

2002-2003 academic year.' He failed to complete the academic requirements for advancement to the twelfth grade. The plaintiff alleges that his failure to complete the requirements was due to a disability he suffers - obstructive sleep apnea and phase-delayed syndrome. He asks the Court to order Haverford to modify its academic requirements so that he may advance.

The ADA requires a covered entity to make reasonable modifications to its policies, practices, or procedures to accommodate disabled individuals so long as such changes would not fundamentally alter the nature of the education offered by the entity. Haverford has agreed that, for purposes of this motion, it is a covered entity and the plaintiff is disabled. At the end of this academic year, the plaintiff took the final examination in only one of five academic courses and failed to do third and fourth quarter work in four of the five courses. Haverford has modified or waived many of its policies over time in accommodating the plaintiff. The Court finds that the additional modifications requested by the plaintiff are not reasonable and would fundamentally alter the services Haverford provides. The Court will deny the motion.

² Harry Doe and his parents, Mr. and Mrs. John Doe are all named plaintiffs. For ease of reference, the Court refers to Harry Doe as "the plaintiff" and to his parents as "Mr. Doe" or "Mrs. Doe."

I. Findings of Fact

The Court makes the following findings of fact pursuant to Federal Rule of Civil Procedure 52(a). The Court's findings of fact are taken from the parties' Amended Statement of Undisputed Facts, the defendant's Supplemental Statement of Material Facts, the plaintiff's Statement of Facts, and the evidence presented at the evidentiary hearing.

1. Harry Doe is a student at Haverford. He has been enrolled at the school since kindergarten. In the 2002-2003 academic year he was enrolled as a Fifth Form student in Haverford's Upper School Division. Fifth Form is Haverford's equivalent of eleventh grade.

2. Haverford is a private non-sectarian secondary school and a place of "public accommodation" within the meaning of 42 U.S.C. § 12181(7)(J). The school is located in the Eastern District of Pennsylvania.

3. Mr. and Mrs. John Doe are the plaintiff's parents. They live with the plaintiff in the Eastern District of Pennsylvania.

4. Exhibit B attached to the plaintiff's motion is a true and correct copy of the Haverford Upper School Handbook in effect during the 2002-2003 academic year.

5. The academic year at Haverford consists of two semesters and four marking periods or quarters. During the 2002-2003 academic year, the first, second, third and fourth marking

periods ended, respectively, on October 30, 2002; January 15, 2003; March 20, 2003; and May 23, 2003. Final examinations were conducted from May 29, 2003 through June 4, 2003 and commencement was June 6, 2003.

6. Haverford's faculty have contracts to perform services from August 15 of a given year until June 15 of the succeeding year. The contract term is for ten months. Exhibit A attached to the amended statement of undisputed facts is a true and correct copy of the faculty contract for the academic year 2002-2003.

7. By the end of the 2001-2002 academic year, the plaintiff had not completed the fourth marking period work for four of six courses in which he was then enrolled.

8. Haverford permitted the plaintiff to make up the incomplete fourth quarter work from the 2001-2002 academic year over the summer months. By the start of the 2002-2003 academic year, the plaintiff's academic work for the fourth quarter of the 2001-2002 academic year was completed.

9. During the summer of 2002, the plaintiff's teachers who were not under contract made themselves available to the plaintiff to facilitate the completion of the plaintiff's work.

10. The plaintiff has been under the care of Stanford Feinberg, M.D. and Steven Sokoll, M.D. The letters collectively

attached as Exhibit A to the plaintiff's motion and as Exhibit B to the amended statement of undisputed facts are true and correct copies of communications among the doctors and Haverford.

11. Counsel for the plaintiff and for Haverford have exchanged a series of letters concerning the plaintiff. These letters are attached as Exhibit C to the plaintiff's motion.

12. The 2002-2003 academic year concluded at Haverford on June 6, 2003. Haverford's next academic year begins on September 3, 2003.

13. At the conclusion of the first semester of the 2002-2003 academic year the plaintiff received failing grades in two courses - Biology and Mathematics. Under Haverford's policies and procedures, Haverford could have withheld the plaintiff's re-enrollment agreement and required him to attend study hall.

14. After the first semester of the 2002-2003 academic year, Haverford did not enforce its study hall and re-enrollment agreement policies and procedures with regard to the plaintiff. On February 6, 2003, Thomas Lengel, Haverford's Head of the Upper School, met with the plaintiff's parents to discuss the plaintiff's status at Haverford. Mr. Lengel sent the plaintiff's parents a letter following that meeting. Mr. Lengel's letter is attached as exhibit A to the defendant's supplemental statement of facts.

15. By the end of the third quarter of the 2002-2003 academic year, the plaintiff had not completed work for the third quarter. He met with his advisor, Regina Sloan, to work out a schedule for completion of his outstanding work. The schedule called for the work to be completed by the end of the spring break on March 31, 2003, and for the plaintiff to take make-up tests and quizzes during the week following spring break. Exhibit B to the defendant's supplemental statement of material facts is a true and correct copy of the schedule.

16. The plaintiff did not complete the work as scheduled. Through his lawyer, he requested an additional week to complete the work. Haverford provided more than the requested time by extending the plaintiff's deadline for the completion of the work through April, 17, 2003.

17. The plaintiff did not complete the required work from the third quarter by April 17, 2003. Haverford provided him additional time for completion of the work.

18. If Haverford had not granted the plaintiff these extensions, the plaintiff could have failed each of his five courses through the third marking period of the 2002-2003 academic year. Rather than failing him, Haverford provided the plaintiff "Incompletes" and additional time to complete the outstanding work.

19. By the end of the fourth marking period of the 2002-2003 academic year, the plaintiff had not completed all of his work from the third or fourth marking periods.

20. Counsel for the parties exchanged letters regarding what work remained uncompleted. These letters are attached as exhibit C to the plaintiff's motion.

21. The plaintiff did not take his final examinations in Math and English at the end of the 2002-2003 academic year. He also did not submit his take home exam in Biology.

22. At the conclusion of the 2002-2003 academic year, the plaintiff qualified for a passing grade in only his Advanced Placement Music course.

23. The plaintiff's transcript from the 2002-2003 academic year currently reflects that the plaintiff's work for the third quarter is "incomplete." Haverford has entered "no credit" for the four courses in the plaintiff has not completed his work. Collectively attached as exhibit C to the defendant's supplemental statement of material facts are true and correct copies of various e-mails exchanged between Haverford faculty and the plaintiff regarding the plaintiff's third and fourth quarter work for the 2002-2003 academic year.

24. The plaintiff cannot complete his Fifth Form Math **work** for the **academic** year 2002-2003 and **seeks** to repeat this course next academic year.

25. The plaintiff seeks to return to Haverford in the academic year 2003-2004 as a Sixth Form or twelfth grade student if he completes his work for Fifth Form Biology, History and English over the summer of 2003 and if permitted to repeat in the academic year 2003-2004 the Math course he took in his Fifth Form year.

26. Haverford will allow the plaintiff to convert the 2002-2003 academic year into a leave of absence. Haverford will also allow the plaintiff to repeat his Fifth Form year. The plaintiff has rejected Haverford's proposal.

27. Dr. Stanford Feinberg testified that the plaintiff suffers from obstructive sleep apnea and phase-delayed syndrome. The former leads to disrupted sleep, daytime drowsiness, and cognitive dysfunction. The latter affects one's ability to initiate sleep at the usual times. Phase-delayed syndrome is common in adolescents and is characterized by a sleep cycle of from 3 or 4 a.m. to noon. A leave of absence would not affect either of these conditions. Dr. Feinberg could not say whether either of these conditions would substantially affect the plaintiff's daily activities.

28. The plaintiff presented evidence related to whether Haverford intentionally discriminated against the plaintiff. This evidence is discussed in the Court's Conclusions of Law.

II. Conclusions of Law

A court must consider four factors in determining whether to issue a preliminary injunction: (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by the denial of relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest. Doe v. Nat'l Bd. of Med. Exam'rs, 199 F.3d 146, 154 (3d Cir. 1999); see American Civil Liberties Union v. Ashcroft, 322 F.3d 240, 250 (3d Cir. 2003).

A failure to show a reasonable probability of success on the merits necessarily results in the denial of an injunction. South Camden Citizens in Action v. New Jersey Dep't of Env'tl. Prot., 274 F.3d 771, 222 (3d Cir. 2001). The Court, therefore, begins its analysis with the reasonable probability of success factor.

A. Statutory Framework

The ADA represents a broad congressional mandate to eliminate discrimination against the disabled and to integrate the disabled into the mainstream of American life. PGA Tour, Inc. v. Martin, 532 U.S. 661, 676-77 (2001). Several general provisions in the statute demonstrate and implement the broad congressional mandate. Notable among these provisions are the

findings of Congress, a congressional statement of purpose, and a definition of disability. See 42 U.S.C. §§ 12101-12102. A disability includes "a physical or mental impairment that substantially limits one or more of the major life activities" of an individual. 42 U.S.C. § 12102(a). For the purposes of the plaintiff's motion, the defendant does not dispute that the plaintiff's obstructive sleep apnea and phase-delayed syndrome are disabilities limiting one or more of his major life activities.³

The ADA attempts to carry out the broad congressional mandate by prohibiting discrimination in major areas of public life. Title I forbids discrimination against disabled individuals in the employment context. See 42 U.S.C. §§ 12111-12117. Title II prohibits discrimination against disabled individuals in the provision of public services. See 42 U.S.C. §§ 12131-12165. Title III forbids discrimination against disabled individuals by places of public accommodation. See 42 U.S.C. §§ 12181-12189. The three different sections of the ADA impose different obligations on the entities covered by that section.

³ At the evidentiary hearing, Dr. Feinberg could not state that the plaintiff's sleeping disorders substantially affected his daily activities. From this testimony, it is unclear whether the plaintiff actually is disabled within the meaning of the ADA. The Court does not decide the issue because Haverford did not challenge whether the plaintiff was disabled within the meaning of the ADA.

Although the ADA is a broad remedial statute, the obligations that it imposes on covered entities are not limitless. The limits on what an entity must do to comply with the ADA differ depending on what Title of the ADA covers the entity. The defendant, a private college preparatory school, concedes for the purposes of the plaintiff's motion that it is a place of public accommodation. Title III, therefore, establishes the defendant's obligations under the ADA and the limits on these obligations.

Under Title III of the ADA, "no individual shall be discriminated against **on** the basis of disability in the full and equal enjoyment **of** the goods, services, facilities, privileges, advantages, or accommodations **of** any place of public accommodation by any person who . . . operates a place **of** public accommodation." 42 U.S.C. § 12182(a). Discrimination includes:

A failure to make reasonable modifications in policies, practices, or procedures when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.

42 U.S.C. § 12182(b)(2) **(A)**(ii) (emphasis added).

There are three requirements under Title III of the ADA that must be met before a covered entity will be obligated to provide a a requested modification to a disabled individual. First, the requested modification must be reasonable. Second,

the requested modification must be necessary for the disabled individual. Third, the requested modification must not fundamentally alter the nature of the services provided by the entity. Martin, 532 U.S. at 683 n.38; see 42 U.S.C. § 12182(a), (b)(2)(A)(ii). The defendant does not challenge the necessity of the plaintiff's requested modifications. The Court, therefore, assumes that the modifications are necessary. The question before the Court is whether the plaintiff has established a reasonable probability of success in showing that the modifications are reasonable and do not fundamentally alter the nature of services provided by Haverford.

B. Previous Modifications Made By Haverford

Haverford made the following modifications to its policies and procedures during the last two academic years:

1. extended the plaintiff a re-enrollment contract in February 2003 despite his having received "F"s in two courses at the end of first semester;
2. exempted the plaintiff from mandatory study hall;
3. provided the plaintiff additional time, and continuing extensions through the end **of** the academic year 2002-2003, to complete his third quarter work;
4. gave the plaintiff "Incompletes" rather than "F"s for the third marking period for each of the five courses in which he was enrolled;

5. allowed the plaintiff additional time through the end of the academic year to make up third and fourth quarter work he did not complete;
6. provided the plaintiff "No Credit", rather than "F"s in the four courses for which he did not complete the requirements by academic year end;
7. provided the plaintiff the opportunity to continue his education at Haverford;
8. provided the plaintiff the opportunity to repeat his Fifth Form year at Haverford;
9. provided the plaintiff the opportunity to graduate from Haverford if he completes the academic requirements.

C. The Plaintiff's Requested Modifications

The plaintiff has requested several additional modifications from the school. Most notable are his requests to:

1. complete his schoolwork from the third and fourth quarters of the 2002-2003 academic year during the summer;
2. have schoolwork completed during the summer graded by Haverford's teachers;
3. require Haverford to make its teachers available during the summer for the plaintiff to contact with questions about his unfinished work;
4. take quizzes and tests that the plaintiff missed during the 2002-2003 academic year during the summer;
5. repeat his Math course from the 2002-2003 academic year during the 2003-2004 academic year with no notations on his transcript that the plaintiff failed this Math class during the 2002-2003 academic year; and

6. receive a transcript that carries no marks of failure for the 2002-2003 academic year.

D. Are the Additional Modifications Requested by the Plaintiff Reasonable?

Title III of the ADA requires places of public accommodations to make reasonable modifications to their policies, practices, or procedures in an effort to accommodate disabled individuals. The use of "reasonable" as a modifier for "modifications" places a limitation on the types of modifications that a place of public accommodation must provide. See 42 U.S.C. § 12182(b) (2) (A)(ii). Determining whether a specific modification is reasonable requires an individualized inquiry under the circumstances of the particular case. Martin, 532 U.S. at 688. What is reasonable in one context may not be reasonable in another context. See Zukle v. Regents of the Univ. of California, 166 F.3d 1041, 1048 (9th Cir. 1998). The concerns and actions of the disabled individual and the covered entity make up the circumstances of the particular case.

Courts are reluctant to disturb academic decisions of educational institutions. Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214, 226 (1985). The plaintiff is correct that the rule of deferring to academic judgments was developed in the context of a student's due process challenge. Courts of Appeals, however, have extended this rule to cases where a student brings an ADA or a Rehabilitation Act challenge. See, e.g., Zukle, 166

F.3d at 1047-48 (9th Cir. 1999); Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141, 153 (1st Cir. 1998); McGregor v. Louisiana State Univ. Bd. of Supervisors, 3 F.3d 850, 858-59 (5th Cir. 1993); Wynne v. Tufts Univ. Sch. of Med., 932 F.2d 19, 24-26 (1st Cir. 1991). The Court agrees with the Courts of Appeals that have accorded deference to academic decisions when a student brings an **ADA** challenge.⁴

That academic decisions of an educational institution are accorded judicial deference does not end the inquiry. A court does not abdicate its role of enforcing the educational institution's obligation to seek suitable means of reasonably accommodating disabled individuals. See Zukle, 166 F.3d at 1048; Wynne, 932 F.2d at 25-26. Instead, deference will be accorded when an educational institution considers alternative means, and the feasibility, cost, and effect on an academic program of the alternative means. For its academic decisions to receive deference, the educational institution must have arrived at a rationally justifiable conclusion that the requested

⁴ The plaintiff attempts to distinguish Wynne, Zukle, and Bercovitch. The plaintiff argues that Wynne and Zukle are not applicable to the present case because the educational institutions at issue in those cases were medical schools with much higher academic standards. The plaintiff argues that Bercovitch does not apply because the plaintiff in that case was causing disciplinary problems. Giving deference to academic judgments, however, did not depend on any of these factors.

modifications would result in a lowering of academic standards. Wynne, 932 F.2d at 25-26; see Zukle, 166 F.3d at 1048; Bercovitch, 133 F.3d at 153.

Haverford made an academic judgment that the requested modifications would not be provided after exploring other ways to accommodate the plaintiff's disabilities. Over the past year, Haverford has gone to great lengths to accommodate the plaintiff, as set forth in Section B above. Despite Haverford's modifications, the plaintiff has work outstanding from the third and fourth quarters in four courses - Biology, Math, English, and History. The plaintiff also did not complete his final examinations for three subjects - Biology, Math, and English.

Haverford's conclusion that the additional time sought to complete third and fourth quarter work would lower academic standards is rationally justifiable. The plaintiff requests in excess of five additional months to complete schoolwork from the third quarter and in excess of two additional months to complete schoolwork from the fourth quarter for four courses. Allowing the plaintiff this much extra time to complete his can work can rationally be viewed as lowering Haverford's academic standards.

The Math course presents a separate issue. The plaintiff concedes that he cannot complete the Math work this summer so he asks the Court to order Haverford to allow him to retake the course in this upcoming year. The plaintiff asks the Court to decide whether the taking and passing of a Math course

should remain a requirement of advancing from eleventh to twelfth grade. The Court will not substitute its judgment on this issue for that of Haverford.

Haverford's conclusions that the plaintiff's other requested modifications would lower academic standards are also rationally justifiable. Requiring Haverford to provide access to its teachers and to force the teachers to grade the plaintiff's late work provides the plaintiff with assistance that no other student in his classes received from Haverford. Allowing the plaintiff to make up quizzes, tests, and exams months after his classmates completed these tasks gives the plaintiff's months of preparation that his classmates did not have. Although tests are designed to test what a student knows, part of taking the tests and part of the educational process is to prepare to take quizzes, tests, and exams in a timely fashion. Haverford's conclusion that avoiding those parts of its educational requirements lowers its academic standards is a decision for the school to make.

The plaintiff argues that Haverford discriminated against him through its treatment of him during the 2002-2003 academic year. If Haverford intentionally discriminated against the plaintiff on the basis of his disability, Haverford's academic decisions may not be entitled to deference. See Zukle, 166 F.3d at 1048; Wynne, 932 F.2d at 25-26.

Both the plaintiff and Mrs. Doe testified concerning trouble the plaintiff had in an Honors Math course that he took during the first quarter **of** the 2002-2003 academic year. The Court also reviewed a series of e-mails and correspondence between the parties concerning the Math course. The plaintiff missed several Math classes and was behind a test and some homework at the end of the first quarter of the 2002-2003 academic year. The teacher expressed his frustration with the plaintiff's performance and attitude, in terms the plaintiffs perceived as harsh.

The plaintiff points to these comments by the Math teacher as evidence of intentional discrimination against the plaintiff because of his disabilities. The Court finds no evidence **of** discrimination - intentional or otherwise. Without deciding whether the teacher's comments about the plaintiff's credibility or attitude were justified, I conclude that the teacher's comments were directed to conduct independent of the disabilities.

Likewise, other teachers and administrators expressed frustration at times with the plaintiff's failure to keep them informed of his situation or to appear when he said he would. Again, the Court concludes that these comments were not evidence of discrimination, but of Haverford's concerns that the plaintiff was getting too far behind to be able to make up the work and advance to the twelfth grade.

Ordering the modifications the plaintiff requests would place the Court in the untenable position of telling Haverford what courses can be required, how much time students have to complete their work, and when the school teachers are required to work. The Court will not substitute its judgment on these matters for that of Haverford. The plaintiff, therefore, has not shown a reasonable probability of success in showing that the requested modifications are reasonable.

E. Do the Modifications Requested by the Plaintiff Fundamentally Alter the Nature of the Services Provided by the Haverford School?

Even if the plaintiff had met his burden with respect to the reasonableness of the modification, he would have established only one part of his ADA claim. Title III of the ADA does not impose a general duty on places of public accommodation to provide all reasonable modifications that a plaintiff requests. Instead, a covered entity is required to make only those reasonable modifications that do not fundamentally alter the nature of its services. 42 U.S.C. § 12182(b)(2)(ii). Haverford has come forward with evidence that the plaintiff's requested modifications fundamentally alter the nature of Haverford's services.

Educational institutions are in the best position to know what modifications would fundamentally alter their services. Courts generally will not substitute their judgment for that of

an educational institution regarding what modifications fundamentally alter these policies. See Zukle, 166 F.3d at 1048, 1050-51; Wynne, 932 F.2d at 25-26.

Academic judgments about what modifications fundamentally alter the nature of an educational institution's services are accorded a similar level of deference as academic judgments about whether a modification is reasonable. The educational institution is under an obligation to consider the feasibility, cost, and effect on an academic program of alternative means in reaching its conclusion. Wynne, 932 F.2d at 25-26; see Zukle, 166 F.3d at 1048, 1050-51; McGregor, 3 F.3d at 858-59.

Haverford is an educational institution. **Its** fundamental purpose is to educate its students. To carry out this purpose, Haverford has established several policies that are described in the school's handbook. The policies include attendance and academic requirements. **To** enforce its policies, Haverford provides for several situations that can lead to a student failing a course or having his re-enrollment agreement withdrawn. For example, students who miss more than twenty school days or fourteen classes in an individual course may not receive credit for the year or for the individual course. Students who submit work late are penalized at a rate of one letter grade per day, but a student still must complete all of the required work to receive credit for the marking period or for

the year. Students who fail two or more academic courses in an academic year will be required to repeat the year or have their re-enrollment agreement withdrawn.

Rigid enforcement of Haverford's attendance and academic policies would have resulted in the plaintiff failing at least four **of** his courses during the 2002-2003 academic year. Given its policies, Haverford likely would have withdrawn the plaintiff's re-enrollment agreement if he failed four courses.

Instead of strictly adhering to its policies, Haverford attempted to accommodate the plaintiff's disabilities. The school repeatedly provided extensions of time to the plaintiff to complete his work. Haverford also allowed grades of "incomplete" to be entered on the plaintiff's transcripts instead of failing him for the courses in which work was not finished. The school provided alternative times for the plaintiff to complete his exams.

Not only has Haverford modified its policies, but the staff at Haverford has spent many hours looking for solutions to the plaintiff's problems with completing his work. Mr. Lengel, the Head of Haverford's Upper School, has met with the plaintiff, the plaintiff's parents, and the plaintiff's doctors to discuss the plaintiff's disabilities. Ms. Sloan, the plaintiff's counselor at Haverford, set up a schedule with the plaintiff for him to complete his outstanding work. Despite Haverford's efforts, the plaintiff has not completed much of his work from

the 2002-2003 academic year. Haverford's judgment that further modifications of the type requested by the plaintiff fundamentally alters the nature of its services is rationally justifiable. The plaintiff's request to complete his work and his exams during the summer completely exempts the plaintiff from Haverford's attendance policy. Haverford's judgment that exempting a student from its attendance policy fundamentally alters the nature of its services is rationally justifiable.

The plaintiff argues that the requested modifications are reasonable and do not fundamentally alter the nature of Haverford's services because the school provided similar modifications last summer. This argument is flawed in at least two respects.

There is not a statutory provision that converts prior modifications into required reasonable modifications for an indefinite time period. Cf. Smith v. Midland Brake, Inc., 138 F.3d 1304, 1310 (10th Cir. 1998) (employment context); Holbrook v. City of Alpharetta, 112 F.3d 1019, 1023 (11th Cir. 1997); Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 545 (7th Cir. 1995). If the Court imposed that requirement, the incentive for covered entities to go beyond the ADA's requirements would be diminished. The current language of the ADA allows covered entities to take a flexible approach and go beyond what the law requires if the entity has the means. The purpose of the ADA is to integrate disabled individuals into society. Entities that

make genuine efforts to integrate the disabled into society should not be subjected to liability when the entities provided more than the law required.

The plaintiff's argument also overlooks that the facts are different this summer as compared to last summer. Last summer, there was work outstanding only from the fourth quarter, and the plaintiff was not far enough behind in any of his classes that there was no hope of completing the work. This summer, the plaintiff has outstanding work from the third and the fourth quarter, and both parties agree the plaintiff cannot complete the remaining work for his Math course over the summer.

An appropriate order follows.

