9-23-1985

Appellant's Brief

Lewis Steel '63

To Be Argued By:
LEWIS M. STEEL
(Time Requested: 20 Minutes)

Court of Appeals

of the

State of New York

HARILYN ROUSSO,

Complainant-Appellant,

– against –

WASHINGTON SQUARE INSTITUTE FOR PSYCHOTHERAPY & MENTAL HEALTH and DR. GERD H. FENCHEL, In His Capacity as Dean of the Washington Square Institute for Psychotherapy & Mental Health,

Respondents-Respondents.

APPELLANT'S BRIEF

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1. Whether the State Division of Human Rights can properly make a finding of no probable cause in an education disability discrimination case in the absence of proof that an otherwise qualified student could not complete the institution's program or could not maintain clinical standards due to her disability. The Appellate Division answered this question affirmatively.

2. Whether there was substantial evidence on the record made before the State Division of Human Rights to sustain a finding that appellant was not discriminated against on the basis of disability. The Appellate Division did not answer this question.

3. Whether an educational institution is required to make a reasonable accommodation to its program in order to aid an otherwise qualified student with a disability to complete the institution's requirements. The Appellate Division did not answer this question.

4. Whether an educational institution has made a reasonable accommodation to an otherwise qualified student with a disability by placing that student in a probationary status, under terms which contain mechanisms for automatic dismissal, but contain no programmatic modifications to enable the student to complete the Institute's program. The Appellate Division ruled that this was an accommodation.

5. Whether the State Human Rights Appeal Board correctly ruled that a probable cause finding should be entered where an educational institution fails to present proof that a student's disability disqualifies her from its program. The Appellate Division answered this question negatively.

STATEMENT OF THE CASE AND JURISDICTION

Harilyn Rousso has mild congenital cerebral palsy (A66).[1] She is a practicing psychotherapist who was admitted to the Washington Square Institute for Psychotherapy & Mental Health ("the Institute") for post-graduate training in psychoanalytic psychotherapy in August 1977, and was terminated in the Fall of 1978 at the beginning of her second year (A71). Approximately six months after her termination, and after repeated requests for an explanation as to why she was terminated, the Institute offered to readmit Ms. Rousso under probationary conditions which made specific reference to her disability (A76-8). Appellant refused to attend the Institute under the probationary terms.

Thereafter, appellant filed a timely charge of disability discrimination under Executive Law 296(4) with the New York State Division of Human Rights ("the Division"). After conducting an investigation which did not include a a confrontational conference, the Regional Director made a determination of no probable cause. In addition, the Division stated that the Institute's offer of probation was an attempt to "accommodate" appellant (A10-11).

Ms. Rousso appealed the Division's determination to the State Human Rights Appeal Board ("the Appeal Board"). On May 30, 1984, the Appeal Board unanimously found that the Division's dismissal of the complaint was arbitrary, capricious and an unwarranted exercise of discretion, ordered that the determination be vacated, a finding of probable cause be entered, and the matter be remanded for a public hearing (A8). The Board found:

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[1] "A" refers to the Appendix filed in this Court.

> The respondents offer no evidence in support of their belief that the appellant was unsuccessful because of her disability. There is a real issue here and it cannot be resolved without a formal hearing. (A7).

The Board further found that the probationary conditions proposed by the Institute to readmit Ms. Rousso were not "an accommodation at all," but conditions which worked to her detriment and might have made it impossible for her to ever succeed in the program (A7).

The Institute sought review in the Appellate Division, First Department, by filing a brief and note of issue on July 30, 1984. As that proceeding was not commenced within 30 days after service of the Appeal Board's decision and order, appellant moved for dismissal. The Appellate Division denied this motion on September 18, 1984, without opinion (A5a).

The Appellate Division, on February 21, 1985, reversed the order of the Appeal Board and reinstated the determination of the Division. The court found that, on the record developed, the Division could have reasonably concluded that the Institute's dismissal of appellant from its program was motivated by an interest in upholding clinical standards and concern for patients assigned to her. The Appellate Division also found, without any evidentiary or legal analysis, that the Institute's probationary readmission conditions were an offer to "accommodate her disability" (A4-5).

A timely notice of appeal was filed to this Court and a jurisdictional statement was submitted. On April 30, 1985, this Court sent counsel a letter stating that the Court was considering this matter under Rule 500.4. The Clerk, after receiving memoranda

on the issue of whether this case should be decided pursuant to Rule 500.4, informed the parties on June 24, 1985 that this case would, in fact, be heard by the Court after full briefing.

The jurisdiction of this Court is based upon CPLR §5601(a)(ii), in that the Appellate Division order determining the proceeding before the Division finally reversed the order of the Appeal Board.

STATEMENT OF FACTS

The facts as set forth below are taken from the various documents which the parties submitted to the Division, as well as the investigative reports of that agency. The facts contained in this Statement stand uncontroverted.

A. Appellant's Background

Harilyn Rousso is a practicing psychotherapist who had been providing counseling and therapy in a professional capacity for three years prior to her enrollment at the Institute (A68-9). Ms. Rousso received a Master's Degree in Social Work in 1974 and a Master's Degree in Adult Education from Boston University in 1972 (A67). She is licensed to practice social work in the State of New York and is a member of the Academy of Certified Social Workers, the Registry of Certified Clinical Social Workers and the National Association of Social Workers' Committee on the Handicapped (A68). Both prior to enrolling in the Institute and after being terminated by the Institute, appellant treated patients in long-term therapy (A19, 36).

B. Appellant's Disability

The Institute stated to the Division that mild cerebral palsy "produces facial grimaces, some postural rigidity and affects [appellant's] voice in such a way as to cause some difficulty in communicating and being understood" (A43). The Institute, however, produced no evidence that any patient of Ms. Rousso's had any difficulty understanding her. According to the Division's investigative report, the Institute's administrator merely contended that some patients reported that they felt "uncomfortable" as a result of Ms. Rousso's disability (A12-13). The Division investigator interviewed Ms.

Rousso at length, and submitted a full report with regard to this interview. This report does not indicate that Ms. Rousso had any difficulty in communicating or in being understood (A17-19). Nor did the Division make any finding that Ms. Rousso had difficulty in communicating or being understood (A12-14).

C. The Evidence Developed by the Division During its Investigation Which Shows that the Institute Considered Appellant's Disability As the Basis for Her Termination

1. The Evidence Regarding Appellant's Experience at the Institute

In August 1977, Ms. Rousso applied for admission to the Institute for training in psychoanalytic psychotherapy (A67). During the admissions interview, a member of the Institute's matriculation committee expressed "concern" that appellant's disability would interfere with her relationship with patients (A43, 67). Nonetheless, appellant was admitted to the Institute's program in September 1977.

It is conceded that Ms. Rousso's academic course work was "excellent," that the staff of the Institute believed that Ms. Rousso was "intellectually superior," and that she "had the capacity to become a psychotherapist" (A21). As a part of the Institute's training program, student therapists are required to conduct ongoing therapy with patients. After several months of course work at the Institute, in December 1977, appellant was deemed ready to see patients (A12). However, she was told by the Institute's supervisor that although she would be assigned patients, the matriculation committee was "concerned" about the effect her disability would have on the patients (A18).

The Administrator of the Institute, Ms. Shirley Fishman, began assigning patients to Ms. Rousso in the latter part of appellant's first year at the Institute (A12, 20). From January 1978 through June 1978, she was assigned six patients. By September 1978, for a variety of reasons which will be discussed below, none of these initially assigned patients remained in treatment with Ms. Rousso. Each time a patient terminated treatment with Ms. Rousso, in accordance with the procedures set forth in the professional and administrative manual of the Institute, Ms. Rousso notified the administration of the patient's termination, wrote a report summarizing the patient's treatment, and submitted this report to her Institute supervisor for his approval (A71).

2. The Evidence Regarding Appellant's Termination from the Institute and the Proposal for her Readmission

In September 1978, Ms. Rousso's supervisor, Mr. Robles, informed her that she was being terminated from the program (A71). He told her that, since her reports showed no irregularity in treatment, he assumed that all the patients assigned to her terminated treatment because of her disability (A16). After discussion, her supervisor told her that she had potential as a therapist, and that he would support her in front of the matriculation committee (A16). Shortly thereafter, appellant met with Dean Fenchel, who told her that her disability had an adverse effect on patients which made it inappropriate for her to continue at the Institute (A18-19, 71). Appellant told Dean Fenchel that in other working situations she had retained patients in long term therapy and that much of her previous professional experience was with voluntarily referred patients (A19).

Subsequently, in October 1978, apppellant's supervisor informed her that the matriculation committee had terminated her from the program (A18-19). He also told her that she should not give up on becoming a therapist, but should try another institute which would be more responsive to and open minded about her disability (A16).

Ms. Rousso requested a written explanation for her termination from her supervisor (A72). When she did not get a response by November 1978, she wrote a letter to Dean Fenchel requesting an explanation (A72, 79). On December 5, 1978, Dean Fenchel wrote appellant a letter saying that the matriculation committee was reviewing her situation and would notify her shortly of the reason for her termination (A72). Ms. Rousso did not receive an official explanation from the Institute until March 20, 1979 (A76).

In his letter, Dean Fenchel explained the Institute's decision and set forth the conditions upon which she could return. The reason given for her termination was as follows:

> Your status was terminated at the Institute because of the high (100%) drop out patients [sic] assigned to you. I believe this problem is partially a result of the nature of our patient population, a problem that is unfortunately out of our control, and also partially a result of the fact that patients were not advised in advance of your handicap. In addition, I believe we based our judgments and expectations concerning you, on your prior experience in counselling [sic] settings and did not allow for the differences and difficulties you would face in moving into an analytic format. Thus the situation developed whereby you were unable to fulfill the internship requirement of the program. And frankly Washington Square could not continue to provide patients in view of the high drop out rate as this is not only difficult for the Institute, but harmful to the patients, as many may never

start therapy again.[2] (A76).

Dean Fenchel then proposed that Ms. Rousso return on a "probationary basis," with the following conditions:

1. The patients assigned to Ms. Rousso would have to be told in advance of her disability;

2. Fifty percent of the patients who were assigned to Ms. Rousso would have to accept her as their therapist after being informed of her disability, but before actually meeting her;

3. Of the patients who accepted assignment to Ms. Rousso, 80% would have to remain in treatment for at least one month, 70% for at least two months, and 60% for at least three months (A77).

Dean Fenchel indicated in his letter that these conditions would have to be met until Ms. Rousso completed the program. Under the proposal, Ms. Rousso was subject to immediate dismissal from the program if these conditions were not met, regardless of the reasons that the patients assigned to her left treatment (A77). Appellant refused to accept these conditions, and thereafter this action was commenced.

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[2] This last explanation with regard to possible harm being visited upon patients appears to conflict with the statement of the Institute's Administrator that respondent's patient population was "sophisticated, well educated, many of whom had previous therapy" (A20).

3. The Evidence Relating to the Six Patients Who Terminated Treatment with Appellant Rousso

Ms. Rousso explained to the Division investigator why each of the six patients assigned to her had terminated therapy. In fact, she presented evidence that four of the six patients originally assigned to her discontinued treatment for reasons entirely unrelated to her disability.

One patient assigned to Ms. Rousso never showed up for the initial therapy session (A17). A second patient terminated therapy with Ms. Rousso after one session. This patient had also terminated therapy with another therapist at the Institute after only one session (A17). A third patient remained in treatment with Ms. Rousso from January 1978 through April 1978 and terminated therapy with Ms. Rousso because she moved to California (A17). A fourth patient assigned to Ms. Rousso terminated treatment with her after two sessions. That patient had diabetes and told Ms. Rousso that her disability made the patient uncomfortable because it reminded the patient of her own illness. This patient was transferred to another therapist within the Institute and terminated treatment with the other therapist after only one session (A17). Ms. Rousso's supervisor later told her that a second student therapist had told him this patient was one of the most difficult persons she had ever seen (A16).

A fifth patient was in treatment with Ms. Rousso for two to three months, and told Ms. Rousso that she preferred to be treated with Jungian therapy instead of the psychoanalytic approach of the Institute. This patient found a Jungian institute and, as a result terminated her therapy at the Institute (A17).

A sixth patient remained in therapy with Ms. Rousso for approximately two months. That patient sought to change therapists after seeing Ms. Rousso for one session because she thought Ms. Rousso was not assertive enough as a therapist. In discussing the patient's desire to change therapists, Ms. Rousso raised the question of whether her disability was a factor. The patient told apppellant that her disability was not a factor in the decision; rather, her lack of assertiveness was the problem (A17). After that discussion, the patient remained in therapy with Ms. Rousso for approximately two months. In the last session, the patient continued to assert, despite Ms. Rousso's exploration of the effect of her disability on the treatment, that appellant's disability was not the reason for her terminating therapy (A15).

The Institute offered no evidence whatsoever as to why the patients terminated treatment with Ms. Rousso other than an administrator's statement to the investigator that several of the patients told her that appellant's disability was "a factor" in their decision (A12). The Institute never identified which of the patients allegedly made these remarks. Furthermore, the Institute presented no evidence that any of the patients who terminated therapy with Ms. Rousso remained in therapy with another therapist at the Institute for any significant length of time.

4. The Evidence Relating to Other Student Therapist Terminations and Placements on Probationary Status

The Division investigator sought information from the Institute as to whether other student therapists had ever been terminated (A20). The investigator's May 7, 1982 report contains the response to this question from the Institute's administrator and the Institute's attorney:

> Both respondents replied by stating that there were several students who failed course work and one or two whose performance with patients was deemed ineffective by their supervisors. (A21).

The Institute submitted no evidence that any other student had ever been dropped from the program because a certain number of the patients initially assigned to the student had terminated treatment.

With regard to placing other students on probation, the Division investigator reported that:

> . . . Respondent admits the conditions placed on the complainant had never been placed upon any other student. . . . (A13).

The Institute justified Ms. Rousso's probationary terms by telling the Division no other student had lost his or her first six patients (A13).

5. The Evidence Regarding the Time Period in Which a Student Must Complete the Required Clinical Patient Hours for Graduation

The Institute's bulletin states:

> Although the Psychoanalytic Psychotherapy sequence can be completed in three years, students are reminded that they may proceed at their own pace and development. (A37).

The Institute submitted no evidence that students were required to complete a certain amount of clinical hours (patient treatment) in the first year of the program, nor any evidence that the provision in the Bulletin was ever altered in the circumstance of other students.

ARGUMENT

I.

APPELLANT WAS TERMINATED BY THE INSTITUTE AS A RESULT OF HER DISABILITY

There is no dispute about the fact that the appellant was terminated by the Institute as a direct result of her disability. The Dean of the Institute stated explicitly in the termination letter that he believed Ms. Rousso lost her first six patients because of "the nature of our patient population, a problem that is unfortunately out of our control, and also partially a result of the fact that patients were not advised in advance of your handicap" (A76, emphasis added). Given this unequivocal statement that the appellant's disability played a critical role in the Institute's decision to terminate her, as well as the uncontroverted evidence that Ms. Rousso was well qualified to be a student at the Institute, as demonstrated by her excellent academic performance, the Appeal Board was fully within its statutory authority to reject the Division's determination that appellant's termination was not based upon her disability.

This case does not come within the teaching of State Office of Drug Abuse Services, et al. v. State Human Rights Appeal Board, 48 N.Y.2d 276 (1979), in which this Court instructed the Appeal Board that it could not reverse a State Division order which was supported by substantial evidence on the whole record. In that case, this Court found "there was ample evidence from which to conclude that [the complainant's] termination was in no way actuated by racial discrimination." 48 N.Y.2d at 284-285. By contrast, in this case,

appellant's termination was based solely on the belief of Institute officials that Ms. Rousso's disability prevented her from successfuly completing the patient therapy component of the program.

While the Institute may attempt to argue that the Division had ample evidence to support its factual finding that Ms. Rousso was unable "to sufficiently participate to allow for evaluation," and thus its decision should not have been disturbed by the Appeal Board, that position would have no record basis. It is undisputed that the Institute made no systematic effort to find out why Ms. Rousso's patients left therapy. The Institute Administrator told the Division investigator that several of Ms. Rousso's six patients had indicated that her disability was "a factor" in their leaving therapy with her, but the Institute offered no explanation as to why Ms. Rousso's other patients left therapy. Ms. Rousso, on the other hand, provided detailed information which established that most of the six patients terminated their therapy for reasons having nothing to do with her disability. The Division itself set forth these reasons in its June 30, 1982 investigation report (A17-18), yet made no effort to determine if they were accurate. Moreover, the Institute never rebutted Ms. Rousso's statements to the Division that her Institute supervisor told her, after she was terminated, that she should not give up on becoming a therapist, but should try another institute which would be more responsive to, and open minded about, her disability (A16).

Viewing the record in the most favorable light to the Institute, therefore, the most that can be said is that the Division investigator credited the Dean's self-serving statement that he believed Ms. Rousso would have difficulty conducting therapy because

of her disability. Thus, the Division's decision appears to be based upon its acceptance of the Dean's conjecture that all prospective patients would prefer treatment from a therapist without the symptoms associated with mild cerebral palsy, thereby making it very difficult for the appellant to complete her work. This Court, therefore, must determine as a threshold matter whether the Division was entitled to accept the Institute's assumptions concerning the effect of Ms. Rousso's disability on patients, grounded on nothing more than statements that several of Ms. Rousso's patients were concerned about her disability, or whether the Division was required to probe further before determining a case such as this one.

Analysis of this question begins with §296(4) of the Executive Law. That Section states:

> It shall be an unlawful discriminatory practice for an education corporation or association which holds itself out to the public to be non-sectarian and exempt from taxation pursuant to the provisions of Article IV of the Real Property Tax Law to deny the use of its facilities to any person otherwise qualified, by reason of his race, color, religion, disability, national origin, age or marital status.

Under a literal reading of this statute, an educational institution is prohibited from rejecting a student with a disability who is "otherwise qualified" to attend. In this case, it is conceded that Ms. Rousso was "otherwise qualified" to attend the Institute. The analysis, however, does not stop here. Just as employers in a variety of different employment discrimination contexts claim they are entitled to consider the sex of an applicant as a disqualifying factor in light of particular job requirements (e.g., the need for

physical strength, possible danger, customer preference), appellee seeks exemption from the prohibition of the Executive Law on the same basis.

Within an educational context, the assertion of this disqualification defense has raised the issue as to what deference, if any, should be given to an educational institution which judges a student unqualified because of a disability. In Pushkin v. Regents of University of Colorado, 658 F.2d 1372 (10th Cir. 1981), the court faced this issue within a framework which was starkly similar to this case. Section 504 of the Rehabilitation Act, 29 U.S.C. §794, contains language similar to §296(4) of the Executive Law in that it prohibits discrimination by recipients of federal funds against "otherwise qualified handicapped individual[s]." The educational institution in that case denied a doctor with multiple sclerosis entrance into a psychiatric residency program because the admissions committee believed that his disability would have an adverse effect on patients, and prevent sufficient interaction with the patients to complete his training. 658 F.2d at 1385. The court rejected this defense, pointing out that handicap discrimination "often occurs under the guise of extending a helping hand or a mistaken, restrictive belief as to the limitations of handicapped persons." The court, therefore, gave little deference to the institutional judgment and ordered the applicant admitted.

The approach taken by the Pushkin court is consistent with traditional civil rights legal concepts relating to customer preference. Only under extremely narrow circumstances can such preferences be utilized to justify the exclusion of minorities, women or persons

of a particular religious belief from job opportunities. See, e.g., Fernandez v. Wynn Oil Co., 653 F.2d 1273 (9th Cir. 1981); Diaz v. Pan American World Airways, 442 F.2d 385 (5th Cir. 1971), cert. den., 404 U.S. 950 (1971); Matter of American Jewish Congress v. Carter, 9 N.Y.2d 223 (1961).

Where consumers of medical services are involved, the Pushkin court ruled that once a plaintiff establishes he or she is "otherwise qualified," a defendant must prove that the handicap actually disqualified the plaintiff, 658 F.2d at 1387, and that that this cannot be established on the basis of generalized knowledge with regard to the disability in question or concern for its effects on patients, 658 F.2d at 1386. Given the well established judicial antipathy to claims of customer preference, the court in Pushkin was on sound ground when it gave little deference to the judgment of educational administrators who sought to reject a student as unqualified based upon their belief that the student's disability disqualified him.

The Pushkin court developed a rule of law that fact finders should have clear evidence of a disability's disqualifying impact on a student before accepting such a defense. This Court should adopt the same rule. Any other approach would, in effect, gut the prophylactic purposes of New York's educational disability law.

The Institute may argue that the appellant was not rejected from the Institute's program at the outset, as occurred to the Pushkin plaintiff. But this distinction is of little significance. From the outset, the Institute's matriculation committee assumed that Ms. Rousso would be unable to complete the program because patients would not stay in therapy with her. Thereafter, she was dismissed at

the first sign that she was not keeping her patients, without being given any chance to build up an appropriate patient load. Moreover, the Institute terminated appellant based upon an assumption that she must have lost her first six patients because of her disability rather than investigating the actual reasons.[3] Thus, the fact that the decision to terminate appellant was made after her admission hardly removes this case from the Pushkin analysis. The analytic process used by the Institute to determine whether appellant could, in fact, complete its program was no more reliable than the approach that was utilized by the University of Colorado and rejected in Pushkin.

The Division thus defeated the purposes of the Executive Law when it gave total deference to the Institute's conjecture that appellant could not complete its program, rather than requiring the Institute to substantiate its defense with facts. The Division order, therefore, was arbitrary and capricious.

The Appeal Board was correct in determining that a formal hearing should be held in this case so that an evidentiary record can be developed which will enable a fact finder to determine whether Ms. Rousso's disability actually disqualified her from participating in the Institute's educational program. Given the absence of such evidence in this record, the Appellate Division improperly reversed the Appeal Board.

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[3] Even if the Institute could have established, contrary to what appear to be the facts in this case, that Ms. Rousso did lose her first six patients due to her disability, this would have been an extraordinarily small sample upon which to reach a conclusion that she would continue losing a very high percentage of her patients due to her disability.

II.

THE INSTITUTE DID NOT OFFER APPELLANT A REASONABLE ACCOMMODATION SO THAT SHE COULD COMPLETE ITS REQUIREMENTS

Even assuming substantial evidence to support a finding that Ms. Rousso would have had difficulty completing the Institute's program, this would not justify the decision below. Under such circumstances, an educational institution should be required to establish that it was willing to make a reasonable accommodation to its program to enable a student to complete the requirements. This the Institute simply did not do.

The courts of New York have not, prior to this case, grappled with balancing an "otherwise qualified" person's need for modifications in an educational program with an educational institution's concern for preserving the integrity of its program. That issue arises in this case as, six months after appellant's termination as a student and after she demanded an explanation for her termination, the Institute's Dean wrote Ms. Rousso a letter which indicated that the Institute was willing to readmit her under rigid and unworkable probationary conditions. The court below, without any analysis, referred to this letter as an accommodation (A5). Appellant contends that this Court should rule, as a matter of law, that the probationary letter was not an accommodation at all, much less a reasonable accommodation.

The United States Supreme Court has attempted to balance the competing interests of persons with disabilities and educational institutions in determining what standards to apply in Rehabilitation Act cases. See Southeastern Community College v. Davis, 442 U.S. 397

(1979); Alexander v. Choate, ___ U.S. ___, 83 L.Ed.2d 661, 105 S.Ct. 712 (1985). Davis involved the admissibility of a person with a serious hearing disability into a training program for registered nurses. The disability, however, would have prevented the applicant from being capable of safely performing the functions of a registered nurse even with full time personal supervision, and the institution would have been required to make fundamental changes in its program to attempt to accommodate her. The institutional decision not to admit her was, therefore, upheld.

Recently, the United States Supreme Court in Alexander v. Choate explained the Davis decision as follows:

> Davis thus struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make "fundamental" or "substantial" modifications to accommodate the handicapped, it may be required to make "reasonable" ones. ___ U.S. at ___, 83 L.Ed.2d at 671.

Thus, the Supreme Court made clear that a discriminatory effect analysis should be applied to disability discrimination claims and that the Davis balancing test should then be utilized to determine whether a complainant should prevail.

Using the Supreme Court's effect and balancing tests, it is clear that Ms. Rousso should have been entitled to a hearing on the merits. The appellant's termination was the direct result of her disability. Either the Institute consciously utilized the fact that her six patients left therapy to terminate her, because it did not wish to train students with her type of disability, or the Institute's "rule" -- promulgated after the fact -- that a student could

not lose her first six patients, had an adverse effect upon Ms. Rousso because of her disability. In either event, under the Supreme Court's analysis, the question which should be faced by a fact finder is whether the Institute could make a reasonable adjustment to its program to accommodate Ms. Rousso's disability.

In this case, of course, it is not clear that the Institute would have needed to make a reasonable modification of its program in order to accommodate Ms. Rousso. The evidence submitted by the Institute indicated only that a few of the patients had a concern which was related to her disability. Therefore, the Institute may only have had to assign additional patients to Ms. Rousso to enable her to obtain her clinical training.

Even assuming that all six of Ms. Rousso's patients had terminated treatment because of her disability, and the Institute could have reasonably concluded that a high percentage of her patients would reject her in the future, the Institute's probationary terms did not constitute a reasonable accommodation to Ms. Rousso's needs consistent with the Supreme Court's standards. In fact, rather than accommodating her needs, the terms and conditions of the Institute's offer did nothing more than create a mechanism which would allow the Institute to terminate her for a variety of reasons.

For example, under the probationary terms, the Institute stated it would terminate Ms. Rousso if 50% of the prospective patients who were told about her disability in advance refused to see her. Moreover, if 80% of those who undertook therapy with her did not stay in treatment for at least one month, 70% for at least two months, and 60% for at least three months, she would be terminated.

Finally, if the number of long term patients fell below the "usual level," she would be terminated (A77). Nothing in the Institute's proposal was designed to accommodate Ms. Rousso's needs. Rather, the purpose of the letter was to set forth grounds for her dismissal.

While it is inappropriate at this juncture to speculate on what reasonable accommodations could have been made for Ms. Rousso if, after a period of time, she was having difficulty retaining patients and that difficulty was traceable to her disability, the possibilities of accommodation should have been fully explored at the Division level prior to any ruling being made on her case. At a minimum, it is clear that the Institute should have developed a plan to help appellant maintain patients, rather than merely place certain numerical requirements on her. If a part of this plan included the screening of prospective patients by advising them of Ms. Rousso's disability -- a highly questionable approach for which no validation was presented to the Division -- there was absolutely no reason for the imposition of the penalty of dismissal if 50% of the prospective patients rejected Ms. Rousso sight unseen.

Finally, under no set of circumstances should a probationary readmission without a single provision to assist a disabled student be classified an "accommodation" and utilized to justify terminating the student.

Throughout these proceedings, every forum has alluded to the concept of accommodation. Nevertheless, the original fact-finding forum, the Division, made no analysis whatsoever as to whether, in fact, the Institute's proposal was an accommodation. Only the Appeal

Board analyzed the nature of the accommodation, and found it to be totally unreasonable. Indeed, the Appeal Board, after reading the plain language of the probationary letter concluded:

> . . . The accommodation was not an accommodation at all but simply conditions which might have been impossible in light of [Ms. Rousso's] earlier experiences. (A7).

The Appeal Board decision in this regard only pointed out the total contradiction between the Institute's defense that Ms. Rousso was having difficulty maintaining her patient load due to her disability and the probationary letter which mandated her discharge unless she maintained high percentages of her patients in treatment for long periods of time. By contrast, the Appellate Division found, without any record support whatsoever, that the Institute "offered to tailor its curriculum to accommodate [Ms. Rousso's] disability" (A5).

Certainly, this Court in State Office of Drug Abuse Services, et al. v. State Human Rights Appeal Board, supra, did not intend to insulate the Division from all meaningful administrative and judicial review, especially in cases where it is absolutely clear that the Division, prior to holding a hearing, was operating in a factual vacuum in an area where meaningful standards of analysis have not yet been developed. Yet the decision below has precisely this effect.

CONCLUSION

For all of the above reasons, the decision of the court below should be reversed, and the decision of the Appeal Board reinstated.

Respectfully submitted,

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