayton.edu/~aep/legaled/planning (last visited May 9, 2006). For a comprehensive approach to planning a law course, see www.udayton.edu/~aep/legaled/planning (last visited May 9, 2006).
[110] Id.
[111] Id.

Faculty engaged in this exercise should then choose the teaching methods most helpful for students in meeting those objectives. Faculty might lecture, assign background reading, use the Socratic method to analyze a case, assign a written exercise to synthesize several cases, assign students to write jury instructions for a tort case, or show a video of a closing argument in a strict liability case, among the many means of helping students learn.[112] This list of potential teaching methods is simply a start on the list of potential means of teaching that a faculty member can choose from, once the professor is clear on the objective.

In considering the alternative means of teaching, faculty should also consider those strategies that address some of the needs of students with disabilities. Hamline University proposes strategies faculty can employ in teaching and drafting assignments and exams that address some of the challenges faced by students with learning disabilities.[113] For example, faculty can assist students with learning disabilities by giving breaks during long lectures, providing clear structure and expectations and having clear objectives and assignments, [114] tips that might help any student. Faculty can also provide opportunities for students to practice skills before testing, a challenge to law schools that traditionally test once at the end of the semester.[115] However, law faculty could offer all students occasional practice problems of the type likely to be tested. Additionally, faculty can learn practical tips such as pausing between ideas to allow concepts to sink in, using text with white space and large

[112] Id.
[113] Hamline University, Faculty and Staff Guide to Students with Disabilities. http://www.hamline.edu/ (last visited May 11, 20060. Although the Hamline resources are not directly related to law teaching, they remain helpful. A scholar familiar with legal education and with disabilities could perform a tremendous service to law professors by better co-relating these resources to the needs of legal educators.
[114] Id.
[115] Id.

print, and encouraging students to process information aloud through discussion or role play.[116]

Finally, faculty should determine the best means of assessing student performance to determine if the students achieved the goal set by the faculty member.[117] If the objective was mastery of a few key tort concepts, an essay exam might be appropriate; if the objective was retention of many concepts, a multiple choice exam permits testing of many concepts.[118] If the objective was relating tort concepts to other concepts, the best assessment tool might be a seminar type paper or a take home exam.

If a few law school professors in each school begin this task, several results will occur. First, more faculty will be prepared to identify the unique qualities of the requirements they assign. Second, more faculty will be open to reasonable requests for accommodations, because these faculty have considered alternative means of teaching and assessing. Third, although not directly related to students with learning disabilities, faculty will very likely teach to a variety of learning styles.[119] Fourth, faculty may even find themselves more confident of their decisions regarding coverage or of their design of the exam. These results will benefit all students.

Initially, the task of defining goals, objectives, teaching methods, and assessment methods may be foreign, even disdainful, to many legal educators, but as they perform this task for one or two courses, they will find it easier for each additional course. These interested faculty members might mentor other faculty willing to try the exercise.

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[116] Id.
[117] Id.
[118] According to Smith, "Essay exams test student's ability to read and analyze complex fact patterns, organize issues, rules, and facts, and produce a succinct, understandable written product while multiple choice exams test reading comprehension and the ability to quickly solve problems of a relatively specific nature." Smith, *supra* note 14, at n. 180.
[119] Gerald F. Hess & Steven Friedland, TECHNIQUES FOR TEACHING LAW, at 8-11 (1999).

To help faculty better define their teaching goals, faculty have available several resources including the website by Professor Randall[120] and the resources of the Institute for Legal Education.[121] The Association of American Law Schools presents conferences for beginning teachers and additional conferences for experienced teachers each summer and presents workshops at its annual meeting on teaching sponsored by the Teaching Methods Section. [122]

B. What Law Schools Should Do

The second track of my proposal is directed at law schools. First, to encourage faculty members to clarify their teaching as proposed in the first track, law schools should identify potentially interested faculty members and support them. Support includes helping them locate resources and rewarding them for doing so. In making teaching assignments and setting scholarship and service expectations, law schools must ensure that faculty members have the time to plan their teaching.

Second, law school deans must ensure their administrators, especially Associate Deans and Admissions directors, and their faculty members are familiar with impact of the Rehabilitation Act and the Americans with Disabilities Act on law schools. As suggested by the cases, members of critical committees such as admissions and curriculum and academic standards must have a basic understanding of their legal obligations in responding to accommodation requests.

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[120] Id.

[121] Institute for Law School Teaching, www.law.gonzaga.edu (last visited May 9, 2006). See also. Hess & Friedland, *supra* note 119 at 8-11.

[122] AALS offers workshops for beginning teachers and for experienced teachers during the summer; the 2006 program includes workshops on learning theory and assessment. In addition, The Association offers program during the Annual Meeting; those offered by the Teaching Methods section are particularly helpful to faculty in defining their teaching goals and methods of assessment. AALS, workshops, www.aals.org (last visited May 9, 2006).

Third, law schools should encourage several faculty or administrators to develop expertise about learning disabilities so they can serve as informal advisors to other faculty and serve as the members of the committees that meet in response to accommodation requests. At a minimum, law schools must develop a relationship with a university center for disabilities or where that is not available, some resource with expertise on disabilities. Fourth, law schools must ensure that faculty, such as academic success faculty, and auxiliary staff, such as career services, understand these laws as well as the nature of the students with learning disabilities and their needs, and how best to assist them.

If a critical mass of faculty begin carefully examining their teaching and assessment methods and a critical mass of law schools begin examining their obligations under these disabilities acts, law schools will be better able to respond to the needs of the law students with learning disabilities. The value of this two track approach is that each track can operate independently. Law professors can proceed without institutional approval and institutions can implement planning with total faculty support. Progress under either track will be helpful; progress under both is ideal.

VI. Conclusion

Law schools of today do not look like they did in Blackstone's day. In meeting the challenges of today, whatever they may be, and especially in addressing issues related to students with learning disabilities, law schools and legal educators will benefit from reflecting on their goals, objectives, teaching methods, and assessment methods. The courts have granted a great deal of deference to academia in determining what constitutes the fundamental nature of the academic program and what would unreasonably alter it. That

deference is not absolute. Courts will ask law schools to justify their requirements by articulating the unique qualities of the requirements. Courts will look for proof that law schools considered the requested accommodations and made a reasoned decision that these proposed alternatives would alter the fundamental nature of the program. Conclusory statements such as "we have always done it that way" or "everyone tests that way" or "I have never done that" will not satisfy the courts. Law faculties, individually and as institutions, need to engage in a task they have deferred for too long: an articulation of their teaching goals, objectives, methods, and assessment methods.

In doing so, legal educators would do well to listen to Blackstone. The theme of accessibility and inclusivity of legal education articulated by Blackstone offers wise guidance to legal educators as they address the need to reach students with learning disabilities.

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