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# Vitriolic Verification: Accommodations, Overbroad Medical Record Requests, and Procedural Ableism in Higher Education

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## I. INTRODUCTION

In 1927, the U.S. Supreme Court, speaking through Justice Oliver Wendell Holmes, Jr., condoned and applauded the states' forced sterilization of disabled persons.[1] Holmes considered disabled persons a blight on society, likening forced sterilization to vaccination.[2] For Holmes, denying disabled persons bodily autonomy was the price to pay for eradicating "incompetence" and those who "sap the strength" of society from our gene pool.[3] In Holmes' opinion, due to the burden they wrought, disabled persons owed society the "sacrifice" of putting an end to their own kind.[4] While today Holmes' opinion may shock the conscience of the average reader, at the time, Holmes' extreme dehumanization of disabled persons was commonplace.[5] From the 1920s to the mid-1970s, state governments across the country forcibly sterilized 70,000 people without informed consent, most of whom were considered disabled.[6] Today, due to stigma, accessibility barriers, and lack

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[1]Buck v. Bell, 274 U.S. 200, 207 (1927).

[2]"The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough." *Id.* at 207 (citing Jacobson v. Massachusetts, 197 U.S. 11 (1905)).

[3]*Id.*

[4]*Id.*

[5]It is important to note that while Buck v. Bell is a reprehensible opinion, it has not been overturned and remains "good law." In fact, guardian-imposed sterilization still exists in the United States. *See, e.g.*, Ari Ne'eman, *Washington State May Make It Easier to Sterilize People with Disabilities,* Am. Civ. Liberties Union (Jan. 29, 2018, 5:45 PM), https://www.aclu.org/blog/disability-rights/integration-and-autonomy-people-disabilities/washington-state-may-make-it#:~:text=And%20yet%2C%20state%20laws%20still,sterilization%20for%20individuals%20under%20guardianship.&text=People%20with%20disabilities%20should%20not%20be%20denied%20this%20choice [https://perma.cc/XJ9P-FXSR].

[6]*The Supreme Court Ruling That Led To 70,000 Forced Sterilizations*, NPR (Mar. 7, 2016, 1:22 PM), https://www.npr.org/sections/health-shots/2016/03/07/469478098/the-supreme-court-ruling-that-led-to-70-000-forced-sterilizations [https://perma.cc/E28Y-8VYY]; *see also* Reiter & Walsh, P.C., *Involuntary Sterilization of Disabled Americans: An Historical Overview*, Am. Baby & Child L. Ctrs. (Nov. 6, 2018), https://www.abclawcenters.com/blog/2018/11/06/involuntary-sterilization-of-disabled-americans-an-historical-overview/ [https://perma.cc/JL5K-KHR8].

of disability cultural competency, on average, disabled persons continue to receive sub-standard medical care when compared to their non-disabled peers.[7]

To say the least, disabled persons maintain a complicated and, at times, painful relationship with the medical profession. Significantly, the medical profession wields an enormous amount of power over disabled persons—they are more likely to need frequent care and rely on their practitioners to verify needs for government rendered social supports, and in the context of education, accommodation verification requests.[8] In effect, the legal and higher education communities have placed the medical community in a position of authority over disabled persons, casting providers in the role of "keeper of the keys" to disability personhood—one of the pitfalls of staunch obedience to the medical model of disability as opposed to a more holistic approach.[9] Thankfully, there are signals that legislators are moving away from the medical model.[10] The Americans with Disabilities Act, as amended ("ADA" or the "Act") does not require the examination of medical evidence as a prerequisite to making a disability status determination.[11] Unfortunately, despite the statutory text, post-secondary accommodation interactive process frameworks often *require* the production of medical documentation as a prerequisite to securing accommodations.[12] This is almost certainly due to the absence of a robust regulatory

[7]*See* Gloria L Krahn et al., *Persons with Disabilities as an Unrecognized Health Disparity Population*, 105 AM. J. PUB. HEALTH S198, S200 (2015) ("[A]lthough public insurance provides coverage for many people with disabilities, it does not cover all people, and … . [e]ven with insurance, people with disabilities are much more likely (16% vs 5.8%) to miss getting need care because of cost."); Rachel Bluth, *For the Disabled, a Doctor's Visit Can be Literally an Obstacle Course — and the Laws Can't Help*, WASH. POST (Oct. 28, 2018, 9:00 AM), https://www.washingtonpost.com/national/health-science/for-the-disabled-a-doctors-visit-can-be-literally-an-obstacle-course–and-the-laws-cant-help/2018/10/26/1917e04c-d628-11e8-aeb7-ddcad4a0a54e_story.html [https://perma.cc/3XKF-8NX9] (describing how a professor at Harvard Medical School who uses a wheelchair went twenty years without having her weight taken due to inaccessible scales); Michael R. Ulrich, *Challenges for People with Disabilities Within the Health Care Safety Net*, HEALTH AFF. (Nov. 18, 2014), https://www.healthaffairs.org/do/10.1377/hblog20141118.042813/full/ [https://perma.cc/49CJ-EHVM] ("This community is all too frequently left to suffer health disparities due to cultural incompetency, stigma and misunderstanding, and an inability to create policy changes that cover the population as a whole and their acute and long-term needs.").

[8]*See* NANCY J. EVANS ET AL., DISABILITY IN HIGHER EDUCATION: A SOCIAL JUSTICE APPROACH 56-58 (2017) (explaining how in the early 20th century policy makers placed "disability" under the dominion of the medical profession).

[9]*Id.*; Sara Goering, *Rethinking Disability: The Social Model of Disability and Chronic Disease*, 8 CURRENT REV. MUSCULOSKELETAL MED. 134, 134 (2015); Deirdre M. Smith, *Who Says You're Disabled? The Role of Medical Evidence in the ADA Definition of Disability*, 82 TUL. L. REV. 1, 40-41 (2007).

[10]Stephen Bunbury, *Unconscious Bias and the Medical Model: How the Social Model May Hold the Key to Transformative Thinking About Disability Discrimination*, 19 INT'L J. DISCRIMINATION & L. 26, 29 (2019) (citation omitted) ("In the last decade, the social model has had a significant impact in shaping public policy and education in the United States."); *see also* Bradley A. Areheart, *When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the* Goldilocks *Dilemma*, 83 IND. L.J. 181, 227-29 (2008) (advocating for the passage of the ADA Restoration Act of 2007, a version of which was passed in 2008, as a return to the social model of disability); *cf.* Mancini v. City of Providence *ex rel.* Lombardi, 909 F.3d 32, 41 (1st Cir. 2018) (collecting circuit court cases to conclude that "some conditions plainly fall within the universe of impairments that a lay jury can fathom without expert guidance. These conditions do not require medical evidence in an ADA case.").

[11]*Mancini*, 909 F.3d at 42 (holding that disabled status does not require medical evidence under the ADA); Johnathan M. Crotty, *Medical Evidence Not Necessary to Prove ADA Disability*, PARKER POE: ATT'YS & COUNS. L. (Dec. 6, 2018), https://www.parkerpoe.com/news/2018/12/medical-evidence-not-necessary-to-prove-ada-disability [https://perma.cc/5J7J-J9H5].

[12]Due to lack of reporting regulations, the exact prevalence of asking for medical documentation before asking for less invasive documentation is unknown as institutions are not required to report their accommodation practices to any administrative agency. However, many prominent universities plainly require medical evidence as a prerequisite for obtaining accommodations. *See, e.g.*, GOLDMAN CTR. FOR STUDENT ACCESSIBILITY, TULANE UNIV., *Documentation Guidelines* (2018), https://accessibility.tulane.edu/sites/accessibility.tulane.edu/files/Guidelines%20for%20Documentation%202018.pdf [https://perma.cc/A3DK-5EAY]; OFFICE OF

regime outlining and limiting the interactive process to inquiries of reasonable scope.[13] As they stand now, regulations do little to prevent onerous and intrusive medical documentation requests, which are sometimes used to stigmatize disabled persons, contorting disability identity into a mark of inferiority.[14]

The current regulatory scheme inadequately defines the boundaries of permissible medical inquiry, resulting in unwieldy documentation requests that intrude upon students' medical privacy and demean their personhood. These practices indicate near sole reliance on the medical model of disability which is not appropriate for the higher education setting; these practices fail to incorporate other disability models and theories (e.g., social model, interactionist model, social justice model, and disability justice model) and as a result is injurious to disabled personhood.[15]

Despite the persistent ableist structures in higher education institutions, self-disclosure of disability status has increased steadily since the 1990s.[16] As enrollment of disabled persons in higher education increases, the absence of medical inquiry boundaries demands the attention of disability education advocates. In 1999, approximately nine percent of undergraduate students reported having a disability.[17] By 2012, eleven percent.[18] In 2015, nineteen percent.[19] Under the ADA framework, student disclosure triggers statutory obligations.[20] More specifically, once a student discloses disability, the institution is required to engage in the "interactive process."[21] As the numbers stand, almost one in five students trigger interactive process obligations, but the Department of Justice ("DOJ") has not promulgated regulations governing appropriate medical inquiry within the interactive process.[22]

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Disability Servs., Princeton Univ., Medical Disability Documentation Form (2018), https://ods.princeton.edu/sites/ods/files/resource-links/medical_disability_documentation_final.pdf [https://perma.cc/YNS3-LX9C]; Student Disability Serv., Cornell Univ., Guidelines for Providers Submitting Documentation, https://sds.cornell.edu/sites/sds/files/docs/Guidelines%20for%20Documentation%20from%20a%20Provider.pdf [https://perma.cc/2SAZ-DWVL]; *Documentation Guidelines and Accommodation Process*, Geo. U. Acad. Resource Ctr., https://academicsupport.georgetown.edu/disability/medical-accommodations/ [https://perma.cc/A6HP-NBWS].

[13]*See Mancini*, 909 F.3d at 43 (1st Cir. 2018) (stating medical documentation is not a necessary component of proving "substantial impairment" under the ADA as amended); Crotty, *supra* note 11 ("In some circumstances, [medical evidence] would be necessary to establish the existence of a qualifying medical condition. But in others, a lay jury can determine this status without detailed medical evidence.").

[14]Jay Timothy Dolmage, Academic Ableism: Disability and Higher Education 7-10 (2017) (explaining how ableism and stigma are used to insinuate inferiority to disabled persons).

[15]Evans et al., *supra* note 8, at 55, 57 (introducing various disability models and theories and stating "the medical model evolved and remains a major paradigm for understanding, treating, and working with people with disabilities.").

[16]*See* Cristobal de Brey et al., Nat'l Ctr. for Educ. Stat., Digest of Education Statistics, 2019 215 (2021) ("Nineteen percent of undergraduates in 2015-16 reported having a disability.").

[17]Dolores E. Battle, *Project Success: Assuring College Students with Disabilities a Quality Higher Education*, 9 ASHA Leader 6, 6 (2004).

[18]*Individuals with Disabilities*, Nat'l Inst. Health: Diversity Extramural Programs, https://extramural-diversity.nih.gov/diversity-matters/individuals-with-disabilities [https://perma.cc/M6JK-EXGW].

[19]Postsecondary Nat'l Policy Inst., Students with Disabilities in Higher Education 1 (2020), https://pnpi.org/wp-content/uploads/2020/10/StudentswithDisabilities_UpdatedOct2020Factsheet.pdf [https://perma.cc/4XPP-JS5Z]; *Fast Facts: Students with Disabilities*, Nat'l Ctr. for Educ. Stat. (2019), https://nces.ed.gov/fastfacts/display.asp?id=60 [https://perma.cc/S89X-5AF2].

[20]*Disabilities in Higher Education*, Legal Aid at Work, https://legalaidatwork.org/factsheet/disabilities-in-higher-education/ [https://perma.cc/NGS4-9X8N].

[21]*Id.*

[22]Postsecondary Nat'l Policy Inst., *supra* note 19; *Fast Facts: Students with Disabilities*, *supra* note 19.

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Twenty-eight percent of students with a previously identified disability disclosed their status to their higher education institution.[23] Of those who disclosed, only seventy percent received accommodations.[24] Momentarily leaving aside the issue of non-disclosure, the story behind the thirty percent of students who disclose a disability but do not receive accommodations requires more attention. To be sure, a portion of those students do not receive accommodations because their disability does not require one. Frustratingly, currently there is no way of knowing what proportion of the thirty percent figure those students occupy. It is not possible to regulatorily address the likely systemic phenomenon of overbroad, injurious, and stigmatizing medical record requests without data collection investigating the practices of covered entities. Recent litigation suggests that overbroad medical record requests tend to screen out persons with disabilities from higher education programs and are thus impermissible under Titles II and III of the ADA.[25]

First, this Note defines the danger of overbroad medical record requests and explains how such requests risk undermining the language and statutory intent of the ADA. Part II examines the history of inclusive education by evaluating statutory and case law developments. Part III examines the value and procedural based complications present in the current disability education law framework that lead to overbroad medical record requests which tend to screen out students with disabilities. Part IV presents a solution in the form of reporting requirements such that the DOJ and private party litigants alike may better understand the documentation request practices of universities.

## II. PROBLEM: THE NOT SO INTERACTIVE PROCESS – ACCOMMODATION ELIGIBILITY EVALUATIONS AND OVERBROAD MEDICAL RECORD REQUESTS IN HIGHER EDUCATION

As the ADA Congress recognized, the promise of societal equity for persons with disabilities necessarily includes the opportunity to fully participate in higher education programs.[26] As it stands now, the higher education accommodations process relies upon affirmative student disclosure and takes for granted good faith inquiries by covered institutions.[27] Recent litigation illustrates that, left to their own devices, higher education institutions and testing organizations can abuse the power dynamic between themselves and students seeking accommodation by requesting unreasonable testing, burdensome demands on students' medical practitioners, and broad record requests that tend to

[23]Cong. Research Serv., R44887, Students with Disabilities Graduating from High School and Entering Postsecondary Education: In Brief 9-10 (2017).

[24]Lynn Newman et al., Inst. of Educ. Scis., The Post-High School Outcomes of Young Adults with Disabilites Up to 8 Years After High School 32 (2011), https://ies.ed.gov/ncser/pubs/20113005/pdf/20113005.pdf [https://perma.cc/A23X-LPFH].

[25]*See, e.g.*, Dep't of Fair Emp't & Hous. v. Law Sch. Admission Council, Inc., 896 F.Supp.2d 849, 852-53, 857 (N.D. Cal. 2012) (alleging discriminatory impact of excessive documentation requests); *Settlement Agreement Between the United States of America and Northern Michigan University Under the Americans with Disabilities Act*, ADA.Gov (Oct. 18, 2018), https://www.ada.gov/nmu_sa.html [https://perma.cc/PW9T-MRYP] [hereinafter *DOJ Settlement Agreement - Northern Michigan University*].

[26]Congress stated that persons with physical or mental disabilities have the "right to fully participate in all aspects of society" and recognized that discrimination prevents such participation, particularly in the area of education. Congress further stated they would use the "sweep of congressional authority" to address discrimination. Americans with Disabilities Act, 42 U.S.C. § 12101 (a)(1)-(3), (b)(4) (2018).

[27]*See Disabilities in Higher Education*, *supra* note 20.

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embarrass the student or delay the interactive process to the student's detriment.[28] This practice not only harms the individual student requesting accommodations, but can chill others from seeking accommodations as well.[29] Currently, Title II and III regulations only address the proper scope of documentation requests in the context of an initial disability status determination.[30] Unfortunately, any regulations regarding the permissible scope of medical inquiry during the accommodation crafting process itself is notably absent. The only word from the DOJ on this subject exists in the form of "technical guides" speaking to the outer limits of medical inquiry for entrance examination companies (e.g., the Law School Admissions Counsel or "LSAC") and professional licensure organizations (e.g., a state bar association).[31] Confusingly, the guides do not address the permissible scope of medical inquiry for colleges or universities engaging in the same type of accommodation based medical inquiries. Even if the guide *did* address medical inquiry boundaries within higher education programs, the non-compliance risk would remain intolerably high as technical guides, unlike duly promulgated regulations, lack the force of law.[32] Essentially, courts have greater liberty to ignore technical guidance, and indeed have done so within the context of the ADA.[33] With no clear regulation outlining the outer bounds of medical documentation requests, covered entities are more likely to inappropriately invade upon students' medical privacy. A recent settlement agreement between the DOJ and Northern Michigan University confirms the DOJ's view that overly broad or unduly burdensome medical record requests for readmission after medical leave may violate a covered entity's accommodation obligations by placing an undue burden on academic program access.[34] This Note posits that, in the same vein, students pressured to release large volumes of medical information may be dissuaded from applying for and accessing academic accommodations.[35] While recent settlement agreements give us a general idea about the proper legal scope of medical documentation, these decisions are only legally binding unto the parties to the settlement, and therefore, are an inappropriate replacement for regulation.

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[28] *See, e.g.*, *Law Sch. Admission Council, Inc.*, 896 F.Supp.2d at 852-53; *DOJ Settlement Agreement - Northern Michigan University*, *supra* note 25, at ¶ 4-6.

[29] In one case, the defendant test company "flagged" scores of accommodated test takers. *Law Sch. Admission Council, Inc.*, 896 F.Supp.2d at 869 (explaining that flagging the scores of prospective law students discourages students from applying for accommodations, amounting to a denial of equal opportunity claim).

[30] *See* 28 C.F.R. § 36.105 (d)(1)(vii) (2018). "The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical evidence. Nothing in this paragraph (d)(1) is intended, however, to prohibit or limit the presentation of scientific, medical, or statistical evidence in making such a comparison where appropriate." *Id.*

[31] U.S. Dep't of Justice, ADA Requirements: Testing Accommodations (2015), https://www.ada.gov/regs2014/testing_accommodations.pdf [https://perma.cc/ZH36-W4XJ]; *ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities*, ADA.Gov, III-1.000, III-4.6000-4.6100 (1993), https://www.ada.gov/taman3.html [https://perma.cc/9WUS-VE44].

[32] Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467, 477 (2002).

[33] Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999); Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984). In *Sutton*, the Court reviewed an EEOC informal guidance document that instructed covered employers to disregard any mitigating factors when evaluating an employee's disability status. *Sutton*, 527 U.S. at 472. The court refused to enforce the guidance stating that it was an "impermissible interpretation of the ADA." *Id.*

[34] *DOJ Settlement Agreement - Northern Michigan University*, *supra* note 25, at ¶ 4-6 (detailing excessive medical inquiries performed by a university). While recent settlement agreements give us a general idea about what the proper scope of medical documentation is, these decisions are only legally binding unto the parties to the settlement, and therefore are an inappropriate replacement for regulation. Accommodation request forms detailing extensive medical documentation requests, from various schools around the country, are on file with the author.

[35] *Id.*

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## III. HISTORICAL GLOSS: DISABILITY RIGHTS AND EDUCATION IN THE UNITED STATES

### A. Equal Education in Primary & Secondary School

In 1954, the case of *Brown v. Board of Education* finally solidified the undeniable truth that separate education is not equal education.[36] The ADA mirrored *Brown's* recognition that society is inherently unequal as there are intangible social benefits that cannot be replicated in a separate environment.[37] In other words, without full and unfettered access to all aspects of public life, people with disabilities are denied their full citizenship and humanity. *Brown* acknowledged that without an integrated education model, societal equity is not achievable.[38] The remnants of wholly segregated education systems linger and disabled people continue to face equal education barriers due to stigma hampering disability disclosure and the unreasonable denial of accommodations.[39] When disabled students matriculate without individually necessary reasonable accommodations, they endure a substandard, second-class form of education.[40]

In 1973, Congress enacted Section 504 of the Rehabilitation Act ("Section 504") barring any program receiving federal funding from discrimination on the basis of disability.[41] Section 504, however, did not specify the obligations of public schools concerning the education of students with disabilities, and did not allocate funding to the state for compliance purposes, so the act, as a stand-alone vehicle, was largely ineffective at curing inequities in primary and secondary education. By contrast, the Individuals with Disabilities Education Act ("IDEA") requires public primary and secondary schools that received federal funding to educate children with disabilities and provides additional federal funding to aid in IDEA compliance.[42] Educational institutions subject to IDEA must abide by six mandates which facilitate the development of comprehensive special education programs, and the identification and accommodation of disabled students.[43]

### B. Post-Matriculation Educational Program Accommodations

Until the passage of the ADA in 1990, Section 504 served as the only source of statutory protection for students with disabilities in higher education.[44] Section 504 still provides protection for individuals seeking accommodations in higher education—the

[36]Brown v. Bd. of Ed., 347 U.S. 483, 495 (1954).

[37]*Id.* at 493.

[38]*Id.* ("[Education is the] principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.").

[39]Allie Grasgreen, *Dropping the Ball on Disabilities*, Inside Higher Ed (Apr. 2, 2014), https://www.insidehighered.com/news/2014/04/02/students-disabilities-frustrated-ignorance-and-lack-services [https://perma.cc/N6GW-3ZWH].

[40]*Id.*

[41]Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2018); *see also* Letter from Arlene Mayerson, Directing Attorney, Disability Rights Educ. & Def. Fund, to Virginia Foxx, Chairwoman, House Comm. on Educ. and the Workforce, & Bobby Scott, Ranking Member, House Comm. on Educ. and the Workforce (May 17, 2018), https://dredf.org/wp-content/uploads/2018/05/DREDF-Letter-re-Brown-for-Committee-051618.pdf [https://perma.cc/QW4D-4QPB].

[42]Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400, 1402 (2018).

[43]*Id.* §§ 1400-1401, 1412-1415 (including six elements: individualized education program, free appropriate public education, least restrictive environment, appropriate evaluation, parent and teacher participation, and procedural safeguards).

[44]*See* Rehabilitation Act of 1973 § 504.

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drafters of the ADA based much of its original language on the text and intent behind Section 504.[45] Section 504 prohibits discrimination on the basis of disability in programs and activities, public and private, that receive federal financial assistance.[46] Additionally, Section 504 and its regulations mandate that covered entities provide comparable education to both disabled and non-disabled students—often achieved by the granting of reasonable accommodations.[47]

In 1990, Congress expanded disability rights via the passage of the ADA.[48] In so doing, Congress expressed concern for disability rights—recognizing the barriers that exist for disabled people to access the world around them (physically, emotionally, and intellectually).[49] Congress admonished the historical isolation of persons with disabilities, recognizing that, while improvements had been made, disability discrimination stubbornly persisted.[50] Unfortunately, not long after the Act's passage, the courts stymied Congress's vision by substantially narrowing the definition of disability and the class of disabled persons able to sue for relief under the Act.[51]

### C. Judicial Backlash: Narrowing the Definition of Disability

Under the ADA, a person is considered "disabled" if they have a "record" of a "physical or mental impairment that substantially limits one or more [of the individual's] major life activities."[52] In 1999, the Supreme Court resolved a definitional dispute around the term "substantially limits."[53] The agencies failed to promulgate regulations adequately defining the term, allowing the Court to adopt its own definition via a series of opinions known as the "*Sutton* Trilogy."[54] The trilogy stood for the proposition that "mitigating measures" (e.g., mobility assistive devices and medication) must be taken into consideration when determining if a person is "substantially limited" in one or more of their major life activities.[55] In so doing, the Court refused to follow Equal Employment Opportunity Commission ("EEOC") guidance supporting the opposite conclusion because, according to the Court, the "plain language" of the statute necessitated the consideration of mitigating factors.[56] By narrowing the definition, the Court slashed the number of disabled persons able to achieve standing under the Act. In fact, before the passage of the ADA

[45] *Introduction to the ADA*, ADA.Gov, https://www.ada.gov/ada_intro.htm#:~:text=Modeled%20after%20the%20Civil%20Rights,law%20for%20people%20with%20disabilities [https://perma.cc/ZT8Z-RV55].

[46] Rehabilitation Act of 1973 § 504; Letter from Arlene Mayerson, *supra* note 41.

[47] *See* Rehabilitation Act of 1973 § 504; Office for Civil Rights, *Protecting Students with Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, U.S. Dep't Educ. (Jan. 10, 2020), https://www2.ed.gov/about/offices/list/ocr/504faq.html [https://perma.cc/P9XN-8HVW].

[48] Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2018).

[49] *Id.* § 12101.

[50] *Id.* § 12101(a)(2).

[51] *See, e.g.*, Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002) (holding that to establish disability status under the ADA, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives and has a permanent or long-term impact).

[52] 42 U.S.C. § 12102(1)(A).

[53] Sutton v. United Air Lines, Inc., 527 U.S. 471, 481-82 (1999).

[54] Barbara Lee, *A Decade of the Americans with Disabilities Act: Judicial Outcomes and Unresolved Problems*, 42 Indus. Rel. 11, 18-19 (2002). *Compare* 29 C.F.R. § 1613.702 (1995) (lacking a definition for 'substantially limits') *with* 29 C.F.R. § 1630.2(j) (1999) (defining "substantially limits" and listing factors to consider).

[55] Lee, *supra* note 54, at 18.

[56] *Sutton*, 527 U.S. at 481-82. United Air Lines' argument that the "[c]ourt should not defer to the agency guidelines cited by petitioners because the guidelines conflict with the plain meaning of the ADA" won

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Amendments Act ("ADAAA" or "the Amendments Act"), most claims against employers were summarily dismissed on a definitional basis.[57] Defining "disability" to exclude those whose impairments are mitigated "enough" by corrective devices, medication, mobility aids, etc. eliminated accessibility protections for millions of disabled Americans.[58] The narrowed definition was particularly problematic with regard to more fluid and "flaring" disabilities that do not have a stagnant relationship to mitigating devices or medications (e.g., Irritable Bowel Disorders).[59]

The circuit courts are split as to their interpretation of the *Sutton* decision.[60] The Second Circuit stated the ability to "self-accommodate" was relevant to assessing disability status, but was not by itself determinative.[61] In *Bartlett v. New York State Board of Law Examiners*, the Second Circuit applied a more individualized assessment, focusing on how a condition impacts a person's major life activities and processes.[62] In *Bartlett*, the petitioner was dyslexic and sued the New York State Bar because it refused to grant bar examination accommodations.[63] In determining the petitioner's disability status under the ADA, the court concluded that it was proper to consider the petitioner's ability to self-cope in the past as a mitigating factor.[64] The court clarified, however, that the ability to self-cope, or any one mitigating factor for that matter, is not determinative as to whether a person is disabled within the meaning of the ADA.[65] Unfortunately, the *Bartlett* court's individualized approach did not permeate other courts' jurisprudence.[66] The Fourth Circuit doubled down on definitional status determinations. The court audaciously stated that one's ability to self-cope is a determinative factor weighing heavily against disability classification under the ADA.[67] Until Congress passed the ADAAA in 2008, courts who followed the Fourth Circuit approach severely limited ADA protections for disabled persons.[68]

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the day. *Id.* at 481. While the ADAAA later nullifies this ruling, the statutory canon remains intact, leaving regulations that the court finds contrary to the statutory text susceptible to evasion.

[57]Wendy F. Hensel, *Rights Resurgence: The Impact of the ADA Amendments Act on Schools and Universities,* 25 GA. ST. U. L. REV. 641, 667-668 (2009) ("Employers won 95.5% of all ADA cases, with the majority on the grounds the plaintiff could not establish a protected disability under the ADA.").

[58]*See id.* at 651-52.

[59]*See* Lawrence D. Rosenthal, *Can't Stomach the Americans with Disabilities Act? How the Federal Courts Have Gutted Disability Discrimination Legislation in Cases Involving Individuals with Gastrointestinal Disorders and Other Hidden Illnesses*, 53 CATH. U. L. REV. 449, 487-88 (2004).

[60]The Second Circuit applied a broader standard and allowed the consideration of mitigating factors without a single determinative factor. *See* Bartlett v. N.Y. State Bd. of Law Exam'rs, 226 F.3d 69, 80 (2d Cir. 2000) (finding that while self-coping mechanisms may properly be considered as a mitigating factor, ability to cope in the past, standing alone, is not sufficient to prove that one is not substantially limited by their condition). The Fourth Circuit applied a much narrower standard and placed a heavy weight on mitigating factors, holding that past ability to perform at a standard level is determinative and enough to extinguish one's protective status under the ADA. *See* Betts v. Rector & Visitors of Univ. of Va., 18 F. App'x 114, 118 (4th Cir. 2001) (declaring petitioner is not disabled under the meaning of the statute because past self-coping mechanisms allowed petitioner to "achieve a history of academic achievement," demonstrating "his learning abilities are comparable to the general population").

[61]*Bartlett*, 226 F.3d at 80.

[62]*Id*. (citing Sutton v. United Air Lines, Inc., 527 U.S. 471, 480 (1999)) (clarifying that while the court "must account for Bartlett's self-accommodations in determining whether she is disabled, … the fact that [Bartlett] can self-accommodate does not itself determine whether she is disabled" and further remarking that a finding of disability "depends on whether the limitations [Bartlett] *actually* faces are substantially limiting").

[63]*Id.* at 75.

[64]*Id.* at 74.

[65]*Id.* (holding Bartlett's ability to self-cope with a cognitive disability does not *automatically* remove her from the ambit of protective class status).

[66]*See Bartlett*, 226 F.3d 69. *Contra Betts*, 18 F. App'x 114.

[67]*Betts*, 18 F. App'x at 118.

[68]*See* Hensel, *supra* note 57, at 671.

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### D. Congress' (Slow) Retort: Overriding the Jurisprudential Mutilation of the ADA & the Restoration of Disability Rights Oriented Litigation

It took Congress nearly a decade to restore the definition of disability via the ADAAA, reversing the definitional death knell of the *Sutton* Trilogy.[69] Specifically, Congress overturned *Sutton* and forbade the consideration of ameliorative effects when determining whether a person is disabled under the ADA.[70] Additionally, Congress reinforced the definition by clarifying that persons with conditions in remission, or that oscillate in severity and restriction, are considered disabled if the condition, when active, "would substantially limit a major life activity."[71] Lastly, Congress laid out its explicit intent for courts to construe disability broadly, leading some courts to default to a finding of disability status.[72]

Eventually, the main issue in ADA litigation evolved from establishing definitional standing to the actual merits of discrimination cases.[73] The definitional issue surrounding the term "substantially impaired" did not reach the circuit courts again until 2014. In *Summers v. Alarum*, the Fourth Circuit considered the validity of duly promulgated EEOC regulations that established employees with a temporary disability (a substantially debilitating condition that lasts for six months or less) fits within the restored definition of "substantially limiting" under the ADA, as amended.[74] In *Summers*, the defendant employer did not grant a temporarily disabled employee accommodations because the employer found the employee was not "substantially limited" under the Act.[75] The employer claimed the EEOC incorrectly interpreted the ADA and erroneously included those with temporary disabilities within the definition of "disabled" under the Act.[76] The Fourth Circuit disagreed. Citing Congress' clearly stated intent to construe disability broadly, the court upheld the EEOC's regulations.[77] It is unlikely that under pre-ADAAA case law, the employee would have survived the motion to dismiss stage.[78] The *Summers* decision has broader implications outside of the employment realm as the definition of disability is stagnant across all Titles of the ADA.[79]

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[69] ADA Amendments Act of 2008, 42 U.S.C. §§ 12101-12213 (2018); *see also Sutton*, 527 U.S. at 482.

[70] 42 U.S.C. § 12102(4)(E); *see also Sutton*, 527 U.S. at 482.

[71] 42 U.S.C. § 12102 (4)(D).

[72] *Id.*. § 12102(4)(A); Tess O'Brien-Heinzen, *The ADAAA: Key Changes to Disability Law*, 85 Wis. Law. 18, 20 (2012).

[73] *Id.*

[74] Summers v. Altarum Inst., Corp., 740 F.3d 325, 329 (4th Cir. 2014); 29 C.F.R. § 1630.2 (j)(1)(ix) (emphasis added) ("The effects of an impairment *lasting or expected to last fewer than six months* can be substantially limiting.").

[75] *Summers*, 740 F.3d at 329.

[76] *Id.* at 331-32; 29 C.F.R. § 1630.2(j)(1)(ix).

[77] *Summers*, 740 F.3d at 330-32 ("Congress … mandated that the ADA, as amended, be interpreted as broadly as its text permits.").

[78] *Id.* at 330-31. In the lower court proceeding, the court found the employee was not disabled because he could work with the use of a wheelchair without accommodation. *Id.* at 330. The Fourth Circuit rejected the argument stating the courts analysis relied on pre-ADAAA case law. *Id.* at 331. The circuit court explained that the ADAAA demands an inquiry into ones disability status without regard to mitigating factors. *Id.* After the court establishes disability and moves on to evaluate whether or not the employee received reasonable accommodations, only then may the court account for mitigating factors. *Id.*

[79] *See id.* at 329.

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## IV. MODERN FRAMEWORK: THE OBLIGATIONS OF HIGHER EDUCATION INSTITUTIONS AND TESTING ORGANIZATIONS UNDER THE AMERICANS WITH DISABILITIES ACT

Title II and Title III of the ADA, and Section 504, command covered entities to provide access for disabled persons to higher education programing.[80] Providing access frequently requires that higher education programs provide reasonable accommodations to disabled students.[81] While regulations under Section 504 are only triggered if a higher education program receives federal funding, practically, Section 504 and ADA regulations apply in any context discussed in this Note (aside from private testing company accommodations, though they are covered by the ADA Title II) as most higher education programs across the country receive federal funding.[82] As is explained *infra*, and indeed is the problem identified by this Note, regulatory guidance regarding the permissible scope of medical documentation requests during the interactive process is limited. ADA jurisprudence and settlement agreements more explicitly comment on the scope of permissible medical documentation requests and, as such, are the framework used for this Note.

There are two main stages to the higher education accommodations process: (1) the initial coverage determination and (2) the interactive process.[83] The first component involves making a determination of a student's baseline eligibility for accommodations under the ADA.[84] Once the institution "verifies" that a student has a disability as defined by the ADA, the school is then required to make reasonable modifications to the degree program.[85] The ADA is far more informative regarding medical documentation requests in the first stage, but is relatively silent regarding the second. Upon making a disability determination, the ADA permits, but does not require, the collection of medical information from students.[86] Title II and III regulations provide that ascertaining one's disability status will "usually … not require scientific, medical, or statistical evidence."[87] For the second stage, except in the realm of entrance examination testing, there are no regulations governing the permissible scope of medical documentation requests when crafting accommodations as part of the interactive process.[88] Case law minimally elucidates the murky regulatory regime that underlies the interactive process within the context of higher education.

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[80]Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2018); Americans with Disabilities Act, 42 U.S. C. §§ 12132, 12182 (2018); *see also* Ass'n on Higher Educ. & Disability, Supporting Accommodation Requests: Guidance on Documentation Practices 1 (2020), https://www.ahead.org/professional-resources/white-papers-guiding-documents/intellectual-disabilities-white-paper [https://perma.cc/M9V5-M2QG].

[81]Importantly, granting access is not necessarily achieved by the provision of reasonable accommodations. However, other access prerequisites, such as the elimination of physical barriers, are outside of this Note's scope. *See* Ass'n on Higher Educ. & Disability, Policy Agenda/Platform 4-7 (2020), https://www.ahead.org/professional-resources/white-papers-guiding-documents [https://perma.cc/6PHP-MPGW].

[82]PACER's Nat'l Parent Ctr. on Transition & Emp't, The ADA, Section 504 & Postsecondary Education 1 (2015), https://www.pacer.org/transition/resource-library/publications/NPC-42.pdf [https://perma.cc/H8D8-S8ZZ].

[83]*See* Ass'n on Higher Educ. & Disability, *supra* note 80, at 3.

[84]*See id.*

[85]*See* Summers v. Altarum Inst., Corp., 740 F.3d 325, 330-31 (4th Cir. 2014).

[86]*See* Americans with Disabilities Act, 42 U.S.C. § 12102 (2018).

[87]28 C.F.R. §§ 35.108(d)(1)(vii), 36.105(d)(1)(vii) (2020).

[88]*See* Ass'n on Higher Educ. & Disability, *supra* note 80, at 1-3 (stating that there is no minimum set of documentation required to request accommodations, and that documentation policies should be tailored to each student).

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Interestingly, until the case of *Guckenberger v. Boston University*, it was not clear whether the interactive process applied to higher education accommodation procedures.[89] Even still, the interactive process has not been formally enshrined in Title II or III regulations and is commonly referenced within the context of employment accommodations governed by EEOC regulations.[90] For purposes of analysis, this Note assumes the interactive process is a mandatory component of higher education accommodation as is declared in *Guckenberger*. The closest we have to an explicit regulation barring unreasonable medical documentation requests during said process is an overarching regulation that prevents covered entities from imposing eligibility criteria that screen out persons with disabilities.[91] If an accommodation framework intentionally or unintentionally screens out disabled students, it violates existing regulations.[92] Indeed, the *Guckenberger* court used the anti-screening provision to invalidate several of Boston University's medical documentation request practices during the interactive process.[93]

As mentioned above, private entrance examination and professional licensure testing agencies must adhere to a somewhat anomalous and more rigorous accommodation framework under Title III.[94] During the interactive process, testing agencies must reasonably tailor medical record requests so that they are "limited to the need for the modification."[95] Furthermore, informal guidance instructs testing agencies to give considerable weight to non-medical documentation such as proof of prior testing accommodations.[96]

### A. Scrutinizing Higher Education's Reliance on Medical Documentation to "Confirm" Disability & Exploring Other Disability Models

In the context of the ADA, the term "disability" is a legal construction rather than a medical diagnosis.[97] Yet, the higher education accommodations framework casts medical professionals into a role that requires legal sophistication.[98] Certainly, medical professionals can offer valuable perspectives as to how a student's diagnosis alters the way in which the student performs major life activities, but the current framework asks medical professionals to step out of the diagnostic realm into the realm of legal judgment and

[89] Guckenberger v. Bos. Univ., 974 F. Supp. 106, 141 (D. Mass. 1997) (citing the use of the interactive process only in an employment context).

[90] *See* 29 C.F.R. § 1630.2 (o)(3) (2020) (stating that under the equal employment provisions of the ADA, an "informal interactive" process may be necessary for employers to determine an individual's limitations due to disability and the reasonable limitations required to overcome the limitations).

[91] 28 C.F.R § 35.130(b)(8) (emphasis added) (Title II entities may not "impose or apply eligibility criteria that *screen out or tend to screen out an individual with a disability* or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered."); *id.* § 36.301(b)(8) (Title III corollary for places of public accommodation).

[92] *See id.* § 35.130(b)(8).

[93] *Guckenberger*, 974 F. Supp. at 138 (finding that a three-year retesting requirement for a stagnant impairment is an unnecessary requirement for students engaging in the interactive process). The court found the requirement that learning disabled students be retested if their prior testing was performed by someone with a master's degree, rather than a doctorate degree, violative of the ADA because it was unnecessary to "accomplish [Boston University's] goal of improving the quality of evaluations." *Id.* at 139-40.

[94] 28 C.F.R. § 36.309.

[95] *Id.* § 36.309(b)(1)(iv).

[96] *Id.* § 36.309(b)(1)(v).

[97] *What Is the Definition of Disability Under the ADA?*, ADA Nat'l Network, https://adata.org/faq/what-definition-disability-under-ada [https://perma.cc/EN8V-KZ7V].

[98] *See* Ass'n on Higher Educ. & Disability, *supra* note 80, at 1-2 (noting that extensive medical documentation requirements "[perpetuate] a deviance model of disability," thus institutions should review their medical documentation processes with legal counsel to comply with laws and regulations).

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construction. The extreme reliance on medical professionals in a capacity for which they are not formally trained strains the physician-patient relationship, renders an undeserved endorsement of the medical model of disability, and tends to screen out disabled persons from accessing full and equal education.[99] Additionally, over-reliance on the medical model fuels overbroad medical record requests. These requests are not just a nuisance—they operate as a disabling practice that both signals to students that they lack expertise and reliability when it comes to their own lived experiences and commands disabled students to explain the extent of their "non-normalcy."[100] Deirdre Smith, a professor at the University of Maine School of Law, explains that medical professionals are often cast as "gatekeepers" of disability rights.[101] Supposedly, medical documentation preserves the integrity of post-secondary programs and entrance examinations by reserving accommodations for students with *authentic* disabilities.[102] The belief, of mythic proportions, that able-bodied students fake disabilities is problematic because it punishes disabled students with procedural hurdles due to their peers' alleged lack of candor.[103] In 2016, the DOJ reportedly uncovered no evidence that students feign disability at any sort of significant rate.[104]

Higher education is not an appropriate "home" for the medical model.[105] It wholly pathologizes disability, ignoring the social, environmental, and political barriers which are ever present in educational institutions. Other disability models deemphasize the role of the medical community and look toward the broader universe of the variables present in the disabled experience.[106] For example, the social model of disability stands for the proposition that people have impairments and, by and large, various aspects of society disable them.[107] Put simply, having an impairment does not make one disabled, rather, physical, social, and pedagogical barriers inhibit access to aspects of society, in this case education.[108] Social model adherents observe that disability is a social construct, not an innate or inevitable state of being.[109] The social model asserts that it is society that disables,

[99]Research supports that Black and Hispanic children "are less likely to receive specialized medical tests than their Caucasian peers." Ashley Yull, *The Impact of Race and Socioeconomics Status on Access to Accommodations in Post-Secondary Education*, 23 AM. U. J. GENDER SOC. POL'Y & L. 353, 377 (2015). This means a minority student with disability, which higher education institutions require the opinion of a medical specialist to confirm (such as the requirement to see a neuropsychologist), is less likely to be successful in the accommodations process. *Id.*

[100]*See, e.g.*, Guckenberger v. Bos. Univ., 974 F. Supp. 106, 136 (D. Mass. 1997) (recalling testimony by Plaintiff Cutler, a former disabled student at Boston University, that BU's unreasonable retesting policy served as a "poignant reminder that she was not 'normal.'").

[101]Smith, *supra* note 9, at 40-42 (describing tendencies of the law and society to rely on medical testimony to prove both a prima facie case and that exclude "nefarious" individuals who aim to exploit benefits from claiming disability.).

[102]*Id.* at 43 (noting concerns by former Boston University President, Jon Westling, that the ADA will "wreak educational havoc" as individuals feign disabilities to seek an advantage while simultaneously demoralizing and undermining both non-disabled and disabled peers).

[103]*See* 81 Fed. Reg. 53,204, 53,213-14 (Aug. 11, 2016) (responding to comments concerned about the feigning of disabilities, the DOJ "acknowledge[d] that there will always be some individuals who seek to take advantage … . [However,] the [DOJ] found no evidence to indicate that the rate of fraudulent claims of disability has increased since the implementation of the ADA Amendments Act in 2009.").

[104]*Id.* at 53,214 .

[105]*See* Areheart, *supra* note 10, at 193 (noting that the circulation of a "medicalized image of disability" in media reinforces misconceptions and produces negative effects in areas such as education).

[106]EVANS ET AL., *supra* note 8, at 62, 64, 71 (describing the social, minority group, and social justice models, which focus on socially-constructed barriers, institutions, and environments that oppress disabled individuals).

[107]*Id.* at 62-63.

[108]Areheart, *supra* note 10, at 188.

[109]For example, in 2017, the author (Tara Roslin) attended the Rebellious Lawyering conference where she listened to disability scholar Lydia X. Y. Brown speak on a panel regarding disability in the legal

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not one's diagnosis. Disability theorists fairly criticize the reductionist nature of the social model—observed too strictly, it erases the experiences of those who, for example, suffer from chronic disease or illness.[110] Nevertheless, the social model importantly relays that sometimes, the institution, rather than one's medical impairment, is the causal factor in a students' perceived limitation in the educational setting. No one model of disability is a panacea for crafting inclusive policy and regulation, and the social model is no exception.

An emerging model known as the disability justice model, which arose out of conversations between disabled queer women of color, expands upon the disabled experience in a way the social model neglects.[111] In explaining the disability justice model, conceptualizers build off the words of Aurora Levins Morales, who states that "[t]here is no neutral body from which our bodies deviate … no body stands outside the consequences of injustice and inequality … [w]hat our bodies require in order to thrive, is what the world requires."[112] As Mia Mingus, one of the founders of the disability justice model explains, "ableism is connected, tied up with and mutually dependent on other systems of oppression" that will persist unless we also "[end] white supremacy, economic exploitation, colonization, and gender oppression."[113] Disabled lives are complex, and societal constructs do not have a one-size-fits-all effect. The disability justice model makes room for a holistic examination of the way ableism shows up in our institutions for persons of varied intersecting identities. Ableist institutional practices affect disabled persons with intersecting marginalized identities differently, and usually, harm disproportionately.[114]

Applying the disability justice model to the higher education accommodations procedure highlights how a university's overreliance on medical documentation tends to screen out less-privileged disabled persons from accessing full and equal education.[115] For instance, disabled students with more wealth, racial, and class privilege are usually able to access more resources to navigate ableist aggression, for instance, seeing a discriminatory or otherwise non-cooperative medical provider, and having the emotional, economic, or social resources to switch medical providers.

### 1. The *Guckenberger* Case: The Medical Model and Procedural Ableism in Higher Education

In 1997, ten students with learning disabilities filed a class action suit against Boston University challenging unreasonable neuropsychological testing requirements.[116] In *Guckenberger*, the court examined Boston University's overzealous accommodation

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profession. One of the attorneys on the panel was Deaf. A sign language interpreter audibly spoke the words signed by the attorney to the audience. Lydia reminded the audience that the interpreter was not present to accommodate the speaker, rather the interpreter was present to accommodate the audience because most of us did not understand sign language. Lydia's poignant distinction and reframing demonstrates that it is sometimes our environments that render us disabled rather than any variances in our bodies' abilities or cognitive processes.

[110] *See generally* Janine Owens, *Exploring the Critiques of the Social Model of Disability: The Transformative Possibility of Arendt's Notion of Power*, 37 Soc. Health & Illness 385, 388 (2014).

[111] *See* Alice Wong & Mia Mingus, *Disability Visibility Project: Mia Mingus, Part 1*, Disability Visibility Project (Sept. 25, 2019), https://disabilityvisibilityproject.com/2014/09/25/disability-visibility-project-mia-mingus-alice-wong/ [https://perma.cc/YA6S-JMPU].

[112] *What is Disability Justice?*, Sins Invalid (June 16, 2020) (quoting Aurora Levins Morales, Kindling (2013)), https://www.sinsinvalid.org/news-1/2020/6/16/what-is-disability-justice [https://perma.cc/5TC9-B5PH].

[113] Mia Mingus, *Reflection Toward Practice: Some Questions on Disability Justice*, *in* Critiques 107, 110 (Caitlin Wood ed., 2014).

[114] Evans et al., *supra* note 8, at 77.

[115] *Supra* note 99 and accompanying text.

[116] Guckenberger v. Bos. Univ., 957 F. Supp. 106, 107 (D. Mass. 1997).

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evaluation protocols impeding access to accommodations.[117] In January of 1996, Boston University changed their disability accommodation eligibility policy due to University President John Westling's skepticism regarding the validity of learning disabilities.[118] Ironically, Westling believed accommodations robbed students of a robust educational experience and believed the learning disability movement did a disservice to unwitting students, stating that the movement "is a great mortuary for the ethics of hard work, individual responsibility, and pursuit of excellence, and also for genuinely humane social order."[119] Westling delivered speeches and published pieces in major news outlets riddled with blatant eugenic statements, including proclamations that learning disabled students were "a plague" and a "silent genetic catastrophe."[120] Westling's assistant, another ableist member of the administration, referred to the students as "draft dodgers."[121] Reflecting such viewpoints, on January 8, 1996, Westling and his staff enacted the following medical documentation policy:

> (1) Students whose documentation was more than three years old 'must be reevaluated in order to continue to receive services and accommodations through the LDSS office;' (2) Students must submit to LDSS documentation of a learning disability that has been prepared by 'a licensed psychologist, clinical psychologist, neuropsychologist, or reputable physician.' [Students with current testing performed by an evaluator with a master's degree need to be retested by an M.D. or Ph.D.][122]

Plaintiffs asserted Boston University's new policies imposed "eligibility criteria that screen[s] out or tend[s] to screen out … individual[s] with a disability … from fully and equally enjoying" the educational services offered by the university's programming.[123] Furthermore, plaintiffs alleged that Boston University could not prove the new policies were a necessary component of the accommodations process.[124] The court confirmed that a blanket requirement mandating students with static learning disabilities (e.g., dyslexia) to undergo fresh testing imposes significant additional burdens in the way of cost and securing an appointment that screens out or tends to screen out persons with disabilities.[125] During the course of litigation, however, Boston University augmented their policy to allow students to waive out of retesting if a "physician or licensed psychologist" explains why retesting is unnecessary.[126] The court found that inclusion of an exemption clause rendered the policy unlikely to screen out students with disabilities because retesting is decided on a "student-by-student" basis.[127] The court, however, also found that the requirement that the waiver procurement come from a provider with a doctorate degree was unreasonable and tended to screen out students with some learning disabilities.[128] Frustratingly, the court left the requirement to procure an evaluation from a provider with a doctorate degree, rather than a master's degree, intact for students getting

[117] *Id.*
[118] *See id.* at 117-18.
[119] *Id.* at 118.
[120] Guckenberger v. Bos. Univ., 957 F. Supp. 306, 312 (D. Mass. 1997).
[121] *Id.*
[122] *Guckenberger*, 974 F. Supp. at 120-21.
[123] *Id.* at 134.
[124] *Id.*
[125] *Id.* at 135.
[126] *Id.* at 136.
[127] *Id.*
[128] *Id.* at 136-37. Conversely, the court ruled that the policy requiring that students with a suspected learning disability test for the *first* time with a doctorate level practitioner was reasonable. *Id.* at 137.

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tested for the first time.[129] Despite the court's assurances, the partially invalidated practice places undue deference and pressure on medical providers, stigmatizes students with confirmed and suspected learning disabilities, and reinforces the medical profession's questionable role as "gatekeeper" in the disability rights space.[130] Covered entities and the courts' devotion to medical documentation to prove disability status is indicative of our society's persistent tendency to categorize disability as a "pathology" rather than a reflection of "externally imposed barriers" to which not everyone is able to acclimate.[131]

Today, injurious policies persist at schools across the country, including Boston University. For instance, a common accommodation for disabled students is an in-class note-taking assistant.[132] Troublingly, Boston University requires students with an in-class note-taker accommodation to connect with the note-taker directly, thereby exposing ones identity and, by simple deduction, disability status to a classmate.[133] This practice places a disabled student in a position where the student must choose between disclosing their disabled identity to a peer or forgoing an accommodation to which they are legally entitled.[134] Additionally, because the note-taker is not permitted to furnish notes to a student who misses a class session, Boston University's policy instructs that a student note-taker must monitor the accommodated student's attendance.[135] This practice subordinates an accommodated student, places a peer note-taker in a position of supervisory power over that student, and reinforces ableist hierarchical dynamics in the classroom. By contrast, other universities employ an anonymous note-taking procedure (e.g. utilizing an online cloud note repository) such that a disabled student does not have to choose between "outing" themselves to a peer or accessing their note-taking accommodation.[136] Accommodations protocols that chill the use of granted accommodations exacerbates the preceding injurious accommodation application process, and widens the chasm between disabled students and meaningful access to higher education.

### 2. The Northern Michigan University Case: The DOJ's Role in Regulating and Monitoring the Scope of Medical Record Requests

In 2018, the DOJ processed a claim submitted by several disabled students at Northern Michigan University (the "University") who, after taking psychiatric medical leave, objected to the University's discriminatory treatment as they sought readmission.[137]

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[129] *Id.*

[130] Smith, *supra* note 9, at 40.

[131] *Id.* at 5.

[132] Interview with Student Note-Taker, Bos. Univ., in Boston, Mass. (Apr. 18, 2020) (transcript on file with author); *Note Taking Services*, B.U. Disability & Access Servs., https://www.bu.edu/disability/accommodations/procedures/specific/notetaker-service/ [https://perma.cc/8DHQ-ETVA].

[133] *Note Taking Services*, *supra* note 132.

[134] Interview with Student Note-Taker, *supra* note 132; *Note Taking Services*, *supra* note 132.

[135] Interviews with Graduate Students, Bos. Univ., in Boston, Mass. (Apr. 18, 2020) (transcript on file with author); *Note Taking Services*, *supra* note 132.

[136] *See, e.g.*, *Note-taking Accommodations*, Rutgers Univ. Off. Disability Servs., https://ods.rutgers.edu/note-taking-accommodations [https://perma.cc/P3C4-3VG8] (stressing that the identity of students receiving notes is confidential); *Notetaking Services*, U. Cent. Ark. Dsiability Resource Ctr., https://uca.edu/disability/notetaking-services/ [https://perma.cc/UEY2-98DM]; *Note Taking Services*, Fla. St. U. Dep't Student Support & Transitions, https://dsst.fsu.edu/oas/services/acc ommodation-policies/note-taking-services [https://perma.cc/LQ7P-NYPP].

[137] Melissa Martinez Bondy, *Northern Michigan University Settles with DOJ Regarding Treatment of Students with Mental Health Disabilities*, JD Supra (Nov. 8, 2018), https://www.jdsupra.com/legalnews/northern-michigan-university-settles-44008/ [https://perma.cc/SU2S-8ZY3]; *see also DOJ Settlement Agreement - Northern Michigan University*, *supra* note 25, at ¶ 4-5.

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The DOJ resolved the claim with a Settlement Agreement (the "Agreement").[138] The Agreement contains a model medical information inquiry form—referenced in the settlement as the "Treatment Provider Form," which limits the scope of *initial* medical inquiry during the readmission process.[139] Now, whenever the University evaluates a student for readmission after psychiatric medical leave, administrators must use the form to request any medical documentation.[140] Before the Agreement, the University engaged in a discriminatory pattern of behavior against students with psychiatric disabilities.[141] For instance, when the University had concerns about a student's psychiatric health, the University compelled the student to undergo a mandatory psychiatric evaluation—a report of which the school required access.[142] Additionally, the University required students to sign behavioral agreements that banned discussion of suicide or other psychiatric concerns with other members of the school's community.[143] The University claimed they acted pursuant to the "direct threat" provision of the ADA, which allows them to conduct an *individualized assessment* of a student who they reasonably believe is a direct threat to the safety or welfare of others.[144] If a student is a direct threat, then the school is not required to allow the student to participate in their degree program.[145] For purposes of this Note, the more interesting implication of the Agreement is not whether a student was a direct threat or not, but rather the steps a school is permitted to take in determining the acuteness of the perceived threat based on a student's medical status. While the Agreement does not explicitly explain why an agreed-upon form is required, intuitively, the DOJ might include such a form to eliminate the danger of overbroad medical record requests.[146] The form itself begins as follows:

> *Dear Provider*: You have been asked to complete this form as part of the process by which students returning from extended time away from campus are transitioned back into the university. We want to ensure that students are able to participate in Northern Michigan University's campus community, *with or without reasonable accommodations*, and that we put in place all that is necessary to help students be successful. Your assessment and recommendations are an integral part of this process.[147]

The form then asks the provider to record treatment dates and detail concerns the provider may have, particularly in the areas of self-care, risk to self, and risk to

[138] *DOJ Settlement Agreement - Northern Michigan University*, *supra* note 25, at ¶ 8.
[139] *Id.* at Attach. A (appending under Attachment A the "Treatment Provider Form").
[140] *Id.* at ¶ 15(a)(iii).
[141] *Id.* at ¶ 4-6.
[142] *Id.* The University claims they acted according to the "direct threat" portion of the ADA, which allows "exclu[sion] [of] an individual with a disability from participation in an activity if that individual's participation would result in a direct threat to the health or safety of others. The [University] must determine that there is a significant risk to others that cannot be eliminated or reduced to an acceptable level by reasonable modifications to the public accommodation's policies, practices, or procedures or by the provision of appropriate auxiliary aids or services." *ADA Title III Technical Assistance Manual*, ADA.GOV, https://www.ada.gov/taman3.html [https://perma.cc/Q6KD-VMUV]; *see also* 28 C.F.R. §35.139 (2018). The DOJ, based on the evidence submitted with the students' complaints, determined there was no such threat. *DOJ Settlement Agreement - Northern Michigan University*, *supra* note 25, at ¶ 6. Furthermore, even if there was such a threat, the inclusion of the model medical inquiry form demonstrates the DOJ's recognition that the previous method of medical information inquiry as to direct threats was inappropriate at best and illegal at worst. *See id.*
[143] *DOJ Settlement Agreement – Northern Michigan University*, *supra* note 25, at ¶ 4-5; *see also* Martinez Bondy, *supra* note 137.
[144] 28 C.F.R. §35.139.
[145] *Id.*
[146] *See DOJ Settlement Agreement – Northern Michigan University*, *supra* note 25, at ¶ 15(a)(iii).
[147] *Id.* at Attach. A (first emphasis altered) (second emphasis added).

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others.[148] The form is notably devoid of any diagnosis-related questions and does not ask for supporting documentation.[149]

There are a couple of ways to interpret the Agreement: a narrow conception that rejects the notion that "Attachment A" is a marking of any boundary related to reasonable accommodation requests, or a broader reading that "Attachment A" suggests the acceptable scope of medical inquiries for more administrative processes like reasonable accommodation requests.[150] Each interpretation requires a fair amount of conjecture, further establishing the need for detailed regulations that increase the predictability of ADA complaint and litigation outcomes. Admittedly, a settlement agreement is an imperfect metric to evaluate the legality of another similar but markedly different inquiry. For example, unlike the readmission process, in the reasonable accommodation process, a student is requesting that the school affirmatively make changes on their behalf. Conversely, in the readmission process, a student is asking to participate in a more general sense, but not necessarily under accommodated conditions.

For issues capable of repetition, like discrimination during the reasonable accommodation evaluation process, administrative regulations are necessary to provide clear guidance to higher education institutions about evaluative procedures and to provide students with the ability to hold institutions accountable when they render a program inaccessible because of a failure to conduct a fair inquiry into their accommodation needs.[151] That being said, the Agreement likely has implications beyond the readmission context. At a minimum, the Agreement suggests the DOJ is open and willing to process claims regarding overbroad medical requests, such that it benefits universities to self-examine for potentially violative processes.

If one reads the medical inquiry implications of "Attachment A" in a limited way, then any prospective implications only apply to re-admission after a medical leave.[152] A broader reading of the language of the Agreement, however, tells a different story. Specifically, it illustrates that the form is inherently linked to the reasonable accommodation record request protocol—and by implication has a much further reach than just to psychiatrically disabled students attempting to gain readmission after a voluntary leave.[153] There are several parts of the Agreement that support a broader interpretation and application. First, in subsection IV, entitled "Title II Obligations and Actions to be taken by NMU," the DOJ underscores the University's responsibility to make reasonable modifications when "necessary to avoid discrimination on the basis of disability."[154] Additionally, the model form references the possibility that a student may require accommodations upon readmittance.[155] The reference to accommodations within the form supports the hypothesis that schools may not engage in unnecessarily expansive inquiry when evaluating the need for accommodation. The section of the Agreement that instructs the

[148] *Id.*

[149] *Id.*

[150] *See id.*

[151] The driving congressional intent behind enacting the ADAAA was to broaden the availability of an adjudicatory forum for disabled peoples facing discrimination. Americans with Disabilities Act, 42 U.S.C. § 12101(b)(5) (2018). Regulations that provide for a clearer path to litigation when individuals are discriminated against when they apply for accommodations is consistent with that intent.

[152] *See DOJ Settlement Agreement - Northern Michigan University*, *supra* note 25, at Attach. A.

[153] *See id.*

[154] *Id.* at ¶ 11(d). The reasonable modification requirement is, as always, attached to the notable exception that a university does not have to make any modification that "fundamentally alter[s] the nature of the service, program, or activity." *Id.*

[155] *Id.* at Attach. A.

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University to create an "ADA/Non-discrimination policy," subpart (a)(iv)-(v), details the method in which reasonable modification decisions must be made:

> "(iv) For all reasonable modification determinations, NMU will conduct an individualized assessment and case by case determination as to whether and what modification(s) can be made to allow a student with a disability to participate in the services, programs, and activities at NMU, and to continue to participate in and benefit from [NMU] … ; and
>
> (v) NMU *will not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability* or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered."[156]

The italicized portion of the quote elucidates the reality that cumbersome disability record requests have a chilling effect on those that require fair evaluations.[157]

## V. SOLUTION: MANDATORY REPORTING REQUIREMENTS FOR HIGHER EDUCATION PROGRAMS

The scope of permissible medical documentation requests within the interactive process is far more explicit in the employment context than it is in the higher education context.[158] In part, the clarity derives from explicit statutory language outlining the acceptable forms and functions of medical examinations and inquiries.[159] The two contexts, employment and education, however, are similar but not analogous. As is detailed in this section, the Title I interactive process framework is complex and it is not feasible to map the framework directly onto Title II and III. Rather, this Note proposes an intermediary step—reporting requirements—to better understand what the current practice of covered higher education institution mandates with regard to medical record requests.

Additionally, reporting requirements may reveal other methods, aside from medical documentation collection, that covered entities find sufficient to verify one's disability and one's accommodation needs. Decreased reliance on the medical community to verify disability and requisite accommodations reflects a consciousness that people with disabilities share a complicated history with the medical community and that the need for medical documentation can act as a barrier for students who are unable to access medical care or shop around for physicians willing to listen to and fully address their concerns.

### A. Title I: An Example of a Comprehensive Medical Record Request Framework

Title I prohibits private employers from discriminating against qualified applicants and employees based on their disability status.[160] According to the EEOC

[156] *Id.* at ¶ 12(a)(iv)-(v) (emphasis added).

[157] *See* Dep't of Fair Emp't & Hous. v. Law Sch. Admission Council, Inc., 941 F. Supp. 2d 1159, 1161 (N.D. Cal. 2013) (implying that certain practices, such as flagging disabled applicant scores, can result in students avoiding seeking accommodations).

[158] *See* Americans with Disabilities Act, 42 U.S.C. § 12112(d) (2018).

[159] *See id.*

[160] *Id.* § 12112(a).

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regulations, employers are liable for discrimination under the ADA when they prevent qualified disabled employees from enjoying the equal opportunity to participate in the workplace based, at least in part, on animus stemming from the employee's perceived or actual disability.[161] When an employer denies an employee's reasonable accommodation request, without demonstrating undue hardship, the employer is denying an equal level of access to the essential functions of a position and thereby committing an act of discrimination.[162] A reasonable accommodation may include "making existing facilities used by employees readily accessible to and usable by individuals with disabilities" or "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities."[163] The EEOC enforces Title I by processing claims against employers and promulgating regulations.[164] Unlike Titles II and III, no private right of action exists for employees aggrieved by an employer's violation.[165] Rather, aggrieved employees must submit complaints to the EEOC and engage in the administrative adjudication process.[166] In certain cases, employees may remove their case from the EEOC to federal court.[167]

The scope of permissible medical documentation requests is far more explicit in the employment context than it is in the higher education context.[168] In part, the clarity derives from explicit statutory language outlining the acceptable forms and functions of medical examinations and inquiries.[169] The permissible scope of the inquiry by an employer varies depending on the stage of the application process or employment.[170] There are three stages that correspond with different permissible scopes of inquiry and certain conditions that may trigger a medical documentation inquiry.[171] The three stages are: (1) pre-employment, (2) post (conditional) offer, but prior to the start of employment, and (3) post-employment.[172]

In the pre-employment stage, an employer may not inquire or conduct a medical examination to determine if an applicant is disabled.[173] An employer is permitted, however, to make a pre-employment inquiry into "the ability of an applicant to perform job-related functions."[174] In other words, employers must phrase pre-employment questions

[161] *See* 29 C.F.R. § 1630.4 (2020); *see also* 42 U.S.C. § 12112(b)(4).

[162] U.S. Equal Emp't Opportunity Comm'n, EEOC-CVG-2003-1, Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA (2002) ("A reasonable accommodation enables an applicant with a disability to have an equal opportunity to participate in the application process and to be considered for a job."); *see* 42 U.S.C. § 12112(b)(5)(A) (establishing that private employers, who can demonstrate granting an accommodation request would result in undue hardship, may legally deny an accommodation request).

[163] 42 U.S.C. § 12111(9).

[164] *Id.* §§ 12111(1), 12116.

[165] *See id.* § 12112(a).

[166] *Filing a Lawsuit in Federal Court*, U.S. Equal Emp. Opportunity Commission, https://www.eeoc.gov/federal/fed_employees/lawsuit.cfm [https://perma.cc/3GMF-LYWA].

[167] *Id.*

[168] *See* 42 U.S.C. § 12112(d).

[169] *See id.*

[170] *See id.*

[171] Christopher J. Kuczynski, *ADA: Disability-Related Inquiries; State Laws*, U.S. Equal Emp. Opportunity Comm'n (July 13, 2008), https://www.eeoc.gov/foia/eeoc-informal-discussion-letter-322 [https://perma.cc/5567-JU9K].

[172] *Id.*

[173] 42 U.S.C. § 12112(d)(2)(A).

[174] *Id.* § 12112(d)(2)(B).

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without reference to disability.[175] In the post-offer/pre-employment stage, an employer can require the prospective employee to submit to a medical examination, and may condition employment on a certain result, so long as every employee is subject to the same examination and requisite result.[176] Unlike post-employment medical examinations, medical examinations during the post-offer/pre-employment stage "do not have to be job-related [or] consistent with business necessity."[177] If the standard medical inquiry screens out potential employees with disabilities, however, the inquiry must be related to the job and "consistent with business necessity."[178]

During employment, medical inquiries are generally not permitted with a few exceptions. The following conditions may trigger a medical examination or inquiry because they are "job-related and consistent with business necessity."[179] If during the course of employment, the employer develops a reasonable belief that an employee has a medical condition that will interrupt the employee's ability to perform essential job functions or that the employee has a medical condition that represents a "direct threat" to the workplace, the employer may initiate a medical inquiry.[180] Additionally, an employer is permitted to conduct a medical inquiry if the employee is engaged in a profession that implicates public safety (e.g., firefighter).[181] Finally, if an employee requests a reasonable accommodation, the employer is permitted to conduct a medical inquiry through the "interactive process."[182] The interactive process is an information-gathering process that occurs, in good faith, between the employee and employer whereby the parties work together to evaluate requests for reasonable accommodations.[183] The last of these conditions is analogous to a student asking a post-secondary institution or testing agency for an accommodation.

If an employee asks for a reasonable accommodation, an employer may, but is not required to, ask for medical documentation if a disabled employee requests accommodations, but only if a disability is "not known or obvious."[184] If an employee's disability is non-apparent, employers are permitted, but are not required to, request medical records.[185] In fact, the EEOC explains that employee requestors are often able to provide sufficient information substantiating the existence of a disability without medical documentation.[186] The scope of the record request is limited to documents related to the accommodation request.[187] Under EEOC guidance, complete medical record requests are impermissible—complete records will almost certainly contain information unrelated to the accommoda-

[175] 29 C.F.R. § 1630.13(d)(2)(B) (2020).
[176] *Id.* §1630.14(b).
[177] *Id.* § 1630.14(b)(3).
[178] *Id.*
[179] *Medical Exams and Inquiries*, Job Accommodation Network, https://askjan.org/articles/Requests-For-Medical-Documentation-and-the-ADA.cfm [https://perma.cc/K3X6-JPZC] ("Job-related and consistent with business necessity" is the standard the EEOC applies when analyzing whether a medical inquiry or examination is permissible under the ADA and corresponding Title I regulations).
[180] *Id.*
[181] *Id.*
[182] *Interactive Process*, Job Accommodation Network, https://askjan.org/topics/interactive.cf m [https://perma.cc/YUA9-FW7A].
[183] *Id.*
[184] Tracie DeFreitas, *Requests for Medical Documentation and the ADA*, Job Accommodation Network, https://askjan.org/articles/Requests-For-Medical-Documentation-and-the-ADA.cfm [https://perma.cc/7AWY-RCLT].
[185] *Interactive Process*, *supra* note 182.
[186] *Id.*
[187] *Id.*

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tion request.[188] Not only does the interactive process encourage an open form of communication with the employee, but it also establishes a productive framework to interact with medical professionals. For instance, if the employer requests information from a medical professional but is not satisfied with the record received, the employer may inquire with the medical professional again, but must specify insufficiencies and explain why the employer requires additional information.[189]

The EEOC's framework demonstrates the value in careful, context driven, medical documentation requests, rather than the solicitation of medical data dumps. The same attitude and ideals are not prominently featured in Title II and III regulations. Aside from brief mention in settlement agreements, the DOJ has no informal guidance or formal regulation guidance requiring schools or testing agencies to engage in staged and cautious medical inquiry. Higher education institutions may take issue with the increased level of involvement demanded by the interactive process. But this concern is easily outweighed when compared to the value of maintaining medical privacy and the reduction of the chilling effects wrought by unreasonable medical record requests.[190]

### B. Reporting Requirements for Entities Collecting Students' Medical Records as a Component of the Interactive Process

Reporting requirement regulations should gather information about the accommodation procedures employed by covered entities. Specifically, schools should report their current accommodation procedure and to what extent that procedure relies on medical documentation collection to the agencies which enforce Title II and III: the Department of Justice, the Department of Education, or the Department of Health and Human Services. If an accommodation request is granted, the reporting institution should record the type of documentation (medical or otherwise) deemed adequate to establish a record of impairment. When an institution denies a student's request, the institution should detail the reasons for the rejection. If the issue cited by the institution implicates insufficient medical documentation, the institution must report exactly what was deficient about the information provided, what steps were employed to attempt to obtain adequate documentation, and if additional testing (such as neuropsychological examinations) were requested of the student. As described *infra*, the proposed reporting framework somewhat mirrors what is expected of employers under Title I of the ADA pursuant to the EEOC's recommended procedures for the interactive process.[191] Therefore, the proposed reporting procedure is in line with the interpretation of covered entities' obligations under Titles II and III.[192] Currently, however, the dearth of on-point regulation makes it difficult for students and schools to craft a compliant interactive process framework. The data gathered by the reporting framework will help the DOJ understand the scope and depth of medical record requests and lead to well-informed regulation development that facilitates an interactive process that does not affirmatively disable or demean students. The regulatory framework as it stands now leaves too much room for documentation requests that chill

[188] DeFreitas, *supra* note 184.

[189] *Id.*

[190] U.S. Equal Emp't Opportunity Comm'n, EEOC-CVG-2016-1, Enforcement Guidance on Retaliation and Related Issues (2016) (generally relaying the unacceptability of chilling a protected class member's will to pursue their rights under the ADA in the employment context).

[191] *See supra* Part V. Firming up an "interactive process" requirement is in line with *Guckenberger*. Guckenberger v. Bos. Univ., 974 F. Supp. 106, 143 (D. Mass. 1997).

[192] *See, e.g.*, *Guckenberger*, 974 F.Supp. at 143.

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access and stigmatize disabled students who are already facing numerous other oppressive societal structures and norms.

## VI. CONCLUSION

The promise of equal education is stymied by procedural ableism which to date is largely unchecked in the realm of higher education. Augmenting or amending regulations will not heal the deep wounds caused by exclusionary accommodations practices, but by reigning in overzealous documentation procedures, the chances of disabled persons successfully matriculating through higher education increases.[193] When we have more disabled persons in education spaces, the community can begin to heal itself and influence the programs to fit their needs, thereby better reflecting the needs of larger society. Disabled students have a toehold in higher education spaces and regulatory agencies, such as the DOJ, must implement regulations that safeguard this progress and support disabled persons as they try to build upon it. If they persist, overbroad, intrusive, expensive, and otherwise burdensome medical requests will set back the disability education inclusion movement. These reporting requirements would arm the regulatory agencies with information about how private and public higher education institutions have implemented the interactive process. From there, the agencies can craft more specific regulations around the boundaries of legally compliant medical documentation requests and ban institutions from soliciting and collecting medical information to which they are not entitled under the interactive process. Regulators can and should curb abuses of power during the accommodations process through comprehensive regulatory reform, increased reporting, and renewed committed to compliance by way of enforcement actions and proceedings. As disabled persons continue to matriculate into higher education spaces, the pressure mounts for regulatory agencies to halt overly burdensome medical information gathering procedures present in higher education institutions.

[193]Battle, *supra* note 17, at 6.

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