TIME TO STOP DEFERRING TO *DAVIS*?: ADDRESSING DISCRIMINATION AGAINST NURSING AND MEDICAL SCHOOL APPLICANTS WITH PHYSICAL DISABILITIES

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I. INTRODUCTION

The COVID pandemic has reinvigorated doctors and nurses with physical disabilities to transform the medical field.[1] Healthcare workers with physical disabilities allege that the medical field "has largely shunned doctors [and nurses] with disabilities, who often face stigma, fear of workplace retaliation[,] and sometimes loss of their jobs or medical licenses."[2] Often, medical staff are denied the requested accommodations and become victims of the medical "grind culture" that pushes doctors and nurses to work around the clock.[3] In recent years, national medical associations and nursing boards have changed specific guidelines to further inclusivity and destigmatize disability in the medical field. In June 2021, the American Medical Association (AMA) adopted guidelines distinguishing "between physicians with disabilities and 'impaired physicians' who can't practice safely even with accommodations or treatments."[4] The Office of Disability Employment Policy (ODEP) has also partnered with the National

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[1] *See* Wendy Lu, *Disabled Doctors Were Called Too 'Weak' To Be in Medicine. It's Hurting the Entire System*, HUFFPOST, https://www.huffpost.com/entry/disabled-doctors-medicine-ableism_n_60f86967e4b0ca689fa560dc (Aug. 26, 2021).

[2] *Id.*

[3] *Id.*

[4] *Id.*; *see also* AMA, REPORT OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS: AMENDMENT TO OPINION E-9.3.2, "PHYSICIAN RESPONSIBILITIES TO IMPAIRED COLLEAGUES" (2021).

Organization of Nurses with Disabilities (NOND) to make nursing more inclusive to people with disabilities.[5]

Although the nursing and medical fields focus on including nurses and doctors with disabilities, surprising discrimination exists in nursing and medical schools. In 2011, Eileen Quinn was accepted to a highly-ranked accelerated nursing program.[6] Eileen never felt disabled by being born with only one hand—she played tennis and rugby and swam in high school without a problem—what would make nursing any different?[7] But a few weeks after beginning her program in January 2012, the school made her take a competency exam, which it did not administer to other students, and she was told her disability rendered her unfit to be a nurse and posed a danger to patients.[8] Later, Eileen Quinn consulted with attorneys, who informed her that the Americans with Disabilities Act (ADA) provided her no protection.[9] Nevertheless, within three years of her dismissal, she graduated nursing school at Seton Hall University; moreover, she won a mediation with the school that rejected her, in which it agreed to educate the school's faculty to work with nursing students with disabilities and never to give another competency exam.[10]

In 2009, Bernard Ray Johnston, who is deaf, consulted a law firm wishing to challenge how medical schools assessed his qualifications.[11] Even in the era of hearing aids, amplified stethoscopes, and sign language, Johnston believed that medical schools were denying him admission solely because of his deafness, suspecting "that the schools [were] interpreting the technical standard for communication as to

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[5] Off. of Disability Emp. Pol'y, *National Organization of Nurses with Disabilities*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/odep/alliances/previous/nond (last visited Oct. 1, 2023).

[6] Leenie Quinn, FACEBOOK (Nov. 3, 2011), https://www.facebook.com/leenie.quinn/posts/pfbid039VazUBCvExC4jNUAYkBSR2jw42VctvmTAnziWNABVg3P5Vmgiw6o99ctDiEwW46l.

[7] Leenie Quinn, FACEBOOK (Mar. 23, 2012) [hereinafter March Post], https://www.facebook.com/leenie.quinn/posts/pfbid0VEydoZ8mVZuiPipt8fE2Szyenm5qdTCgQs94L8daApDs95Dgr7dACDiquM8FgaX5l.

[8] *See id.*; Leenie Quinn, FACEBOOK (Oct. 11, 2012) [hereinafter October Post], https://www.facebook.com/leenie.quinn/posts/pfbid02r8fPzAfCAHxuQEPW7aDmExXLtWMFFUDpPjQUNgFdU2Ve8WTzdwQA3Th8NnzBsf2Tl.

[9] March Post, *supra* note 7.

[10] *See* October Post, *supra* note 8; Leenie Quinn, FACEBOOK (May 14, 2014), https://www.facebook.com/leenie.quinn/posts/pfbid02s7ZWRksmqnnv8JMPvXvsky5t4vCi8nSogtW4wrynSk3ScYs1iE5feFC79CrWNTSWl.

[11] Michael Schwartz, *Technical Standards for Admission to Medical School: Deaf Candidates Don't Get No Respect*, 28 BUFF. PUB. INT. L.J. 31, 33 (2009).

require speech and hearing."[12] Both of these situations occurred after the passage of the ADA as well as the passage of the ADA Amendments Act of 2008.

Many nursing and medical experts argue that a need exists for more students with disabilities in medical school and nursing school, including those with physical disabilities.[13] A significant reason for the lack of nursing and medical students with physical disabilities is the admissions requirements for nursing and medical school.[14] Certain types of accreditation, such as accreditation from the Liaison Committee on Medical Education (LCME), requires that "schools must explicitly articulate [their] technical standards."[15] Due to the technical standards medical schools and nursing schools created, which outline the functional abilities required by potential students, programs frequently reject applicants with physical disabilities before said students even have the chance to prove themselves as capable.[16]

Congress has generally addressed disability discrimination in education through legislation, including section 504 of the 1973

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[12] *Id.*

[13] *See, e.g.*, BETH MARKS & SARAH AILEY, WHITE PAPER ON INCLUSION OF STUDENTS WITH DISABILITIES IN NURSING PROGRAMS FOR THE CALIFORNIA COMMITTEE ON EMPLOYMENT OF PEOPLE WITH DISABILITIES (CCEPD) 1 (2014), ("By increasing the numbers of health care providers with disabilities, we can enhance the potential for creating innovative health care services across the lifespan ."), https://www.doi.org/10.13140/RG.2.1.4741.9606.

[14] *See id.* at 5; Michael McKee et al., *Medical Schools' Willingness to Accommodate Medical Students with Sensory and Physical Disabilities: Ethical Foundations of a Functional Challenge to "Organic" Technical Standards*, 18 AMA J. ETHICS 993, 994 (2016). This Comment will use the term "physical disability" to incorporate mobility and/or physical disabilities—including disabilities such as paralysis, lost limbs, and multiple sclerosis—and sensory based disabilities, such as deafness or low vision. *See Sensory Disabilities*, VA. DEP'T OF EDUC., https://www.doe.virginia.gov/programs-services/special-education/specific-disabilities/autism-spectrum-disorders/sensory-disabilities (last visited Oct. 1, 2023); Leslie Neal-Boylan & Michelle Miller, *How Inclusive Are We, Really?*, 15 TEACHING & LEARNING NURSING 237, 238 (Apr. 2020) (defining sensory disabilities as those relating to "hearing, seeing, or communication"); *see also* Lisa Meeks et al, *Change in Prevalence of Disabilities and Accommodation Practices Among US Medical Schools, 2016 vs 2019*, 332 JAMA 2022, 2022 tbl.1 (2019) [hereinafter *2019 Accommodation Practices*] (differentiating mobility disabilities from other disabilities).

[15] McCulley v. Univ. of Kan. Sch. of Med., No. 12-2587, 2013 U.S. Dist. LEXIS 156233, at *14–15 (D. Kan. Oct. 31, 2013).

[16] *See, e.g.*, Schwartz, *supra* note 11, at 33.

Rehabilitation Act (section 504) and the 1990 ADA.[17] Moreover, the federal government has begun working with disability advocates in the nursing and medical fields.[18] Nevertheless, the current legislation, regulations, and court precedent fail to adequately protect qualified nursing and medical school applicants with physical disabilities from discrimination.

This Comment argues that legislation and courts fail to balance the rights of applicants with disabilities and the legitimate interests of schools in maintaining the level of their programs and keeping future patients and clinical patients safe. To accomplish this, Part II first provides an overview of seminal cases and legislation, including *Southeastern Community College v. Davis.* Part III then introduces post-*Davis* caselaw and highlights the differing evidentiary requirements in some circuit courts. Part IV focuses on critiques from disability rights scholars in nursing and medicine, namely that, considering the current state of technology and the requirements of working in the medical and nursing fields, current technical standards emphasizing stringent physical requirements are more harmful than helpful. Part V recommends that courts require medical schools and nursing schools to provide material evidence showing they performed a conscious inquiry of reasonable accommodations—including new approaches and new technologies—before courts accord them deference regarding academic decisions. Part VI recommends that attorneys representing applicants correspondingly look into medical and nursing professionals with disabilities, new technologies, and accommodations provided by other medical schools and nursing schools to similarly situated students. Lastly, Part VII briefly concludes.

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[17] *See generally* Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794(a); Americans with Disabilities Act of 1990,
Pub. L. No. 101-336, § 2, 104 Stat. 328 (codified as amended at 42 U.S.C. § 12101(b)) (declaring the purpose of the ADA as addressing disability discrimination); *see also* ADA Amendments Act of 2008 (ADAAA), Pub. L. 110-325, § 4(a), 122 Stat. 3553 (codified as amended at 42 U.S.C. § 12102, specifically the definintion of disability); Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400(d) (clarifying the purpose of the IDEA act).

[18] *See, e.g.*, Off. of Disability Emp. Pol'y, *supra* note 5.

II. HOW THE LAW CONTRIBUTES TO THE LACK OF MEDICAL AND NURSING STUDENTS WITH PHYSICAL DISABILITIES

A. *Statistical and Factual Background*

Currently, the number of students with disabilities, particularly physical disabilities, is low.[19] "[Multiple] studies have [shown] that less than [1] percent of medical students have disabilities[,]"[20] and the number of medical students with physical disabilities relative to the general population is also low.[21] Moreover, in Lisa Meeks' 2019 survey of sixty-four medical schools, of the students that reported disabilities, only 3.6 percent reported mobility disabilities, 1.2 percent reported hearing disabilities, and 2.3 percent reported visual disabilities.[22] Studies have found that nursing programs are more likely to admit students with learning disabilities but less likely to admit students with physical disabilities.[23]

According to Leslie Neal Boylan, an expert in the field of disability and nursing, this discrepancy is partly due to safety concerns related to nursing programs' clinical placement practicum and the antiquated belief that all nurses need to be capable of heavy lifting and moving patients.[24] Doctors also often equate disabilities with incompetence.[25] For example, preceptors told Emerson Wheeler, whose disability allowed them to take breaks and obtain note-taking assistance at the University of Vermont Medical School, that if they "need this much help, maybe medicine isn't right for [them]."[26] Because of assumptions in the fields of medicine and nursing, doctors and nurses with disabilities, especially those with physical disabilities, are seen by others in the field as slowing down work, even when this is not the case. Consequently, professors of nursing and medicine have these

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[19] Stanley F. Wainapel, *Unjustified Barriers for Medical School Applicants with Physical Disabilities*, 17 AMA J. ETHICS 157, 157 (2015).

[20] Samuel R. Bagenstos, *Technical Standards and Lawsuits Involving Accommodations for Health Professions Students*, 18 AMA J. ETHICS 1010, 1010 (2016); Sarah M. Eickmeyer et al., *North American Medical Schools' Experience with and Approaches to the Needs of Students with Physical and Sensory Disabilities*, 87 ACAD. MED. 567, 567 (2012).

[21] Wainapel, *supra* note 19, at 157.

[22] *2019 Accommodation Practices*, *supra* note 14, at 2022 tbl.1.

[23] Neal-Boylan & Miller, *supra* note 14, at 237.

[24] *Id.* at 237–38.

[25] Lu, *supra* note 1.

[26] *Id.*

assumptions in mind when teaching nursing and medical students with physical disabilities.[27]

B. *Statutory and Caselaw Background: The Importance of* Southeastern Community College v. Davis

Section 504 of the 1973 Rehabilitation Act, the predecessor to the ADA, is the primary, applicable statute in cases of disability discrimination related to nursing and medical school programs.[28] When passed, section 504 "[p]romote[d] and expand[ed] employment opportunities in the public and private sectors for individuals [with disabilities] and place[d] such individuals in employment."[29] Pursuant to section 504: "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of [their] disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance."[30] A program or activity includes "a college, university, or other postsecondary institution, or a public system of higher education."[31]

The Supreme Court first interpreted section 504 in *Southeastern Community College v. Davis*.[32] Davis was already enrolled in Southeastern Community College but wanted to enter Southeastern's Associate Degree Nursing program and thereafter apply "for state certification

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[27] *See, e.g.*, Cecily L. Betz et al., *A Survey of California Nursing Programs: Admission and Accommodation Policies for Students with Disabilities*, 51 J. NURSING EDUC. 676, 677 (2012) (noting that a survey of nursing school faculty "reported that [teacher's] highest level of concern pertained to perceptions that accommodating nursing students with disabilities would create additional burdens on their time and effort").

[28] *See, e.g.*, Se. Cmty. Coll. v. Davis, 442 U.S. 397, 400 (1979) (stating that *Davis* was a matter of first impression regarding the interpretation of section 504); Zukle v. Regents of the Univ. of Cal., 166 F.3d 1041, 1045 (9th Cir. 1999) (filing claims under section 504 and the ADA); McCulley v. Univ. of Kan. Sch. of. Med., 2013 U.S. Dist. LEXIS 156233, at *35 (D. Kan. Oct. 31, 2013) (detailing that a plaintiff filed a claim under section 504).

[29] Rehabilitation Act of 1973, Pub. L. No. 93-112, § 2(8), 87 Stat. 335 (current version at 29 U.S.C. § 794(a)).

[30] 29 U.S.C. § 794(a). Additionally, 29 U.S.C. § 705(20)(A) defines the term "individual with a disability" as any individual who "has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment [and] can benefit in terms of an employment outcome from vocational rehabilitation services provided pursuant to subchapter I, III, or VI." *Id.* The definition of individuals with disabilities is not at issue in this Comment.

[31] *Id.* § 794(b)(2)(A).

[32] 442 U.S. 397, 405 (1979).

as a registered nurse."[33] Davis suffered from severe hearing loss and, even with a hearing aid, needed to read lips to understand the people around her.[34] After consulting with the executive director of the North Carolina Board of Nursing, Southeastern denied Davis admission.[35] Per the school's reasoning, Davis's disability made it unsafe for her to join the program because her inability to lip-read would threaten patient safety during clinicals.[36] The school claimed that clinicals often required Davis to communicate with others in surgical masks, meaning she could not lip-read.[37] The school also argued that no accommodation would solve Davis's problem except those that were costly or would fundamentally alter the program.[38]

The Court of Appeals for the Fourth Circuit found that Southeastern's denial of Davis's admission to the associate nursing program violated section 504. It held that applicants "need not meet legitimate physical requirements in order to be 'otherwise qualified.'"[39] Thus, even if Davis could not participate in clinicals as required by Southeastern, she was "otherwise qualified" under section 504. The Fourth Circuit also "suggested that [section] 504 required 'affirmative conduct' on the part of Southeastern to modify its program, 'even when such modifications become expensive.'"[40]

The Supreme Court reversed, finding that Southeastern did not violate section 504 when denying Davis admission to its nursing program.[41] The Court first interpreted the term "otherwise qualified" within section 504,[42] holding that "other" qualifications that a person with a disability is required to meet include "necessary physical qualifications,"[43] such as a nursing school's technical standards for admissions.

The 1978 regulations regarding section 504, promulgated by the Department of Health, Education, and Welfare (HEW), reinforced the

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33 *Id.* at 400.

34 *Id.* at 400–01.

35 *Id.* at 401–02.

36 *Id.*

37 *Id.* at 403

38 *Davis*, 442 U.S. at 401–02.

39 *Id.* at 406.

40 *Id.* at 404 (citing Davis v. Southeastern, 574 F.2d 1158, 1162 (4th Cir. 1978)).

41 *Id.* at 413–14.

42 *Id.* at 404–06.

43 *Id.* at 407.

Court's interpretation of the statute.[44] The regulations defined a qualified person "[w]ith respect to postsecondary and vocational education services"—such as a nursing school or medical school—as "a . . . person who meets the academic and technical standards requisite to admission or participation in the [recipient's] education program or activity."[45] And the regulation's appendix noted that "the term 'technical standards' refers to all nonacademic admissions criteria . . . essential to participation in the program in question."[46]

The Court then addressed Davis's other arguments: first, section 504 "compel[led] Southeastern to undertake affirmative action that would dispense with the need for effective oral communication,"[47] and second, Southeastern did not need to train her to do all the tasks that a registered nurse could do, and section 504 required her admission if she might perform some of the duties of a nurse satisfactorily.[48] The Supreme Court found these arguments unconvincing and held that given the differences in language and structure within various provisions of the Rehabilitation Act, enforcement of section 504 does not require such "affirmative action."[49] Rather, the Court concluded that the federal regulations adopted alongside section 504 do "not encompass the kind of curricular changes [needed] to accommodate respondent in the nursing program…especially [given]. . . she would not receive even a rough equivalent of the training a nursing program normally gives."[50] Rather, it would constitute "an unauthorized extension of the obligations" of section 504.[51] Thus, the Court held Davis was not an otherwise qualified person under section 504,[52] and there is no affirmative duty to substantially change a nursing school's

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44 *Davis*, 442 U.S at 406.

45 *Id.* (citing 45 C.F.R. § 84.3(k)(3) (1978) (current version at 45 C.F.R. § 84.3(l)(3))). It is interesting to note that the definition of a qualified person with a disability differs depending on the context. *See* 45 C.F.R. § 84.3(l)(1)–(2), (4).

46 *Davis*, 442 U.S. at 406 (citing 45 C.F.R. § 84, App. A p. 405 (1978) (current version at 45 C.F.R. § 84, App. A, p. 8)).

47 *Id.* at 407.

48 *Id.* at 407–08.

49 *Id.* at 410–11 (comparing the affirmative action provisions of 501(c) of the Rehabilitation Act with the language of section 504).

50 *Id.* at 409–10 (mentioning 45 C.F.R. § 84.44 (a)).

51 *Id.* at 410.

52 *Davis*, 442 U.S. at 397–98.

program beyond what is necessary to "eliminate discrimination against otherwise qualified individuals."[53]

Still, the Court discussed the complications posed by technological advancements in the context of section 504 cases. The Court emphasized that at some point, the line "between a lawful refusal to extend affirmative action and illegal discrimination against . . . persons [with disabilities]" will not always be clear.[54] Given the possibility of technological advancements, opined the Court, "situations may arise where a refusal to modify an existing program" amounts to discrimination and it should be the responsibility of the HEW and courts to continue to evaluate when such situations arise.[55]

The Supreme Court returned to its *Davis* opinion in *Alexander v. Choate*, where it emphasized that, while schools under *Davis* need not fundamentally alter their programs, schools still needed to provide reasonable accommodations to applicants with disabilities short of fundamentally changing the curriculum.[56] The Court noted the necessity of balancing "the statutory rights of [people with disabilities] to be integrated into society" alongside "legitimate interests of federal grantees in preserving the integrity of their programs."[57] For this reason, "[t]he benefit [a school offers] cannot be defined in a way that effectively denies otherwise qualified individuals with disabilities the meaningful access to which they are entitled[, and] to assure meaningful access, reasonable accommodations in [a school's] program . . . may have to be made."[58]

The *Davis* decision is binding on any court interpreting section 504, and it guided the drafting and interpretation of the ADA. The Rehabilitation Act shaped Title II of the ADA ("Title II"),[59] which prohibits discrimination against people with disabilities by state and local public entities and programs.[60] The Department of Justice's regulations implementing subpart A of Title II require that "a public

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[53] *Id.* at 410

[54] *Id.* at 412.

[55] *Id.* at 412–13.

[56] 469 U.S. 287, 301 (1985).

[57] *Id.* at 300.

[58] *Id.* at 301.

[59] Zukle v. Regents of the Univ. of Cal., 166 F.3d 1041, 1045 (9th Cir. 1999); *see also* Douglas K. Rush, *Through the Looking Glass: Judicial Deference to Academic Decision-Makers*, 10 RICH. J.L. & PUB. INT. 1, 20 (2006) (finding the use of the ADA and Rehabilitation Act to be similar, and sometimes identical).

[60] 42 U.S.C. § 12132.

entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would *fundamentally alter* the nature of the service, program, or activity,"[61] which is similar to the fundamental alteration exception in *Davis*.[62]

Title III of the ADA, which addresses public accommodations that private services or entities provide, such as private secondary schools and vocational schools, provides that "[n]othing in [Title III] shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages, and accommodations of such entity where such individual poses a *direct threat* to the health or safety of others."[63] The direct threat provision in Title III—and regulations associated with the provision—codified the Court's decision in *School Board of Nassau County v. Arline*, a case that involved determining whether a teacher with tuberculosis was otherwise qualified under section 504.[64] The section of *Arline* codified by Title III cites *Davis* within a footnote, thereby connecting the direct threat defense of Title III with the Court's holding in *Davis*.[65]

Courts also found "[t]he legislative history of the ADA indicates that Congress intended the judicial interpretation of the Rehabilitation Act be incorporated by reference when interpreting the ADA."[66] Because of *Davis'* influence over the ADA's plain text and judicial interpretation, the ADA never expanded the rights of nursing school and medical school applicants with physical disabilities like it expanded the rights of other disenfranchised groups of people with disabilities.[67] Additionally, the judicial analysis for ADA and section 504 disability discrimination claims against medical and nursing

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[61] 28 C.F.R. § 35.130(b)(7)(i) (2023) (emphasis added).

[62] *See* Se. Comty. Coll. v. Davis, 442 U.S. 397, 409–10 (1979).

[63] 42 U.S.C. § 12182(b)(3) (emphasis added).

[64] *Compare* 28 C.F.R. § 36.208(b) (2023) (describing the four factors used to determine whether an individual poses a direct threat to the health and safety of others), *with* Sch. Bd. of Nassau Cty. v. Arline, 480 U.S. 273, 287–88 (1987) (outlining the same four factors to determine whether employing a teacher with tuberculosis poses a direct threat to students).

[65] *See Arline*, 480 U.S. at 287 n.17.

[66] Collings v. Longview Fibre Co., 63 F.3d 828, 832 n.3 (9th Cir. 1995), *cert. denied*, 516 U.S. 1048 (1996).

[67] MARKS & AILEY, *supra* note 13, at 3.

schools are often combined.[68] More importantly, older views of what is essential to partake in a nursing school or medical school program and to enter the healthcare field, highlighted throughout the *Davis* opinion, became part of the fabric of the law.[69]

III. APPROACHES TO BURDENS OF PROOF AND JUDICIAL DEFERENCE TO ADMISSIONS DECISIONS POST-*DAVIS*

This Part outlines the allocation of burdens of proof and persuasion in section 504 claims related to nursing and medical school applications, addresses the split of how heavily circuit courts defer to academic decisions made by nursing and medical schools, and highlights the Supreme Court of Iowa's decision in *Palmer College of Chiropractic v. Davenport Civil Rights Commission* and its discussion of the types of evidence courts should seek out in these cases.

A. *Burdens of Proof and Persuasion in Section 504 Claims*

The *Davis* decision created several issues: allocating burdens of proof when plaintiffs brought disability discrimination claims and the level of judicial deference, if any, that should be accorded a decision to refuse accommodations and deny admissions for a particular student.

The Ninth Circuit's decision in *Zukle v. Regents of University of California*, which concerned the dismissal of a former medical student with a learning disability, has guided courts on allocating burdens in claims under section 504.[70] There, the court held that a plaintiff-student retains the ultimate burden of persuading the court that she is otherwise qualified with or without accommodation.[71] First, a plaintiff bears the initial burden of producing evidence that they are an otherwise qualified person.[72] This includes producing evidence of a

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[68] *See, e.g.*, Palmer Coll. of Chiropractic v. Davenport C.R. Comm'n, 850 N.W.2d 326, 334 (Iowa 2014) ("Various courts have explained the ADA's 'reasonable modification' requirement and the Rehabilitation Act's accommodation requirement impose coextensive obligations, and the terms and standards may often be used interchangeably.").

[69] *See, e.g.*, MARKS & AILEY, *supra* note 13, at 6 ("[T]he *Davis* case also established a precedent that has restricted students with disabilities from being recruited and admitted across all health care professional education programs. With the Davis case, the focus narrowed to the physical aspects of technical standards, failing to [consider] the 'what' versus the specification of the 'how' . . . .").

[70] *See* 166 F.3d 1041, 1046 (9th Cir. 1999).

[71] *Id.*

[72] *Id.* at 1047.

reasonable accommodation that would enable a student to meet the academic institution's educational requirements.[73] If a plaintiff shows this, the burden then shifts to the educational institution to produce evidence that the requested accommodation would require a fundamental alteration of its program or a substantial modification of its standards[74] or that the acceptance of the student with a physical disability would pose a direct threat to the safety of others.[75] The school may also meet its burden by showing that the requested accommodations, regardless of whether they are reasonable, would not enable the student to meet its academic standards, meaning the student would not be otherwise qualified.[76]

B. *Circuit Split on Approaches to Academic Deference in Section 504 Claims*

More interesting is how various courts have approached the level of judicial deference to a school's academic decisions, including a school's judgment on whether a student with a disability is otherwise qualified in light of its particular technical standards, decisions relating to the acceptance and denial of possible reasonable accommodations, and findings about whether a school's technical standards are proper. While the *Davis* Court, statutes, and regulations provided no guidance on this issue, other Supreme Court cases, such as *Regents of University of Michigan v. Ewing*, where the Court held that a student's dismissal from a combined medical school and undergraduate program violated his Fourteenth Amendment due process rights, suggested that when reviewing a "genuinely academic decision," courts should "show great respect for the faculty's professional judgment" and "not override [an academic decision] unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."[77]

When circuit courts have faced section 504 claims like that in *Davis*, they generally deferred to the standard stated in *Ewing* when evaluating an institution's decisions on what skills are essential for students to have in nursing and medical school programs, and, as a

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[73] *Id.*

[74] *Id.*

[75] Sch. Bd. of Nassau Cty. v. Arline, 480 U.S. 273, 287–88 (1987); *see also* 42 U.S.C. § 12182(b)(3).

[76] Zukle v. Regents of the Univ. of Cal., 166 F.3d 1041, 1047 (9th Cir. 1999).

[77] 474 U.S. 214, 225 (1985).

consequence, whether students are otherwise qualified despite their disability.[78] Nevertheless, each circuit court developed a formulation of the deference standard.[79] For example, the Second Circuit opined that while courts should determine as a matter of law whether a student is otherwise qualified, "*considerable judicial deference* must be paid to the evaluation made by the institution itself, absent proof that its standards and its application of them serve no purpose other than to deny an education to . . . persons [with diabilities]."[80] On the other hand, absent evidence of disparate impact or discriminatory intent, the Fifth Circuit requires courts to accord "*reasonable deference*" to schools' academic choices such as decisions concerning admissions and reasonable disability accommodations.[81]

In contrast, the Tenth Circuit declined to use a rational basis test in *Pushkin v. Regents of the University of Colorado*.[82] In *Pushkin*, the Tenth Circuit affirmed the finding that the plaintiff, who used a wheelchair, was "otherwise qualified" and "excluded . . . solely by reason of his [disability]" by the university's psychiatric residency program, notwithstanding the university's rational basis for denial.[83] To shield itself from judicial scrutiny, the university needed to provide evidence showing that the plaintiff could not "carry[] out the responsibilities involved in the residency program and future patient care."[84] Proper evidence the court mentioned included "testimony dealing with the inability of [the plaintiff] to serve in the residency program based upon his handicap," but not observations from the admissions panel solely "based upon the examiners' general knowledge of multiple sclerosis

[78] *See Zukle*, 166 F.3d at 1047.

[79] *See id.* (comparing Doe v. N.Y.U, 666 F.2d 761, 776 (2d Cir. 1981), with McGregor v La. State Univ. Bd. of Supervisors, 3 F.3d 850, 858–59 (5th Cir. 1993), Wynne v. Tufts Univ. Sch. of Med., 932 F.3d 850 (1st. Cir. 1991), and Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372 (10th Cir. 1981)); *see also* Anderson v. Univ. of Wis., 841 F.2d 737, 741 (7th Cir. 1988) ("[Section 504] does not designate a jury, rather than the faculty . . . as the body to decide whether a would-be student is up to snuff. . . . [J]urors unacquainted with the academic program . . . could not make the readmissions decision more accurately than the faculty . . . ."). *See also* Palmer Coll. of Chiropractic v. Davenport C.R. Comm'n, 850 N.W.2d 326, 338 (Iowa 2014) (quoting North v. State, 400 N.W.2d 566, 571 (Iowa 1987)).

[80] *Doe*, 666 F.2d at 776 (emphasis added).

[81] *McGregor*, 3 F.3d at 859 (emphasis added).

[82] 658 F.2d 1372, 1383 (10th Cir. 1981); *see also Zukle*, 166 F.3d at 1047.

[83] *Pushkin*, 658 F.2d at 1376–77, 1383.

[84] *Id.* at 1386.

and their concern for psychologic reactions of the patient and in turn the doctor, as a result of [plaintiff's] being in a wheelchair."[85]

The First Circuit in *Wynne v. Tufts University* also found the rationale of *Ewing* persuasive, notwithstanding two qualifications.[86] First, the Circuit found that when seeking summary judgment, schools must submit a factual record showing it sought suitable means to accommodate a student reasonably.[87] Second, the First Circuit found *Ewing's* holding basing judicial deference to a university's admissions decision "on 'a substantial departure from accepted academic norms'" unhelpful in light of the ruling in *Davis*.[88] Courts must instead find that institutions submitted undisputed facts showing relevant institution officials "considered alternative means[;] their feasibility, cost[,] and effect on the academic program[;] and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring substantial program alteration."[89] The Ninth Circuit in *Wong v. Regents of the University of California* came to a similar conclusion to that in *Wynne*,[90] finding that courts should not defer to institutions' decisions "'when institutions present no evidence regarding who took part in the decision' or when 'simple conclusory averments of [the] head of [an] institution' is all that is offered to support" denying a student admission.[91]

C. *Limiting Deference and* Palmer College of Chiropractic v. Davenport Civil Rights Commission

While most courts agree that there must be at least some deference to schools' academic decisions, including decisions about admissions, reasonable accommodations, and determinations on whether a student is otherwise qualified, several circuits considerably

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[85] *Id.*

[86] 932 F.2d 19, 25 (1st Cir. 1991), *rev'd on other grounds*, 976 F.2d 791 (1st Cir. 1992). The reversal of opinion in the latter case did not overrule the test announced in this opinion. *Wynne*, 976 F.2d at 794 ("[The new opinion] only [added] a few decurtate observations embellishing what the en banc court previously wrote.")

[87] *Wynne*, 932 F.2d at 25–26.

[88] *Id.* at 26 ("As the Court acknowledged in Davis, '[t]echnological advances can be expected to enhance opportunities to rehabilitate [people with disabilities] or otherwise to qualify them for some useful employment.'" (quoting Se. Comty. Coll. v. Davis, 442 U.S. 397, 412 (1979)).

[89] *Id.*

[90] Rush, *supra* note 59, at 39 (citing Wong v. Regents of the Univ. of Cal., 192 F.3d 807, 818 (9th Cir. 1999)).

[91] *Id.* (quoting *Wynne*, 932 F.2d at 28).

limit such deference. Thus, the rights of students with disabilities are likely to turn to a significant degree depending on which court, or which circuit, hears the case. Additionally, even in more deference-limiting decisions, such as *Wynne* and *Wong*, the courts do not specify what forms of alternative means of accommodation nursing schools and medical schools need to consider for courts to afford them a deferential standard of review.

A case that does consider the precise means and evidence required by the court is *Palmer College of Chiropractic v. Davenport Civil Rights Commission.*[92] This case involved a section 504 claim brought by a blind applicant to Palmer's Chiropractic program.[93] Palmer has bachelor of science and doctor of chiropractic programs in three locations nationwide.[94] The plaintiff applied to Palmer's bachelor of science program at its Davenport, Iowa location, told the school's disability representative about his blindness, and expressed his intention to matriculate into Palmer's graduate program after completing his bachelor program.[95] The plaintiff completed his required undergraduate coursework within two trimesters.[96]

Palmer's technical standards for its graduate program, introduced in 2002, included "sufficient use of vision, hearing, and somatic sensation necessary to perform chiropractic and general physical examination, including the procedures of inspection, palpation, auscultations, and the review of radiographs as taught in the curriculum."[97] When the school's disability committee met to discuss the plaintiff's matriculation into the graduate program, the committee expressed doubt regarding the plaintiff's accommodations.[98] The plaintiff suggested accommodations that included adaptive technologies for note-taking and "producing tactile versions of images and diagrams"; using a sight reader during the radiology unit and clinicals; and modifications of certain exams.[99] While trying to further negotiate with the school after enrolling in the graduate program, the plaintiff noted he knew at least two chiropractors who were blind and

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[92] *See* Palmer Coll. of Chiropractic v. Davenport C.R. Comm'n, 850 N.W.2d 326, 336–46 (Iowa 2014).

[93] *See id.* at 328–29.

[94] *Id.* at 328.

[95] *Id.* at 328–29.

[96] *Id.* at 329.

[97] *Id.*

[98] *Palmer*, 850 N.W.2d. at 329.

[99] *See id.* at 329–30.

had graduated from Palmer's other campuses outside Iowa.[100] Additionally, the plaintiff explained that the Iowa Department of the Blind (IDOB) had "'a wealth of information about strategies and techniques' for coping with some of the challenges Palmer foresaw and suggested Palmer should consult with IDOB before rejecting his requests and suggestions for accommodation."[101]

Nevertheless, Palmer's committee asserted that none of the plaintiff's suggested accommodations would be feasible and the plaintiff would not be allowed to complete Palmer's graduate program.[102] The committee told the plaintiff these accommodations, especially the use of a sight reader, would "compromise Palmer's compliance with standards promulgated by the Council on Chiropractic Education (CCE)."[103] Palmer stated that the school's technical standards were non-negotiable after the plaintiff questioned the actual purpose of these technical standards.[104] Because discussions were fruitless, the plaintiff withdrew from Palmer and filed a complaint against the college with the help of the Davenport Civil Rights Commission (DCRC).[105] The DCRC found by a preponderance of the evidence that Palmer discriminated against the plaintiff based on his blindness, but the school sought judicial review, and the district court reversed the DCRC's order.[106] The district court found the DCRC, "as a matter of law failed, to give appropriate deference to Palmer's identification of its curricular requirements" and concluded substantial evidence from Palmer showed the plaintiff's suggested accommodations "would constitute a fundamental alteration of the Palmer curriculum."[107]

The Iowa Supreme Court reversed the district court's decision.[108] It found that the plaintiff's proposed modifications were reasonable and the school erred by not conducting a better search of modifications and not considering all of the plaintiff's suggested modifications.[109] Specifically, the court cited the DCRC's findings that

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[100] *Id.* at 330.

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Palmer*, 850 N.W.2d. at 330.

[105] *Id.* at 331.

[106] *Id.* at 331–32.

[107] *Id.* at 332.

[108] *Id.* at 346.

[109] *Id.* at 346.

the school rarely interacted with the plaintiff and failed to investigate (1) how other former blind students had performed specific tasks; (2) how other blind students at other schools and blind chiropractic practitioners found success in the field; (3) how blind students at other chiropractor programs benefitted from new technologies in school and professional settings; and (4) failed to engage individuals with experience teaching other blind individuals.[110] The court also found that Palmer incorrectly determined that the plaintiff's suggested modifications would fundamentally alter the program.[111] While the court acknowledged that "[s]ome deference to the institution's professional or academic judgment may often be appropriate . . . whether and the extent to which that deference is appropriate depends heavily on the institution's satisfaction of several obligations."[112]

The court further disagreed with Palmer's argument that courts cannot override an institution's judgment "unless it is . . . a substantial departure from accepted academic norms."[113] Instead, the court emphasized that this level of deference to an institution's judgment comes *after* an "institution has established it has fulfilled its obligations of conscientious inquiry."[114] Schools, according to the court, must look towards "new approaches or devices quite beyond 'accepted academic norms'"[115] when evaluating what constitutes a reasonable accommodation and whether a plaintiff is otherwise qualified, as "the application of deference based on 'accepted academic norms' is inadequate in the disability discrimination context."[116] It also found evidence of other medical school programs granting "accommodations the same as or similar to the accommodation at issue[,]" which demonstrates that an accommodation is "reasonable and does not fundamentally alter [an] institution's curriculum."[117]

Like in *Wynne* and *Wong*, the court in *Palmer* emphasized the need for nursing schools and medical schools to perform a proper inquiry into reasonable accommodations for applicants with physical

[110] *Palmer*, 850 N.W.2d. at 341–42.

[111] *Id.* at 342.

[112] *Id.* at 337 (citing Wong v. Regents of the Univ. of Cal., 192 F.3d 807, 817–18 (9th Cir. 1999); Wynne v. Tufts Univ., 932 F.2d 19, 25–26 (1st Cir. 1991).

[113] *Id.* at 338 (quoting North v. State, 400 N.W.2d 566, 571 (Iowa 1987)).

[114] *Id.* at 339 (citing Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985)).

[115] *Id.* at 338 (quoting *Wynne*, 932 F.2d at 26).

[116] *Palmer*, 850 N.W.2d at 339 (quoting *Wynne*, 932 F.2d at 26).

[117] *Id.* at 343.

disabilities; however, unlike all the other cases previously mentioned, the *Palmer* court elaborates on what a showing of "conscientious inquiry" requires. This includes looking past typical approaches to accommode various disabilities; instead, a school must look towards new approaches, new technology, and successful students and professionals with similar disabilities. Otherwise, the court can refuse to defer to an institution's findings regarding whether a student is otherwise qualified or whether a student's proposed modifications would require a fundamental alteration of a nursing or medical school's program. This approach to determining whether to accord a deferential standard of review is the most plaintiff-friendly. It also allows the judicial system to acknowledge the critiques of technical standards.

IV. CURRENT CRITIQUES OF NURSING SCHOOL AND MEDICAL SCHOOL TECHNICAL STANDARDS

A. *Technical Standards As a Primary Barrier to Nursing and Medical School Programs for Applicants with Physical Disabilities*

Doctors and nurses who are disability advocates argue that the current interpretations of the ADA, section 504, and related regulations—especially regarding proper technical standards in the nursing and medical school contexts—inadequately protect nursing school and medical school applicants with physical and sensory disabilities.[118] In particular, they argue that technical standards are the main barrier to nursing and medical school programs for applicants with physical disabilities.[119]

Schools often use technical standards to evaluate applicants with physical disabilities to see if they are "otherwise qualified" to attend the program, and institutions often form these standards based on accreditated organizations' templates and guidance.[120] These

[118] *See, e.g.*, MARKS & AILEY, *supra* note 13, at 6 ("In response to the Davis case, nurse educators have endorsed technical standards and essential functions related to [s]ection 504 and the ADA that reflect a narrow focus on the 'how' of nursing rather than the 'what.'").

[119] *Id.* at 5 (finding that essential functions justifying technical standards are a major barrier to nursing students with disabilities); *see also* Bagenstos, *supra* note 20, at 1010 ("[S]tudents with disabilities are often barred by the requirement to meet inflexible technical standards that emphasize particular physical capacities over the ability to perform tasks that arise in medical practice.").

[120] *See* McKee et al., *supra* note 14, at 994 (explaining that schools use technical standards "to assess the qualifications of [students with disabilities] for the study of

technical standards often "require students to demonstrate certain physical, cognitive, behavioral, and sensory abilities without assistance," notwithstanding mentions of reasonable accommodations.[121] For example, Missouri State University's nursing program technical standards require applicants to "[p]ossess the capacity to perform the physical manipulations and diagnostic procedures that are part of a complete nursing practice and diverse clinical experience," such as moving patients and performing CPR.[122] Subject to "reasonable disability-related accommodations," admitted nursing students must also have "four[] functional limbs (normal or artificial) that allow the student to perform sufficiently to move from room to room and maneuver in small spaces[] and possess[] gross and fine motor abilities sufficient to provide safe and effective nursing care."[123] Applicants must also have "normal or corrected hearing ability within the 0–45 decibel range" and "normal or corrected vision within the range of 20/20–20/80."[124] Advocates argue that stringent technical standards like these "highlight students' limitations or deficits rather than their abilities[]"[125] and make prospective applicants with physical disabilities question whether it is even worth applying to the program.

B. *Issues Regarding the Inconsistency of Technical Standards and Their Application*

Technical standards are often vague and differ from program to program, whether in the context of nursing or medical school. The Association of American Medical Colleges (AAMC) has provided technical standard guidelines since the passing of section 504 and the ADA to aid medical schools' ability to assess students with disabilities'

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medicine" and that the AAMC provided technical standard guidelines "to aid medical schools' ability to assess [students with disabilities'] qualifications for the field of medicine.").

[121] *Id.* at 994–95; *see also* Philip Zazove et al., *U.S. Medical Schools' Compliance with the Americans with Disabilities Act: Findings from a National Study*, 91 ACAD. MED. 979, 982 tbl.2 (2016) (describing the number of medical schools requiring full function of hearing, vision, and mobility).

[122] *Technical Standards for Nursing Practice*, MO. STATE UNIV., https://www.missouristate.edu/Nursing/Undergraduate/technical-standards.htm (last visited Oct. 1, 2023).

[123] *Id.*

[124] *Id.*

[125] McKee et al., *supra* note 14, at 994–95.

qualifications for the field of medicine.[126] The LCME, one of the primary accreditation groups for medical schools, "requires that medical schools' develop and publish technical standards for the admission, retention, and graduation of applicants or medical students in accordance with legal requirements.'"[127] Specific technical standard language, however, is left up to each school, and "schools vary widely in how technical standards are incorporated, implemented, and made available. Many are vague and not clearly presented in the school admission materials or on schools' websites."[128] In fact, many applicants with disabilities "face barriers to admission from ADA nonadherence," even from schools that maintain accredidation.[129] According to a study of 173 medical school programs in 2016, only 33 percent of medical schools specifically expressed a willingness to provide accommodations, 49 percent had equivocal wording, and 5 percent had language unsupportive of providing accommodations.[130] Failure to explicitly support accommodations goes against the intention of the ADA as well as section 504.[131]

Problems also exist in nursing schools regarding the publication of proper technical standards.[132] A 2012 study comparing sixty-five California nursing school programs revealed that, when determining whether a student with a disability is eligible for admittance to a nursing program, 34 percent reported using standard program requirement criteria, such as that promulgated by the American Association of Colleges of Nursing (AACN).[133] 23 percent used other criteria, including a medical release and an evaluation by a Disability

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[126] *Id.* at 994.

[127] Lisa M. Meeks et al., *Institutional Accountability for Students with Disabilities: A Call for Liaison Committee on Medical Education Action*, 97 ACAD. MED. 341, 343 (2022) [hereinafter *LCME Paper*].

[128] McKee et al., *supra* note 14, at 994.

[129] *See* Zazove et al., *supra* note 121, at 980 ("[Studies] found that many [medical schools] make individual decisions regarding [technical standards] legal language rather than using ADA guidelines.").

[130] *Id.* at 981.

[131] *Id.* at 982.

[132] Betz et al., *supra* note 27, at 677–78; *see also* Catherine Stauffer et al., *Technical Standards from Newly Established Medical Schools: A Review of Disability Inclusive Practices*, 9 J. MED. EDUC. & CURRICULAR DEV. 1 (2022) ("Of the [fifteen new medical] schools, 73% of the technical standards were not easy to locate online. Few (13%) included language that support disability accommodations. Most (73%) used language that was coded as 'restrictive' for students with physical or sensory disabilities.").

[133] Betz et al., *supra* note 27, at 676–78.

Student Programs and Services (DSPS).[134] 20 percent of the sample reported no criteria for determining such eligibility.[135] The fact that some schools have no criteria to determine eligibility shows how vague and arbitrary technical standards can be. Additionally, it casts doubt on deferring to the judgment of medical and nursing schools to bar evidence of disparate impact or intentional discrimination, as outlined in the Second Circuit's decision in *Doe*.[136]

C. *Technical Standards As an Outdated Concept*

Scholars also argue that technical standards are often outdated and do not account for new ways of thinking. For example, the undifferentiated medical school graduate, which is the idea that all medical school graduates should have the basic skills and abilities to enter any field, originated in the 1950s.[137] When the AMA created the LCME, a group of renowned doctors wrote a report to a committee on medical education and concluded that the aim of medical school "is to give the student a comprehensive concept of man and his diseases and to inculcate those habits of mind which will enable him to enter *without handicap* any one of the fields of medical practice and research."[138] This concept poses a problem when medical schools reject an applicant with a physical disability because of their inability to perform certain physical maneuvers—or because their lack of sensory skills required by certain medical fields—but the applicant wishes to enter a medical field that does not require those abilities.[139] Some critics argue this concept of the "undifferentiated graduate" is outdated and unreasonable,[140] and it is especially outrageous when retaining this

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[134] Betz et al., *supra* note 27, at 680.

[135] *Id.*

[136] *See* discussion *supra* Part III.

[137] *See* Bagenstos, *supra* note 20, at 1012 (defining the undifferentiated medical school graduate); *see also* Schwartz, *supra* note 11, at 37.

[138] Schwartz, *supra* note 11, at 37–38.

[139] *See* McCulley v. Univ. of Kan. Sch. of Med., No. 12-2587, 2013 U.S. Dist. LEXIS 156233, at *26–30 (D. Kan. Oct. 13, 2013) (citing a plaintiff's accommodation request form that notes plaintiff's plan on not specializing in a physically demanding area while holding that plaintiff's inability to perform those physical demands allows the medical school to deny her admission).

[140] *See* Bagenstos, *supra* note 20, at 1012 (finding the idea of the undifferentiated graduate in today's world of medical specialization to be "unrealistic and unclear"); Schwartz, *supra* note 11, at 58–66.

concept "entirely exclude[s] some applicants with disabilities who could successfully practice in many specialties."[141]

Others note that in the past century, more medical school graduates have joined teams of networks and specialists, instead of working as primary solo care practitioners.[142] This change in practice means "[t]he idea of the undifferentiated graduate is no longer tenable in a world of specialization and technological advances";[143] consequently, it means that, even if an applicant lacks certain physical capabilities, such as the ability to perform chest compressions, the applicant will likely be working alongside a team of individuals in actual practice, one of whom could quickly step in and assist them in performing the maneuver.

Lastly, technological advancements have allowed more room for reasonable accommodation and make a stronger case for why stringent technical standards are outdated. For example, "[a]mplified stethoscopes can also make a nursing career achievable for someone with a hearing loss and [have] been observed to be of benefit for new nursing students without disabilities to learn how to accurately recognize lung, bowel, and heart sounds."[144] Deaf healthcare professionals were instrumental in developing transparent surgical masks, which benefit not only healthcare professionals who are deaf or hard of hearing but also benefits patients who rely on visual cues for communication or reassurance.[145] For nurses with low vision, pressure devices offer a read-out in large print of the patient's blood pressure and pulse, which permits low-vision nurses and students to monitor their patients' vital signs.[146] Even technology in the form of social media has allowed disability activist groups to offer tutorials on how to work with students with physical disabilities. NOND, for example, has posted various how-to videos for people with limb deficiencies,

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[141] Bagenstos, *supra* note 20, at 1012.

[142] Schwartz, *supra* note 11, at 58; *see also id.* at 62 (citing Reed M. Van Matre et al., *Technical Standards for the Education of Physicians with Physical Disabilities: Perspectives of Medical Students, Residents, and Attending Physicians*, 83 AM. J. PHYSICAL & MED. & REHAB. 54, 55 (2004)) (noting that 69.8 percent of respondents in a study sent to practicing physicians regarding physicians with disabilities "disagreed with the concept of the undifferentiated graduate as one who possesses all of the technical skills required to enter any specialty").

[143] Schwartz, *supra* note 11, at 59.

[144] MARKS & AILEY, *supra* note 13, at 9.

[145] *Id.* at 6.

[146] *Id.* at 9.

including a tutorial on how to start an IV with one hand.[147] These accommodations are not costly.[148] Advances in technology make it unnecessary for all potential nursing and medical students to have abilities such as hearing in a particular decibel range and the functional use of all four limbs; however, most nursing and medical schools' technical standards exemplify how schools have not kept up with these technological advances.[149]

V. SOLUTIONS

A. *Solutions Introduced by Scholars and Advocates*

Considering the statistics, personal accounts, case law, and academic literature introduced above, the balance between the rights of applicants with physical disabilities and the legitimate interests of medical schools and nursing schools has weighed in favor of the latter. Although section 504, the ADA, and related regulations generally protect individuals with disabilities from discrimination, judicial interpretations of section 504 and the ADA have overemphasized the need for stringent technical standards in nursing and medical schools, which pose a substantial barrier for applicants with physical disabilities. Additionally, interpretations of these statutory obligations accord academic decisions deference that they often do not deserve.

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147 *See, e.g.*, *Educational Videos*, NOND, https://nond.org/what-we-do/educationtraining/open-the-door-film (last visited Oct. 1, 2023) ("Eileen 'Leenie' Quinn, NOND Director has responded to numerous requests that came to NOND on how to administer intramuscular, subcutaneous injections, and starting an IV with one hand.") .

148 *See, e.g.*, MARKS & AILEY, *supra* note 13, at 12 (finding that 98 percent of accommodations for students with disabilities cost less than $500.00).

149 *See, e.g.*, Wainapel, *supra* note 19, at 158 ("A recent review of the technical standards for admission set by medical schools, however, demonstrates that they have not kept pace with legislative or technological developments."). Wainapel further that while medical facilities have implemented technology to create an accessible environment for people with physical limitations, "the mandate to provide accommodation [for college students with disabilities wishing to become doctors] [conflicts] with society's stereotypically high expectations of physicians and its equally low expectations of persons with disabilities." *See id.* at 157. Wainapel further emphasizes that practicing physicians—including those who teach medical students—likely are unaware a doctor with paraplegia can stand up using a special device while operating on patients and "that a physician whose vision precludes reading chart notes can easily access electronic medical records using screen-reading software, or that a medical student with a hearing impairment can do cardiac auscultation using an electronic stethoscope." *Id.* at 157–58.

Medical schools and nursing schools are at a crossroads. On the one hand, some schools continue to hold onto ideas of the essential functions of nurses and doctors that have been disproven and that predate section 504 and the ADA. Meanwhile, scholars, advocates, practicing nurses and physicians, and some medical and nursing school programs have adapted to the times and created more disability-inclusive curriculums. Nevertheless, to achieve more meaningful access for nursing school and medical school applicants with physical disabilities, schools must substantially reform technical standards and admissions processes across the board.

Scholars and advocates have already introduced solutions that schools can and have implemented. Some argue for eliminating technical standards in admissions to nursing and medical schools that are heavily based on essential functions in the workforce.[150] Others argue for standards that "focus on . . . students' abilities," rather than students' limits, "with or without the use of accommodations or assistive technologies."[151] Instead of technical standards requiring students to hear at certain decibel levels, technical standards should require students "to be able to acquire the necessary information by hearing or other means."[152] Beth Marks, an expert in nursing education, says schools should ask specific questions when creating their technical standards.[153] These questions include whether the standards "consider overall ability" rather than "the particular way an ability is manifested" and whether the standard is based on "skills students will learn to do in a nursing program."[154] Moreover, Marks advocates for nursing programs to apply these guidelines uniformly.[155] Lisa Meeks also recommends that the LCME "verify medical schools have technical standards that [comply] with the ADA before reaccreditation."[156]

[150] *See generally* Susan B. Matt et al., *Educating Nursing Students with Disabilities: Replacing Essential Functions Entry Criteria*, 28 J. POSTSECONDARY EDUC. & DISABILITY 461, 465–66 (2015) (recommending using technical standards for education as opposed to functional requirements of nursing employment as entry criteria); Betz et al., *supra* note 27, at 677 ("NOND advocates that the functional abilities criteria that are uniformly used by nursing schools be eliminated or modified.").

[151] McKee et al., *supra* note 14, at 995.

[152] *Id.*

[153] MARKS & AILEY, *supra* note 13, at 13.

[154] *Id.*

[155] *Id.* at 14.

[156] *LCME Paper*, *supra* note 127, at 342 tbl.1.

B. *Potential Solutions for Courts*

Still, the above solutions fail to address the judiciary's role in shifting this balance. Supreme Court cases such as *Davis* and regulations clarifying section 504 and the ADA control the adjudication of applicants' discrimination claims in a way that accords schools' evaluations and promulgation of technical standards more weight than they deserve. Courts cannot simply begin ruling to abolish all nursing and medical school technical standards unless they focus on students' abilities rather than their limits, nor can courts force schools to change the entire curriculum or spend excessive amounts of money just so a program can admit one student.

Courts can, however, require more from universities when they rebut the presumption that a plaintiff is otherwise qualified or the reasonableness of a plaintiff's proposed accommodations. As opposed to following in the path of *Ewing* or *Doe*, where courts gave substantial deference to the school's academic decisions, there should be a fact-sensitive, conscientious inquiry into the school's procedures to "ensure that educational institutions are not disguising truly discriminatory requirements as academic decisions."[157] This includes looking into all the factors outlined in *Palmer*. But, most importantly, courts should emphasize a need for schools to look at new approaches or devices beyond "accepted academic norms," including, but not limited to, the solutions and accommodations that scholars have proposed in nursing school and medical school education.[158] Only then should courts grant deference to the medical school or nursing school's academic decisions. Not only does this change in deference balance the power between schools and applicants with disabilities but it also ensures that courts acknowledge what the Supreme Court in *Davis* noted at the end of the majority opinion, namely, that at some point in time, "continuing past requirements and practices might arbitrarily deprive genuinely qualified . . .persons [with disabilities] of the opportunity to participate in a covered program," and schools should expect technology to provide more chances for nursing and medical school applicants with physical disabilities to attain admission to schools.[159]

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[157] Wong v. Regents of the Univ. of Cal., 192 F.3d 807, 808 (9th Cir. 1999); *see* Palmer Coll. of Chiropractic v. Davenport C.R. Comm'n, 850 N.W.2d 326, 337 (Iowa 2014).

[158] *Palmer*, 850 N.W.2d at 338 (quoting Wynne v. Tufts University, 932 F.2d 19, 26 (1st Cir. 1991)); *see* discussion *supra* Part III.

[159] Se. Cmty. Coll. v. Davis, 442 U.S. 397, 412 (1979).

Lastly, attorneys who come across potential section 504 claims from students with physical disabilities, such as Bernard Ray Johnston or the plaintiff in *Palmer*, should be prepared to look for evidence of new technologies to assist in accommodations, stories of similarly situated students who successfully graduated nursing school or medical school, and new ways of thinking about the functions of nursing and medical school education. As shown in *Palmer*, courts find this evidence persuasive when analyzing whether an applicant with disabilities is otherwise qualified and whether an accommodation proposed by a plaintiff is reasonable. It can also withstand rebuttal from a defendant medical or nursing school when the institution has failed to keep up with ADA and section 504 guidelines.

VI. ARGUMENTS AGAINST A CONSCIOUS INQUIRY REQUIREMENT

The three main counterpoints to this solution or any push to change technical standards at nursing and medical schools include possible conflicts with school accreditation requirements, potential dangers to patients when more students with physical disabilities are allowed into clinicals, and costs on the schools.

A. *Accreditation Issues*

While medical and nursing schools' concerns about accreditation and the licensure of graduates are valid, current accreditation and licensing standards are broad enough to allow for a wide breadth of accommodations approaches towards accommodations in nursing and medical school education. In some cases, the court must rely on a school's deference to accreditation standards. Various organizations, including the LCME, the Commission on Collegiate Nursing Education (CCNE), the Accreditation Commission for Education in Nursing, and more, accredit nursing and medical schools.[160] In most states, obtaining a license in nursing or medicine requires students to attend nursing or medical schools accredited by a national accrediting board.[161] The Tenth Amendment preserves the state's power to

[160] *See generally What's the Deal with Accreditation?*, NURSINGCAS (Mar. 12, 2018), https://nursingcas.org/whats-the-deal-with-accreditation (last visited Nov. 6, 2022); *see LCME Paper*, *supra* note 127, at 341.

[161] *See, e.g.*, McCulley v. Univ. of Kan. Sch. of. Med., No. 12-2587, 2013 U.S. Dist. LEXIS 156233, at *10 (D. Kan. Oct. 13, 2013) ("The Kansas Board of Healing Arts ('KBHA') requires graduation from 'an accredited healing arts school or college' as a prerequisite for qualification to sit for examination to practice as a physician." (quoting KAN. STAT. ANN. § 65-2873(a)(2) (2015)), *aff'd*, 591 F. App'x 648 (10th Cir. 2014); *see also* Wisc. Dep't of Safety & Prof. Services, *Registered Nurse*, STATE OF WISC.,

establish laws that protect the "health, safety, and general welfare of its citizens," including the ability to enact laws that create state medical and nursing licensing boards.[162] These boards can set the standards granting medical and nursing licenses in the state.[163]

Furthermore, state nursing and medical boards can set curriculum guidelines for schools within the state.[164] Per the Kansas Board for Healing Arts (KHBA), medical students must attend an accredited school.[165] This medical school "must require 'study of medicine and surgery in all of its branches . . . to have a standard of education substantially equivalent to the University of Kansas [S]chool of [M]edicine.'"[166] Moreover, the KHBA "also provides that it establishes the criteria for minimum standards for accreditation of medical schools and that those standards will include [a]dmission requirements."[167]

These statutes regarding accreditation were central to the District Court of Kansas' holding in *McCulley v. Kansas University School of Medicine*, in which the court granted summary judgment for the school on the plaintiff's section 504 and ADA claims.[168] The court found that the plaintiff, who had multiple sclerosis that made her upper body physically weak and required the use of a wheelchair, failed to carry the burden of demonstrating the existence of a reasonable accommodation.[169] More importantly, the court concluded evidence showed that the university's motor technical standards—including being able to perform chest compressions or move patients without an assistant—were essential to the program because "[they] were adopted

https://dsps.wi.gov/Pages/Professions/RN/Default.aspx (last visited Oct. 1, 2023) (requiring "[c]ompletion of high school or its equivalent and diploma from accredited school of nursing approved by board" under Pre-Credential Education Information).

162 Robin Schroeder et al., *Do State Medical Board Applications Violate the Americans with Disabilities Act?*, 84 ACAD. MED. 776, 776 (2009).

163 *See, e.g.*, N.J. ADMIN. CODE § 13:37-2.1 (2022) (describing the New Jersey's nursing board licensure requirements); *see also* Schroeder et al., *supra* note 162162, at 776 ("[E]ach state enacted a medical practice act charging state medical boards with responsibility for granting licenses to physicians to practice in the state . . . .").

164 *See, e.g.*, N.J. ADMIN. CODE § 13:37-1.8 (2022) (outlining curriculum requirements for New Jersey nursing schools).

165 *See McCulley*, U.S. Dist. LEXIS 156233, at *10 (quoting KAN. STAT. ANN. § 65-2873(a)(2) (2015)).

166 *Id.* (quoting KAN. STAT. ANN. § 65-2874 (2015)).

167 *Id.* (quoting KAN. STAT. ANN. § 65-2874(b) (2015)).

168 *Id.* at *44.

169 *Id.* at *34.

as part of [the University's] accreditation procedures" under the LCME and the KHSA, "and [those] [s]tandards serve to ensure that medical students can execute physical movements which are reasonably required to provide general care and emergency treatment."[170]

While almost all states require medical and nursing schools to adopt admissions requirements as part of accreditation procedures, state licensing board requirements for nurses and doctors do not have specific physical requirements listed in them. For example, the licensure requirements in New Jersey for registered nurses and licensed practical nurses include passing a national nursing exam, known as the NCLEX; a written confirmation from the student's nursing school of the school's accreditation; and the student's fulfillment of all requirements for graduation.[171] Additionally, nationally recognized accreditation bodies, such as the LCME referenced in *McCulley*, do not have a specific list of technical standards for schools to implement. While the LCME requires the publishing of technical standards by medical schools in compliance with legal requirements, the board does not specify any particular physical skills, observational skills, or gross motor abilities required in these technical standards; instead, it is left to the judgment of the institution to determine what those skills are.[172] The LCME's accreditation standards for 2023–2024 also include disability in their antidiscrimination statement, which implies the importance of seeking reasonable accommodations for students with disabilities whenever possible.[173]

Accreditation standards are also subject to change, including changes that promote accessibility for applicants with physical disabilities. For example, "the Accreditation Council for Graduate Medical Education (ACGME) recently added disability-focused institutional and program mandates into accreditation standards for residency programs and expanded its definition of diversity to include disability."[174] The ACGME's "program-level requirements mandate

[170] *Id.* at *11, *38.

[171] *See* N.J. ADMIN. CODE §§ 13:37-2.1 to 13:37-2.2 (2022).

[172] LIAISON COMM. ON MED. EDUC., ASS'N OF AM. MED. COLLEGES & AM. MED. ASS'N, FUNCTIONS AND STRUCTURE OF A MEDICAL SCHOOL: STANDARDS FOR ACCREDITATION OF MEDICAL EDUCATION PROGRAMS LEADING TO THE MD DEGREE 26 (2022).

[173] *Id.* at 4.

[174] *LCME Paper*, *supra* note 127, at 341.

that training programs provide accommodations to trainees."[175] Although the LCME has not followed suit yet, disability rights advocates have called on the LCME to do so.[176] The AACN's essentials for nursing from 2011 also focus more on inclusive guidelines with no mention of motor skills or specific visual and hearing capabilities.[177] Consequentially, as accreditation bodies continue to modify their requirements to account for nurses and doctors with disabilities, medical and nursing schools ought to and will lose the ability to rely on this defense in court.

B. *Safety Concerns*

The Supreme Court in *Davis* mentioned the importance of safety in its opinion.[178] Many assume that nursing and medical students with physical disabilities pose a danger to patients, unlike those without disabilities.[179] This assumption carries over into evidence used by courts and statutes addressing disability discrimination.[180] Typically, however, students with physical disabilities understand their limitations and adapt to them.[181] "[T]eam[s] whose members each fulfill a different role" more often address emergencies in medical school and nursing school clinicals, meaning that a "person with a mobility disability would not need to be able to intubate a cardiac arrest patient" because another member of the team can.[182] According to Leslie Neal-Boylan, this safety fear is unfounded, as "there are no documented incidents of a patient injury caused by a nurse with a

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175 *Id.*

176 *See generally id.*

177 *See* Sarah H. Ailey & Beth Marks, *Technical Standards for Nursing Education Programs in the 21st Century*, 42 REHAB. NURSING J. 245, 250 (2017) (outlining the AACN's nine essentials for nursing).

178 Se. Cmty. College v. Davis, 442 U.S. 397, 408–09 (1979).

179 MARKS & AILEY, *supra* note 13, at 10.

180 *See, e.g.*, 42 U.S.C. § 12182(b)(3) ("Nothing in [Title III] shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages, and accommodations of such entity where such individual poses a *direct threat* to the health or safety of others." (emphasis added)); *see also Davis*, 442 U.S. at 407 ("It is not open to dispute that, as Southeastern's Associate Degree Nursing program currently is constituted, the ability to understand speech without reliance on lip-reading is necessary for patient safety during the clinical phase of the program.").

181 McKee et al., *supra* note 14, at 995.

182 *Id.*

physical disability."[183] The Institute of Medicine also reports medical errors are most often attributable to "faulty systems, processes, and conditions," not "the characteristics of individual clinicians or recklessness or the actions of a particular group."[184] Thus, the assumption that medical and nursing students with physical disabilities pose a direct threat under Title III and are dangerous to patients is unfounded; additionally, this assumption is possibly more harmful to students with physical disabilities than any potential patients they would come into contact with.[185]

C. *Increases in Costs*

Schools also fear the increasing costs of using new technologies as accommodations and reeducating professors to better educate students with physical disabilities better. Courts should continue to find that reasonable accommodations "do not cost so much that the program will be placed in financial jeopardy" or cause an undue burden on the institution.[186] At the same time, "the mere fact that an accommodation imposes cost does not excuse a medical school from providing it."[187] According to Marks:

> While changing the prejudicial status quo usually is of little to no cost, statistics show that 98 [percent] of accommodations for people with disabilities are on average less than $500.00 with many accommodations having no associated costs or some costs [that] can be shared through the vocational rehabilitation services (VRS).[188]

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183 MARKS & AILEY, *supra* note 13, at 10 (quoting Leslie Neal Boylan, *End the Disability Debate in Nursing: Quality Care is a Fact*, INSIGHT INTO DIVERSITY 11 (2013)); *see also* McKee et al., *supra* note 14, at 995 ("Despite concerns about patient safety, not a single legal case known to the authors has been filed in which patient harm resulted from an accommodation provided to [a student with a disability].").

184 MARKS & AILEY, *supra* note 13, at 10.

185 *See id.* (implying that the "large[] and unrecognized" concern of patients with disabilities who report "that health care professionals often lack knowledge and sensitivity about their disabilities" could be resolved with the introduction of more nurses with disabilities into the field); *see also* Ailey & Marks, *supra* note 177177, at 250 ("In the context of a complex healthcare environment and the need for nursing leadership, the issue of clinical experiences should be rethought in terms of what nurses with various disabilities may bring to the profession and on what insights nurses with disabilities may bring to improve safety.").

186 Neal-Boylan & Miller, *supra* note 14, at 239.

187 Bagenstos, *supra* note 20, at 1011.

188 MARKS & AILEY, *supra* note 13, at 12.

Another study showed that 33 percent of accommodations had no cost.[189] In light of these statistics, nursing and medical schools' fears of costly changes to their program are also unfounded. Even with the level of deference courts give schools currently, schools rarely argue successfully that an accommodation's cost would make it unreasonable, and this solution would not change that fact.[190]

VII. CONCLUSION

To conclude, as the Supreme Court opined in *Davis*, the line between "a lawful refusal to extend affirmative action and illegal discrimination against . . . persons [with disabilities]" will not always be clear given advances in technology and thought,[191] and "situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory."[192] Thus, when courts hear nursing and medical schools' rebuttals of a plaintiffs' with physical disabilities section 504 claim, they should require schools to show material evidence of a conscientious inquiry into new adaptive technologies and new approaches to educating nursing and medical students with disabilities.

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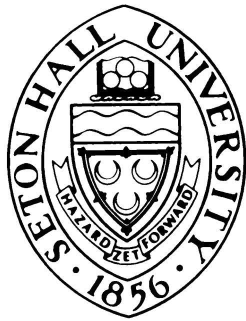
189 LISA M. MEEKS & NEERA R. JAIN, ASSOC. OF AM. MED. COLLS., ACCESSIBILITY, INCLUSION, AND ACTION IN MEDICAL EDUCATION LIVED EXPERIENCES OF LEARNERS AND PHYSICIANS WITH DISABILITIES 11 (2018).

190 *Id.* at 11, 68; *see also* Arghenyi v. Creighton Univ., 703 F.3d 441, 445–51 (8th Cir. 2013) (finding that defendant violated section 504 and Title III by not providing a hearing-impaired student Communication Access Real-time Transcription (CART) system even in light of the cost to the University).

191 Se. Cmty. Coll. v. Davis, 442 U.S. 397, 412 (1979).

192 *Id.* at 412–13.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