2019-2020 Higher Education-Disability Rights "Legal Year in Review"©

Court Decisions, Settlements, & Agency Guidance

Annual update to:

The Law of Disability Discrimination for Higher Education Professionals, Carolina Academic Press

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You should seek the advice of legal counsel to resolve the legal issues that you are responsible for addressing. Further, any policy or procedure additions or revisions under consideration should be reviewed by counsel prior to implementation.

USE AND PERMISSIONS

In the past, annual legal updates by Paul Grossman have been limited to those individuals who enroll in training opportunities available through AHEAD and its affiliates or by purchasing a copy of ***The Law of Disability Discrimination for Higher Education Professionals.*** ***This year is different***, this update is free of charge to all DSS/DSPS professionals, all post-secondary faculty and administrators, as well as all post-secondary students. Accordingly, consent is provided to share and republish this document for the benefit of any of the aforementioned individuals.

Though presented as a slide deck, nearly all the slides are sufficiently detailed to be read as a book. These materials are in an accessible PDF format. There are no pictures. (There is one flowchart.) Further, consent is provided to convert these materials into Braille or other alternate format as a necessary accommodation to making them accessible to any individual with a disability.

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Cases in Context (1)

- **I. Definition of Disability: Condition, Manner, or Duration**
  - ***Berger v. Nat'l Bd. of Med. Examiners***
  - ***Ramsay v. Nat'l Bd. of Med. Examiners***

- **II. "Otherwise Qualified Individual/Student with a Disability (QSD/'QID)"**

  A) Introduction to the Paradigm

  B) The Breadth and Limits of the "Interactive Duty"
    - ***Mbawe v. Ferris State University***

  C) Direct Threat to Others as an Element of QSD/QID
    - ***R.W. v. Columbia Basin College***

  D) Deference Must be Earned
    - ***Rogers v. Western University of Health Sciences***

Cases in Context (2)

- **III. Self-Injurious Behavior, Some Complications, Some Guidance**
  - ***Remand* in *Regents of the Univ. of Cal. vs. Superior Court of Los Angeles, Supreme Court of California***
  - ***Nguyen v. MIT (See also, Charles v. Orange County)***
  - ***Guidance inferred from Five DOJ Settlements***
    - ***Settlement between United States of America and Northern Michigan University***
    - ***Settlement between Disability Rights Advocates and Stanford University***

Cases in Context (3)

- **IV. Equal Communication**
  - ***Payan and Mason v. Los Angeles Community College District***
  - ***What About Captioning?***
    - ***National Association of the Deaf v. Harvard University***
  - **Supplementary materials on websites of public accommodations**
    - ***Robles v. Domino's Pizza***
    - ***Thurston v. Midvale Corp***

Cases in Context (4)

- **V. But Is It "Necessary"?**
  - ***A.L. by and through D.L. v. Walt Disney Parks and Resorts US, Inc.***
  - ***J.D., by his father and next friend, Brian Doherty v. Colonial Williamsburg Foundation***
- **VI. Food Service Accommodations**
  - ***Settlement Agreement between the United States of America and Rider University:* DOJ 202-48-32**

Module I: ***Documentation and Definition of Disability***

Two Case Studies Concerning Denial of Accommodation Claims Against the NBME Demonstrating the Failure of the NMBE to Implement "Condition, or Manner, or Duration" Analyses

Berger v. Nat'l Bd. of Med. Examiners, No. 1:19-CV-99, 2019 WL 4040576 (S.D. Ohio Aug. 27, 2019), appeal to the 6th Cir. filed (September 19, 2019); ***Ramsay v. Nat'l Bd. of Med. Examiners,*** No. 19-CV-2002, 2019 WL 7372508 (E.D. Pa. Dec. 31, 2019), appeal to the 3rd Cir. filed (January 9, 2020)

How We Got Here

- Ever since the adoption of Section 504 of the Rehabilitation Act **of 1973**, codified at 29 U.S.C. § 701 et seq., as amended in 1974 (December 7, 1974), under Federal Law addressing discrimination on the basis of disability, individuals with disabilities have been defined as:

  "Any person who (a) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (b) has a record of such an impairment, or (c) is regarded as having such an impairment"

- Though the words have been constant, the court-created rules for "construing" (interpreting and applying) these words have changed; consequently, so has their meaning and application

- In response to the courts interpreting the definition of disability in a very demanding way, making it very hard for plaintiffs to establish that they were individuals with disabilities, Congress passed the ADA Amendments Act of 2008, 42 U.S.C. § 12101, undoing these demanding standards --- "restoring" the ADA to the wider coverage that Congress initially intended

Restoration of the ADA (and Section 504) by Congress by Reconstruction of the Definition of Disability

- **Americans with Disabilities Act of 1990** [**ADA**], 42 U.S.C. § 12101
  - ***Effective July 26, 1990***
  - ***https://www.ada.gov/pubs/ada.htm***
- ***Americans with Disabilities Act, Amendments Act of 2008 (ADAAA)=ADA, as amended***
  - Effective January 1, 2009
  - https://www.eeoc.gov/laws/statutes/adaaa.cfm
  - EEOC, ***Regulations and Guidance implementing the ADAAA***
    - 29 CFR Part 1630 [employment]
    - Effective September 15, 2011, published in the Federal Register on March, 25, 2011
    - http://www.eeoc.gov/laws/statutes/adaaa_info.cfm; https://www.gpo.gov/fdsys/pkg/FR-2011-03-25/pdf/2011-6056.pdf
  - DOJ, ***Title II & III Regulations and Guidance implementing the ADAAA***, focusing on the testing and higher education industries
    - 28 CFR Parts 35 & 36 [testing and higher education]
    - Effective October/11/2016, published in the Federal Register on August 11, 2016
    - https://www.federalregister.gov/documents/2016/08/11/2016-17417/amendment-of-americans-with-disabilities-act-title-ii-and-title-iii-regulations-to-implement-ada
    - Most important guidance for DSS providers

For Higher Education, An Important Example in the EEOC *Regulations*

- Initial responsibility for issuing regulations to implement the objectives of Congress is adopting the ADAAA was assigned to the EEOC
- Though the EEOC's jurisdiction concerns employment discrimination, its regulations are the model for all titles of the ADA, including those pertaining to post-secondary students
- One very important paradigm adopted by the EEOC concerns consideration of "condition, manner, and duration":
  - An impairment may substantially limit the ''condition'' or ''manner'' or "duration" under which a major life activity can be performed in a number of ways
    - "…the condition or manner under which a major life activity can be performed may refer to the ***way*** an individual performs a major life activity."
    - "Condition or manner may also describe ***how performance of a major life activity affects the individual with an impairment***."
    - "…condition or manner may refer to ***the extent to which a major life activity*** … ***can be performed***."
  - "Condition, manner, or duration may also suggest ***the amount of time or effort an individual has to expend when performing a major life activity*** because of the effects of an impairment, even if the individual is able to achieve the same or similar result as someone without the impairment."

DOJ 2016

Regulations implementing the ADAAA with Regard to Title II and Title III of the ADA and DOJ Analysis

- http://federalregister.gov/a/2016-17417
- The purpose of these new regulations was to explicitly ensure that the ADAAA definition of disability is implemented in entities covered by Titles II and III with regard to all claims of disability
- The focus is on two "entities", higher education and the standardized testing industry and on two kinds of impairment, learning disabilities (including Dyslexia) and ADHD
- The content is common to both the Title II and Title III regulations
- *All quotations in the slides that follow are attributable to the DOJ section-by-section analysis, not the regulations, except when a regulation cite is given immediately following the quotation*

2016 DOJ Rules and Guidance Pertinent to the Plaintiffs in the *Berger* and *Ramsay* Case Studies (1)

- The list of impairments, found at 28 CFR §§ 35.108(b)(2) and 36.105(b)(2), has never been exclusive ("nonexhaustive") but explicit inclusion in the list is helpful to plaintiffs with a listed impairment---the list has been amended to include:
  - Attention Deficit Hyperactivity Disorder (ADHD)
  - "Dyslexia and other specific learning disabilities"
- The list of major life activities, found at 28 CFR §§ 35.108(c) and 36.105(c), has never been exclusive but the list has been amended to explicitly include:
  - Writing
  - The list continues to include, in part, "learning, reading, concentrating, thinking, writing, communicating"

2016 DOJ Rules and Guidance Pertinent to the Plaintiffs in the *Berger* and *Ramsay* Case Studies (2)

- Analysis should emphasize consideration of “limits” rather than “outcomes” “For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in one or more of the major life activities of reading, writing, speaking, or learning because of the additional time or effort he or she must spend to read, speak, write, or learn compared to most people in the general population”
- During the public comment period, prior to issuance of the final version this regulation, it was opposed in the written comments prepared by counsel for the NMBE

Berger and Ramsay Share a Lot of Challenges (1)

- Both Brendan Berger and Jessica Ramsay attend medical school; respectively, private (American University of the Caribbean School of Medicine) and public (School of Medicine of Western Michigan University)
- Both must pass all three Steps of the USMLE (United States Medical Licensing Exam) in order to become practicing physicians
- The USMLE is developed and administered by the NBME (the National Board of Medical Examiners)
- Berger and Ramsay have been denied by the NBME accommodations on the USMLE, including requests for extra time, breaks, and a low-distraction testing environment

Berger and Ramsay Share a Lot of Challenges (2)

- Both Berger and Ramsay are intelligent individuals who have strong academic records, and ***without accommodations***, have done as well as the average person in the general population on some demanding high stakes standardized exams such as the MCAT and, in Berger's case, passing Step 1 of the USMLE
- Both received informal and formal accommodations in high school, college and formal accommodations throughout medical school
- Both individuals have provided the NBME extensive expert-prepared objective, observational, and self-narrative documentation supporting that, despite high IQs, they are substantially impaired with regard to reading, writing, and mathematical fluency (below the 10th percentile), as well as with regard to concentration
- The performance of both individuals is substantially improved on standardized diagnostic achievement test when he/she receives extra time to complete the test
- Both individuals have provided direct observation, expert-based, diagnoses of dyslexia and ADHD

Berger and Ramsay Seek Preliminary Injunctions

- Both individuals, despite extensive preparation, have been unable to complete important standardized exams including one or more USMLE Step Exam
- Without passing all USMLE Step Exams neither Berger nor Ramsay will become a doctor
- They are both concerned that, even if they could pass the Step Exams without accommodations, their scores would be so low as to preclude desirable residency placements
- Under Title II or III of the ADA, in different Federal district courts, Berger and Ramsay, sought preliminary injunctions against the NBME for disability discrimination through the denial of exam accommodations
  - Section 504 claims were made but set aside due to a lack of information about Federal financial assistance to the NMBE

Following Similar Reasoning, Both Federal District Courts Granted the Requested Preliminary Injunctions (1)

- The NMBE's review standards are not consistent with several provisions of the ADAAA as implemented through DOJ regulations and guidance
  - "[A]lthough NBME may not have liked the terminology used in the implementing regulations, despite its registered objections, the foregoing language is what was enacted and it is this language which must be followed in assessing accommodations requests under the ADA. It [the NBME] decidedly did not do so in this case." ***Ramsay*** at 17.
- Without any persuasive reason, and contrary to DOJ guidance, the NMBE granted greater weight to the judgment and conclusions of its own experts, who had never met with either Plaintiff, than those experts who had observed them directly
  - Both Plaintiffs were evaluated by qualified experts
  - Both Plaintiffs were evaluated with a variety of instruments
  - The reports submitted by both Plaintiffs were prepared following direct observation not just of outcomes, including observed self-accommodative practices, including ones that bear on fluency or the condition, manner, or duration skills necessary to success on the USMLE

Following Similar Reasoning, Both Federal District Courts Grant the Requested Preliminary Injunctions (2)

- As to both Plaintiffs, the NMBE followed a bottom line analysis rather than a condition, manner or duration analysis:
  - "[The] NBME either discounted or disregarded entirely the admonition to focus on 'how a major life activity is substantially limited, and not on what outcomes an individual can achieve' and apparently ignored the example that 'someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population.' 29 C.F.R. § 1630.2(j)(4)(iii). NBME's exclusive focus on Plaintiff's prior academic successes and her performance on the ACT and MCAT standardized examinations without accommodations was therefore improper …." ***Ramsay*** at 18.
  - "[T]he Court also recognizes that '[a] definition of disability based on outcomes alone, particularly in the context of learning disabilities, would prevent a court from finding a disability in the case of any individual . . . who is extremely bright and hardworking, and who uses alternative routes to achieve academic success," a result that would be inconsistent with the goals of the ADA.' ***Bartlett v. New York State Bd. of Law Examiners***" ***Berger*** at 45.
  - The inability of Berger to finish exams, ones for which he had prepared to an exceptional degree, should have been given considerable weight as appropriate to a condition or manner or duration analysis. ***Berger*** at 29-30 and 46-47.

Following Similar Reasoning, Both Federal District Courts Grant the Requested Preliminary Injunctions (3)

- Though neither student received a formal diagnosis of a disability prior to high school, both had extensive histories of informal and formal accommodations, including in medical school; histories given little weight by the NBME:

  "[W]e also find that Defendant ran afoul of 28 C.F.R. § 36.309(b)(v) which requires that '[w]hen considering requests for ... accommodations ... the [testing]entity give[ ]considerable weight to documentation of past modifications, accommodations, or auxiliary aids or services received in similar testing situations ...' Again, it does not appear from the record that NBME gave any consideration, much less the 'considerable weight' required to Ms. Ramsay's past record of having received accommodations." ***Ramsay*** at 18.

Following Similar Reasoning, Both Federal District Courts Grant the Requested Preliminary Injunctions (4)

- Some of the conclusions of the NMBE, were simply unreliable and without persuasive support:
  - Berger was accused of malingering on assessment exams contrary to the clear evidence in his personal statement that he had taken exceptional steps to pass unaccommodated exams; such as, studying for the MCAT for 8 hours a day for a year
  - One NMBE expert opined that Berger's lack of fluency was due to the fact that he was raised in a bilingual (French and English) environment, but to the court this conclusion appeared to be without any support and was not relied upon by any other NMBE expert

Relief Granted Common to Both Berger and Ramsay

- Both Plaintiffs demonstrated to their respective courts a strong likelihood that he or she would succeed on the merits of the claims
- Plaintiffs' primary relief included:
  - Extra-time
  - Exam breaks
  - Exams in low-distraction environments

The NMBE Has Appealed both Decisions

- ***Berger v. Nat'l Bd. of Med. Examiners,*** No. 1:19-CV-99, 2019 WL 4040576 (S.D. Ohio Aug. 27, 2019), appeal to the 6th Federal Circuit filed September 19, 2019, No. 3885, 2019 WL 4040576
- ***Ramsay v. Nat'l Bd. of Med. Examiners,*** No. 19-CV-2002, 2019 WL 7372508 (E.D. Pa. Dec. 31, 2019), appeal to the 3rd Federal Circuit filed January 9, 2020, No. 20-1058, 2019 WL 7372508

Module II: *Otherwise Qualified Student with a Disability*

A) Introduction to the Paradigm

B) Direct Threat to Health and Safety

C) The Breadth and Limits of the "Interactive Duty"

D) Whether, When, or How a Student Requested an Accommodation May be an Important Issue ©

Case Studies

Mbawe v. Ferris State University, Case No. 18-1046, 751 Fed.Appx. 832, 2018 WL 5793188 (6th Cir., November 2018)[unpublished]; cert. den., 139 S.Ct. 2022 (Mem), 2019 WL 1171674 May 2019

R.W. v. Columbia Basin College, NO: 4:18-CV-5089-RMP, E.D. Wash (October 4, 2019)

Rogers v. Western University of Health Sciences, No. 18-55003, 2019 WL 4887847 (9th Cir. Oct. 3, 2019) [unpublished]

Particularly in Litigation, Often, the Overarching, All Encompassing Analytical Framework or Question is: Is the Plaintiff a Qualified Student with a Disability (QSD)?”

QID/QSD Flowchart

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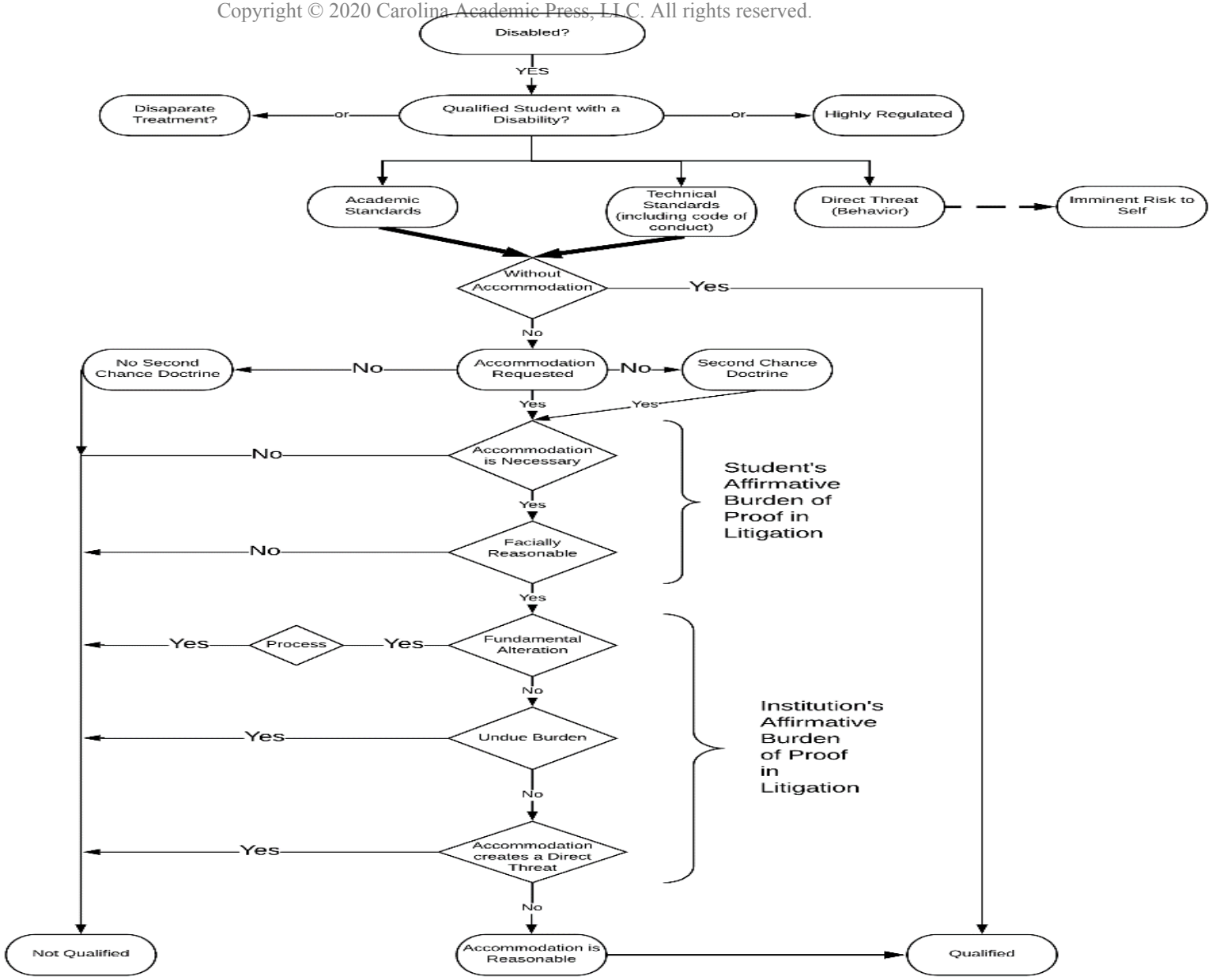

QID/QSD Foundation (1)

- This paradigm, QSD (or qualified individual with a disability [QID], most often arises in court cases concerning academic or conduct-based suspension or dismissal, for example
  - A person with an SLD or ADHD fails to maintain the minimum GPA in law school or a graduate school program
  - A person with a psychological disability fails to comply with the code of conduct or seems unable to distinguish between fantasy or reality in an internship setting
  - A health science student who repeatedly fails to pass clinical rotations, even the second time around
  - A medical student who fails to pass intermediate USMLE Step Exams

QID/QSD Foundation (2)

- In litigation, the student as a plaintiff would be alleging: "I Remain a Qualified Student with a Disability but Was Nonetheless Treated Adversely"
  - It's good to be a QSD!:
  - *A student who has been admitted to a program and who is a "qualified individual [student] with a disability" cannot be excluded, dismissed, or suspended from that program on the basis of disability*

QSD Definition

- A qualified student with a disability is:
  - a person with a disability
  - who, with or without reasonable accommodation (including auxiliary aides and services)
  - meets the essential academic and technical standards requisite to admission or continuing participation in the college or university's educational program or activity
    - including compliance with the code of conduct (a technical standard) and
    - the ability not to represent a direct threat to the health and safety of others.

A Corollary Claim: Denial of an Accommodation (1)

- Given that "accommodation" is an element of qualification, some plaintiffs and many courts chose to analyze denial of accommodation questions in the context of the QID/QSD question
  - "I would be a QSD if the college had provided me the accommodation(s) that I requested"
  - "I would be a QSD if the college had implemented the accommodation(s) it had approved."
  - "Even though I did not request any accommodations, going forward, I would be a QSD if the college would implement the accommodation I have just identified"

A Corollary Claim: Denial of an Accommodation (2)

- In a denial of accommodation QSD claim, the student must establish:
  - The functional limitations associated with my disability are why my academic performance or conduct has been impaired
  - The accommodation I requested would have worked

A Corollary Claim: Denial of an Accommodation (3)

- If the student had not previously requested an accommodation:
  - The student may have no viable claim to make
    - This appears to be OCR's consistent position as well as the position of a significant number of courts
      - Except where the college or university failed to make clear how to request an accommodation or failed to recognize the student's desire to make such a request
  - Other courts allow the student to proceed with his/her claim if he/she can establish:
    - The functional limitations associated with his/her disability are why his/her academic performance or conduct has been impaired to an impermissible degree [a question of logic and for student as well as expert testimony]
    - The accommodation that he/she is now proposing is likely to work to the degree necessary to be a qualified student [a question of logic and for student as well as expert testimony]
    - The accommodation that he/she is now proposing is "reasonable" in the legal sense of this term [a question of law as well as expert testimony]
    - This additional chance is consistent with the duty of college's and universities to accommodate students with disabilities [largely a question of law]

Case Study 1

Mbawe v. Ferris State Univ.

Mbawe v. Ferris State University-Background (1)

- Case No. 18-1046, 751 Fed.Appx. 832, 2018 WL 5793188 (6th Cir., November 2018)[unpublished]; cert. den., 139 S.Ct. 2022 (Mem), 2019 WL 1171674 May 2019
- A pharmacy student at Ferris State University (FSU), admitted on probation, failed to meet academic standards for his first year, but was retained and given a second chance
- During his second chance he began conversing with faculty statements that reflected paranoid delusions and maybe schizophrenia
  - A friendly individual who was not considered "bizarre," a threat to himself, or others but not in touch with reality
    - Mbawe reported that he was being spied upon and that people were injecting him with foreign substances while he was asleep
    - He could not keep track of class schedule or comprehend course assignments
    - He refused psychiatric care or participation in a physician's recovery program
      - This was of great significance to the court

Mbawe v. Ferris State University-Background (2)

- A state court granted FSU's petition to have Mbawe involuntarily committed to a psychiatric hospital.
- Mbawe's commitment rendered him ineligible to maintain his pharmacy-intern license, required of all pharmacy students; and consequently, FSU involuntarily withdrew Mbawe from the pharmacy program
- Based on the above, and how much class he had missed, Mbwae was involuntarily withdrawn from the pharmacy program; a status that made it more likely that he could return to the program at a later date than if he had been dismissed
- Nevertheless, when his appeals failed, and he sued Ferris State University for disability discrimination

Is Mbawe a QSD?

- Following a QSD analysis, both the district and appellate courts issued summary judgement for FSU:

  "The plaintiff bears the burden of demonstrating that he is qualified by "proposing an accommodation and proving that it is reasonable, including establishing that he can meet a program's necessary requirements with that accommodation." ***Shaikh v. Lincoln Mem'l Univ.,*** 608 F. App'x 349, 353 (6th Cir. 2015)

- There was no dispute that Mbwae was an individual with a disability
- Allocation of burdens of proof on the issue of QSD:
  - Mbwae had the burden of identifying an accommodation that would make him otherwise qualified
  - In the opinion of both courts, Mbawe never proposed any accommodation
  - The accommodation that had been identified by the Ferris State prior to his involuntary withdrawal, participation in psychiatric help and in a physician's recovery program, which included monitoring, was declined by Mbwae on trivial grounds

Did Ferris State Fail to Engage in an Interactive Duty? (1)

- Maybe to address the fact that he did not propose an accommodation, as an alternative argument, Mbawe also alleged that Ferris State failed to engage with him in the interactive process [one that might have resulted in identifying an effective accommodation]:

  ”Mbawe …. claims that FSU officials failed to engage in an "interactive process" to "identify … potential reasonable accommodations that could overcome [his] limitations," as required by the ADA. This argument fails. … [W]e have held in the employment context that, to trigger the duty to participate in the interactive process, "[a]n employee has the burden of proposing an initial accommodation." … [But], Mbawe failed to propose any accommodation that would have allowed him to remain qualified to be a pharmacy student, so FSU's duty to engage in the interactive process was never triggered. …. [Consequently] "we need not consider whether [FSU] failed to engage in the interactive process." [Citations omitted]

Did Ferris State Fail to Engage in an Interactive Duty? (2)

- "Here, the only accommodation that would have allowed Mbawe to remain in compliance with the pharmacy program's Technical Standards—participation in HPRP—was identified by FSU and rejected by Mbawe"
- Court also took note of the multiple chances Mbawe was given to continue in the program and less severe consequences associated with the withdrawal option taken by Ferris State as evidence that Ferris State lacked a desire to arbitrarily exclude him due to his disability

Is There any Duty to Engage in the Interactive Process?

- This is a favorite theory of OCR: ***Letter to Tulsa Community College, Metro Campus***, OCR Docket # 07092064 (June 2011); ***Letter to Irvine Valley College,*** OCR Case Number 09-17-2090 (April 2017) --- many more
- But *some* courts are skeptical that such a duty exists, except under Title I [employment] ***Stern v. Univ. of Osteopathic Med. & Health Scis.***, 220 F.3d 906, 909 (8th Cir. 2000); ***Rossley v. Drake University,*** United States District Court, 342 F.Supp.3d 904, (S.D. Iowa, October 12, 2018)
- ***In any event it is a good practice***, even if only to document a genuine attempt to identify an effective accommodation or, learn that no such accommodation exists

An Element of the QSD Analysis: Direct Threat

Case Study 2

R.W. v. Columbia Basin Coll., Lee Thorton [interim President] ***in his official and Individual Capacities and*** **RALPH REAGAN** [Assistant Dean of Student Conduct]**, in his official and individual capacities**

Preface (1)

- NO: 4:18-CV-5089-RMP, E.D. Wash (October 4, 2019) https://casetext.com/case/rw-v-columbia-basin-coll
- This case is an unreported district court opinion and cannot be located in WestLaw
- It has very little value as a precedent
- This case nonetheless has value as a case study or as the basis for a hypothetical workshop/classroom exercise as it explores and addresses many of the most daunting aspects of the application of the direct threat affirmative defense to the post-secondary student setting

Preface (2)

- In my opinion, this case should have, but failed to cite the Supreme Court decision that first articulated the concept of direct threat, **School Bd. of Nassau County v. Arline,** 480 U.S. 273 (1987)
  - Like the decision in ***R.W.,*** explored in the next several slides, the Supreme Court in ***Arline*** refused to buy the argument that discrimination against the symptoms or manifestations of a disability is not the same as discrimination on the basis of disability
  - As in ***Arline***, the court in ***R.W***. recognized that sanctioning someone for manifestations of a disability that are an authentic direct threat (determined in a proper way) is not disability discrimination but this must be distinguished from sanctioning someone based on myths and fears about their disability
  - The question in ***R.W. v. Columbia Basin College*** is which basis was used by the College to bar a nursing student from coming onto campus, because he was a direct threat to the health and safety of the faculty or because he was an individual with disturbing mental health disabilities that made faculty members ***feel*** unsafe?
- This case also raises some very interesting First Amendment issues

Factual Background (1)

- R.W. was enrolled in Columbia Basin College's ("CBC") nursing program, needing to complete only one more quarter of classes to graduate
- Over the course of his attendance at CBC and subsequently he was variously diagnosed with a seizure disorder, depression, Adjustment Disorder, Unspecified Depressive Disorder and Acute Stress Disorder with accompanying anxiety
- R.W., on his initiative, reported to his primary physician that he was having a hard time sleeping, was experiencing an increase in the frequency of his seizures and was having homicidal ideations about three particular instructors at CBC, in which he imagined killing them by lighting their offices on fire and attacking them with saws

Factual Background (2)

- R.W. reported to a hospital mental health crisis invention team, one to which he agreed to be referred by CBC, that these feelings were triggered by loss of sleep, criticism from his teachers, and bad grades
- R.W., at the suggestion of the crisis team, voluntarily agreed to hospitalization during which, without R.W.'s consent, the three professors were warned about R.W. by campus security
- The faculty were told that RW was in the hospital and not an "immediate threat;" nonetheless these faculty stated that what they were told "made them afraid" to have R.W. in their classes

Factual Background (3)

- While R.W. was in the hospital, the Assistant Dean for Conduct “trespassed” R.W. on the grounds that R.W.'s actions had the "effect of creating a hostile or intimidating environment“ even if unintended by R.W.
- R.W. was afforded an elaborate set of multiple due process appeals but the trespass order remained in effect, until “R.W. successfully re-enrolled in the nursing program, participated in mental health counseling, and completed a mental health evaluation”
- At a minimum R.W. was blocked from completing his degree for a year (Columbia Basin may also have required R.W. to repeat some courses)

Claims of R.W.

- Proceeding under 42 U.S. Code, Section 1983, R.W. alleged that Defendants CBC, Reagan, and Thornton denied to him of his First Amendment right to free speech when they, in effect, sanctioned him for making statements to his doctor about his mental health
  - Apparently, R.W. was not notified by his physician of any circumstances under which his medical information might be shared nor was he asked to give his consent
- R.W. alleged that the same defendants also violated his rights under Title II of the ADA, Section 504 of the Rehab Act, and Washington State disability rights laws
- R.W. sought an injunction
  - Lifting the trespass order
  - Preventing CBC from requiring R.W. to retake any of his nursing classes
  - Preventing CBC from requiring R.W. to provide regular reports of his medical treatment as a condition of re-enrollment
- R.W. also asked for compensatory, punitive, and nominal damages, as well as attorneys' fees

R.W.'s First Amendment Claim is Successful! Reasoning of the Court (1)

- The First Amendment rights of post-secondary students are quite broad; broader than those accorded to elementary and secondary students
- Even then, colleges and universities may sanction students for "true threats"
  - True threats encompass those statements where ***the speaker means*** to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals"
  - When the speaker targets specific individuals, courts are more likely to find that the speech is a true threat

R.W.'s First Amendment Claim is Successful! Reasoning of the Court (2)

- The Ninth Circuit has clarified that the relevant constitutional inquiry is: "Did the speaker ***subjectively*** intend the speech as a threat?" [Emphasis added]
  - R.W. never expected that the statements to his doctor for the purposes of medical treatment would reach his instructors and intimidate them
  - R.W.'s instructors only discovered his statements through an alleged mandatory reporter informing CBC officials

R.W.'s First Amendment Claim is Successful! Reasoning of the Court (3)

- According to the court, no reasonable factfinder could conclude that R.W. had the requisite intent to transform his statements to his doctor into true threats to intimidate his instructors and thus, ***R.W.'s speech is protected by the First Amendment***
- Violation and liability found!:

  "College students have a clearly established right to engage in protected speech, even if that speech violates their universities' codes of student conduct. CBC officials violated clearly established law and violated R.W.'s First Amendment rights. Therefore, CBC officials Mr. Reagan and Mr. Thornton are ***not entitled to qualified immunity*** on R.W.'s First Amendment claim."

R.W.'s Disability Claims Are Sufficiently Close that More Evidence Needs to Be Taken (1)

- Summary judgment for Columbia College on the Section 504 and ADA claims is denied as the key question remains, is R.W. a QSD or a direct threat to the health and safety of others?
- R.W. cannot prevail under the Section 504 or the ADA unless he is a QSD
  - An individual who represents a direct threat to the health and safety of others cannot be a QSD
  - A decisionmaker's subjective belief, "even if maintained in good faith," does not shield him from liability if no objective threat exists

R.W.'s Disability Claims Are Sufficiently Close that More Evidence Needs to Be Taken (2)

- When a public entity must decide whether a person is a direct threat, it must:
  - Make an "individualized assessment." 28 C.F.R. § 35 .139(a).
  - Base it's assessment on "reasonable judgment that relies on current medical knowledge or on the best available objective evidence." 28 C.F.R. § 35.139(b)
  - The entity must determine:
    - "the nature,
    - duration
    - and severity of the risk
      - The probability that the potential injury will actually occur
      - Whether reasonable modifications . . . or the provision of auxiliary aids or services will mitigate the risk"

R.W.'s Disability Claims Are Sufficiently Close that More Evidence Needs to Be Taken (3)

- Evidence is not sufficient, at this point, to establish a direct threat:
  - CBC can point to:
    - R.W.'s statements to his doctors including a specific method and intended victims
    - R.W.'s doctors could not ensure that R.W. would not continue to have homicidal thoughts if he returned to CBC
  - R.W. can point to the fact that:
    - He made no threats to anyone at CBC
    - R.W. is who checked himself into the hospital
    - CBC did not consider him an "immediate threat" while he was in the hospital
    - R.W.'s medical records show that he did not like to experience intrusive thoughts
    - R.W.'s therapist indicated that R.W. "appeared to have good insight and judgment."
    - At a post-hospitalization meeting, R.W. stated he had no more homicidal ideations, that he did not want to hurt anybody, that he was sleeping better, and that "adjusting his medications helped with his overall sense of well-being."
    - Mr. Reagan, the person in charge of discipline, stated in his deposition that he did not believe R.W. posed a serious risk of harm to anybody at CBC

R.W.'s Disability Claims Are Sufficiently Close that More Evidence Needs to Be Taken (4)

- What appears to make the court most uncomfortable with CBC:
  - Mr. Reagan stated that the goal of his investigation was to determine whether R.W. would act out his homicidal thoughts
    - Reagan decided that R.W. ***was unlikely to do so***
    - Reagan concluded, "My decision was that he wasn't going to act them out but that it did unintentionally create an intimidating environment."

R.W.'s Disability Claims Are Sufficiently Close that More Evidence Needs to Be Taken (5)

- CBC argues that it is entitled to summary judgment because it trespassed R.W. for safety concerns, not because of his disability
  - CBC asks the courts to differentiate between a mental disorder and the thoughts that the mental disorder causes
    - "The line between the two is untenable"
    - "No precedent requires this Court to differentiate between a disorder and the disorder's symptoms" [including **School Bd. of Nassau County v. Arline,** 480 U.S. 273 (1987), as noted above]
- Conclusion: "Whether officials at CBC believed R.W. posed a credible threat, and the extent to which they based their decision to sanction him on that conclusion or because of a disability, is an issue of material fact that must be resolved by the factfinder"
- With so much more exploration needed, summary judgment is not appropriate at this time

In a QSD Matter, Whether, When, or How the Student Requested an Accommodation May be an Important Issue

Case Study 3: ***Rogers v. Western University of Health Sciences***

Background

- No. 18-55003, 2019 WL 4887847 (9th Cir. Oct. 3, 2019) [unpublished]
- Lindsay Rogers, a medical student, alleged that the Western University of Health Sciences medical school, a private entity, denied her reasonable accommodations for her learning disabilities in violation of Title III the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973 (Section 504)
- The federal district court for the Central District of California granted summary judgment in favor of Western as to all of Ms. Roger's claims
- In an unreported decision, a three-judge panel for the 9th Circuit (Alaska, Arizona, California, Hawaii), affirmed in part and reversed in part the judgement of the district court, and remanded her surviving claims for further proceedings (taking of evidence) by the district court

Dismissal by the District Court Sustained, in Part

- Affirming the district court, the 9th Circuit dismissed several ADA claims as moot (no longer timely or viable) as Rogers would not be returning to Western and could not personally make use of the relief that she requested
- The appellate court interpreted a request for return ("disgorgement") of tuition as a request for monetary damages, a form of relief not available to private plaintiffs under Title III of the ADA

What Constitutes a Valid Request for an Accommodation? (1)

- Appellate Court focused more on the clarity and documentation of the student's request than to whom the request was made:
  - Rogers claimed that she requested but did not receive "stop-the-clock" breaks for exams
    - Summary judgement for Western by the district affirmed
      - Initial request by Rogers, as stated on the Western Accommodation Request Form, was for food, water, and bathroom breaks
      - Roger's independent neuropsychological report was also limited to food, water, and bathroom breaks
      - Rogers's vague testimony that she "sort of" verbally requested stop-the-clock breaks
      - Once Rogers made this request clear, "stop-the-clock" breaks were promptly granted to her as a form of accommodation by the DSS office

What Constitutes a Valid Request for an Accommodation? (2)

- Rogers claimed that she requested but did not receive a change to her exam schedule so that she didn't have to take multi-hour exams, back-to-back, on the same day
  - Summary judgement for Western granted by the district court, reversed by the Circuit Court
    - Record shows that Rogers contacted the Associate Dean, Dr. Thrush, to request an exam schedule change and explained the fact that she would otherwise have to take two multi-hour exams on the same day with no break for rest or tutoring
    - Record shows that Associate Dean heard the request, but responded merely with "let's see how the next exam goes"
    - Western argues that Rogers failed to specifically identify this as a disability-related accommodation request but this is not logical since her existing accommodation of double time of tests is one of the reasons that the schedule conflict would exist
    - Western argued that Rogers failed to bring her request to the attention of Western DSS
      - In fact, Rogers did not contact the University's DSS office
      - But, "a reasonable factfinder could conclude from Dr. Thrush's numerous emails to Rogers on the subject that ***he held himself out as an appropriate person to handle the request"***
    - Western argued that the accommodation would not have made a difference but offered no evidence to support this argument

What Constitutes a Valid Request for an Accommodation? (3)

- Rogers argued that she had requested but had not received alternate media was appropriate for summary judgment for Western on the grounds that she had not completed a DSS alternate media form
  - She had made an oral request
  - “In light of the statements of…. the assistant [DSS] director, that Western does not ‘directly provide’ alternative texts to students because it ‘d[oes] not produce its own version of alternative text formats,’ there is a genuine dispute of material fact whether filling out the form would have made any difference in Rogers receiving alternative texts from the university

Judicial Deference to the Decisions of Academic Institutions is Not Automatic

- Western argued that its decisions with regard to Rogers's exam schedule were entitled to deference by the court
  - Under the circumstances of this case, the 9th Circuit declined to accord deference to Western
  - "[W]e defer to an educational institution's academic decisions only if the "undisputed facts" show that it conducted "a fact-specific, individualized analysis of the disabled individual's circumstances and the accommodations that might allow [her] to meet the program's standards" and "concluded that the accommodations were not feasible or would not be effective." *Wong v. Regents of Univ. of Cal.*, 192 F.3d 807, 818–19 (9th Cir. 1999). [N.B.: *Wong relies on Wynne v. Tufts*, 932 F.2d 19 (1st Cir. 1991); 976 F.2d 791 (1st Cir. 1992); see Axelrod and Grossman, "Process, Process, Process"]
  - "Western has not made this showing"

Alternate Media

- Summary judgement for Western with regard to the production of alternate media reversed by the Circuit Court
  - Telling Rogers that she could get alternate media on her own initiative and expense from third party providers did not fulfill its duty to provide her this accommodation
  - Argument by Western that this accommodation was “not reasonable” was insufficiently supported to justify summary judgement
    - Rogers has received this accommodation from other universities at their expense in the past
    - Western had provided this accommodation to other students of its own in the past

Dissent: She Didn't Follow the Accommodation Request Rules

- "[E]ven if Rogers did request a schedule change as a disability accommodation from Dr. Thrush, it was improper for her to do so. Rogers acknowledged Western's policy requiring students to direct disability accommodation requests to the [DSS office]. There is no evidence that Rogers submitted a renewed request to the AARC for an academic schedule change in February 2015."

Module III: Self-Injurious Behavior©

A) How We Got Here

- ***Regents of the Univ. of Cal. vs. Superior Court of Los Angeles, Supreme Court of California***, S. Ct. of Cal., No. S230658, slip op. at 27 (Mar. 22, 2018)
- ***Nguyen v. MIT,* S.Ct. Mass., SJC-12329** (May 7, 2018)

B) Settlement-Based Guidance Case Studies

- ***Settlement Agreement between the United States of America and Northern Michigan University (NMU)***
  https://www.ada.gov/nmu_sa.html
- ***Settlement Agreement between DRA and Stanford University***
  https://dralegal.org/press/stanford-and-students-with-mental-health-disabilities-reach-landmark-settlement/

III.A) How We Got Here (1)

- Mental Health on Campus
  - 1 in 5 college students live with a mental health related disability
  - One half of all students who drop out of college did so due to a mental health related disability
    - Porter and Fernandez, ***Ending Discrimination in Campus Mental Health***, Mental Health America, 2019 https://www.mhanational.org/issues/state-mental-health-america
- Suicide on campus is a very serious matter:
  - Approximately 4.2% of all American adults engage in suicidal ideation; this number has been increasing despite a general decrease in the prevalence of depression
  - There are more than 1,000 completed suicides on college campuses per year
  - Suicide is the second-leading cause of death among people aged 25 to 34 and the third-leading cause of death among people aged 15 to 24
  - 1 in 10 college students has made a plan for suicide

    http://www.emorycaresforyou.emory.edu/resources/suicidestatistics.html

How We Got Here (2)

- In March of 2011, DOJ issued new Title II and III regulations, and chose not to recognize "threat to self" as a legitimate legal concept
  - ***There is no regulation pertaining to students, as opposed to employees, authorizing sanctions against an individual who is solely a direct threat to themselves***
  - Anticipating DOJ's lead, OCR took the same position in OCR letter to Spring Arbor, 15-10-2008 (December 2010) http://www.bazelon.org/wp-content/uploads/2017/01/12.16.10-Spring-Arbor-University-OCR-Letter.pdf, last visited September 21, 2018

How We Got Here (3)

- Based on this DOJ/OCR guidance, in theory***,*** a student remains a ***qualified student with a disability***:
  - Who is an individual with a disability
  - Meets the essential academic and technical standards of the institution
  - Abides by the code of conduct
  - Does not pose a direct threat to the health and safety of ***other*** students
  - But, nonetheless, ***is threatening*** to engage in harm to self or has attempted suicide
- ***In theory***, such a student ***may not*** be dismissed on the basis of being a threat to him or herself

How We Got Here (4)

- As reported in last year's legal year in review, tort law developments have made compliance an even more daunting task – "damned if you do, damned if you don't."
  - ***Regents of the Univ. of Cal. vs. Superior Court of Los Angeles, Supreme Court of California***, S. Ct. of Cal., No. S230658, slip op. at 27 (Mar. 22, 2018) [colleges, due to their "special relationship" with students, owe them a "duty to protect them from foreseeable acts of violence by other students in the classroom or during curricular activities" -- in this case, the circumstances were sufficiently plausibly foreseeable to let a jury decide if the University should be liable to an injured student]
  - ***Nguyen v. MIT,* S.Ct. Mass., SJC-12329** (May 7, 2018) [colleges, due to their "special relationship" with students, when foreseeable, owe them a duty to prevent suicide -- in this case not foreseeable]
  - *Remand in* ***Regents,*** No. SC108504, 2018 WL 6314402 (December 3, 2018) ["*Ordinary," not a limited, standard of care* governs a university's duty to protect its students from foreseeable acts of violence. Namely "that degree of care which people of ordinarily prudent behavior could be reasonably expected to exercise under the circumstances."

Nguyen v. MIT: Some Useful Guidance

- **S.Ct. Mass., SJC-12329** (May 7, 2018)
- ***Nguyen*** and ***Regents of the Univ. of Cal. vs. Superior Court of Los Angeles, Supreme Court of California***, S. Ct. of Cal., No. S230658 (March 22, 2018) both hold that a "special relationship" exists between students and colleges and that a duty exists to protect them from foreseeable injury
- Concerning the issue of "foreseeability," the ***Nguyen and Regents*** decisions have been previously presented
- ***Nguyen*** is also valuable to colleges and universities for guidance pertinent to the question of the nature of their duty to respond to self-injurious students with "reasonable measures"

- N.B

Nguyen v. MIT: Succinct Background (1)

- At the time of his death on June 2, 2009, Nguyen was a twenty-five year old graduate student in the marketing program at MIT's Sloan School of Management (Sloan)
- Nguyen was experiencing substantial academic difficulties
- Nguyen lived off-campus, where he committed suicide
- Citing to the just decided decision in ***UCLA v. Superior Court,*** Nguyen's father on behalf of his son's estate brought a "wrongful death action" against MIT seeking damages for Nguyen's death

Nguyen v. MIT: Succinct Background (2)

- MIT made many offers of assistance to Mr. Nguyen:
  - Mental health and DSS services were offered but largely declined along with Nguyen withholding or providing inaccurate information about what forms of help he was receiving
  - Accommodations were implemented including a reduced course load and a reduced-pressure examination schedule
  - Counseling on academic etiquette, and encouraging him to engage in a master's degree program rather than a Ph.D. program
    - This last form of "assistance" may have contributed to Nguyen's decision to take his own life and may explain the claims of his estate

Nguyen v. MIT: What Triggers the Duty to Implement "Reasonable Measures"?

- "[W]here a student has attempted to commit suicide while enrolled at the university or recently before matriculation or stated plans or intentions to commit suicide, that probability is sufficient to justify imposition of a duty on the university." **….** "[Conversely,] [t]he duty is not triggered merely by a university's knowledge of a student's suicidal ideation without any stated plans or intentions to act on such thoughts."

Nguyen v. MIT: "Reasonable Measures" (1)

- "[I]nstitutions of higher education face heightened risk of liability for suicide when they ignore or mishandle known suicide threats or attempts. . . . The main obstacle to better suicide prevention on campus is underreaction, especially the failure to provide [perhaps even require] prompt professional evaluation and treatment for any student who threatens or attempts suicide" [emphasis in original]).
  - N.B.: Over-action can also lead to liability as exemplified in the next case concerning Northern Michigan University

Nguyen v. MIT: "Reasonable Measures" (2)

- Follow university's protocol, if one exists
  - Per footnote 18 of the decision in ***Nguyen***, in drafting a protocol, consider ***The JED Foundation Framework for Developing Institutional Protocols for the Acutely Distressed and Suicidal College Student*** (2006) -- https://www.jedfoundation.org -- 1-800-273-8255
- "In the absence of such a protocol, reasonable measures will require the university employee who learns of the student's suicide attempt or stated plans or intentions to commit suicide:
  - to contact the appropriate officials at the university empowered to assist the student in obtaining clinical care from medical professionals
  - or, if the student refuses such care, to notify the student's emergency contact
  - In emergency situations, reasonable measures obviously would include contacting police, fire, or emergency medical personnel." [Reformatted for presentation]
- "By taking the reasonable measures under the circumstances presented, a university satisfies its duty."

Nguyen v. MIT: "Reasonable Measures" (3)

- *Three Elements of the JED Framework:*
  - 1)Respond
    - Prepare to identify students at risk
    - Develop in advance a range of responses including when a student refuses intervention
    - Develop MOUs with local police and emergency personnel
  - 2)Develop and implement voluntary and involuntary hospitalization procedures
    - Follow the MOUs
    - Identify non-hospitalization options
    - Create a return to school process
  - 3) Provide each student who requires an intervention with post-crisis follow-up plan
    - *See* ***Charles v. Orange Cty.,*** 925 F.3d 73 (2d Cir. 2019)[Former civil immigration detainees treated for serious mental illnesses at county correctional facility state a plausible claim, and survive a motion to dismiss alleging that the defendants' failure to engage in discharge planning or to provide detainees with discharge plans upon release, violated their substantive due process rights under the Fourteenth Amendment of the U.S. Constitution]

III.B) Settlements

- Previously covered:
  - ***W.P. v. Princeton***, CIVIL DOCKET #: 3:14–cv–01893–JAP–TJB (D. N.J. Mar. 25, 2014) , settled with confidential agreement] https://www.justice.gov/opa/pr/justice-department-reaches-agreement-princeton-university-resolve-americans-disabilities-act (2016)
  - ***Quinnipiac University, Conn., pre-litigation settlement with U.S. Attorney*** *(2014)* *https://www.justice.gov/usao-ct/pr/justice-department-settles-americans-disabilties-act-case-quinnipiac-university*
  - ***University of Tennessee Health Sciences Center, pre-litigation settlement with DOJ*** *(2016)* https://www.justice.gov/crt/case-document/university-tennessee-health-science-center-settlement-agreement
  - *See also* "***NaBITA Statement on Involuntary Withdrawal***" WWW.NaBITA.org; https://www.prnewswire.com/news-releases/nabita-issues-position-statement-on-involuntary-withdrawals-and-the-use-of-behavioral-agreements-300807127.html?tc=eml_cleartime
- Newest settlements, covered in this PowerPoint deck:
  - ***Settlement Agreement between the United States of America and Northern Michigan University (NMU)***
    - https://www.ada.gov/nmu_sa.html
  - ***Settlement Agreement between DRA and Stanford University***
    - ***https://dralegal.org/press/stanford-and-students-with-mental-health-disabilities-reach-landmark-settlement/***

Three Key Consistent Principles Inferred from the Five Listed Settlements

- Do not adopt or implement, in writing or practice, actions (punitive or non-punitive) that will serve to discourage self-injurious students from seeking mental health-related help on campus or off
- Do not suspend on a long term basis, expel, or terminate a self-injurious student without first thoroughly exploring whether there exists an implementable, reasonable accommodation (mitigating measures) that would enable to student to remain in the educational program of institution, in housing or not, as a qualified individual with a disability
- If a student must be suspended, but has not been expelled, make sure that there are terms of return that are clearly individualized to the particular student in question

Settlement between the United States of America and Northern Michigan University -- Introduction (1)

- This case calls into question, a practice used by a number of universities, which has been to focus on the deleterious impact of a student's self-injurious behavior on others:
  - Self-injurious behavior can have a traumatic impact on friends and roommates, etc.
  - Suicide can lead to "copycat acts"
  - ***OCR Letter to Mt. Holyoke College***, 01-08-2024 (July 2008) [http://www.bazelon.org/wp-content/uploads/2017/01/7.18.08-Mount-Holyoke-OCR-Letter.pdf last visited September 21, 2018]
    - OCR permitted Mt. Holyoke to focus on impact on other students when a self-injurious student was exceptionally focused on disturbing others in widely recounting her injurious acts
    - The DOJ-NMU settlement draws this strategy into question or at least limits it to students who are exceptionally focused on impacting others not students who are merely using social media to communicate with persons they believe are part of their support system

Settlement between the United States of America and Northern Michigan University -- Introduction (2)

- Settlement: https://www.ada.gov/nmu_sa.html
- Through its own investigation, DOJ found support for allegations that:
  - NMU threatened to dis-enroll the complainant and required her to submit to a psychological assessment and **sign a behavioral agreement** after she sent a chat message to a friend and fellow NMU student in which she told her friend that she ***"has Major Depressive Disorder and her doctors are concerned that she is at risk for suicide"***
  - This chat was reported to the Dean's webpage, which, according to DOJ, turned out to not be just a place to help friends in crisis, but a pathway to suspension
  - The behavioral agreement prohibited her from engaging in any discussion of suicidal thoughts or actions with residents of her dorm, friends, or other students
  - Three other students had been treated similarly

Northern Michigan University: Articulation of a "Legitimate Test"

- DOJ found that:
  - NMU's *Policy Relating to Student Self-Destructive Behavior* "does not reflect or impose legitimate safety requirements" within the meaning of Title II of the ADA
  - NMU's Dean of Students office took adverse action against NMU students with mental health disabilities who did not pose "***an actual risk of serious self-harm***" or imposed ***"safety requirements" based not on "actual risks, [but] on mere speculation,"*** rather than examining **"actual [conduct-based not behavioral-based] risk"**
    - DOJ was very concerned that some such adverse actions were precipitated by reports anonymously made to the *Dean's website*
- The settlement also supports taking into account the actual ***"capacity [of a student] to carry out substantial self-care activities"***
- Though it entered into an extensive settlement agreement, NMU denied all claims

Remedies and Damages with NMU

- DOJ found that the policies and practices of NMU with regard to its treatment of students mental health disabilities violated Title II of the ADA (no mention of Section 504) and required NMU to materially revise its policies and practices as well as pay a group of students $173,000 in damages
- The Appendices, as negotiated with DOJ will be adopted and implemented

Appendices:
Quoted Sample Policies and Forms Negotiated as Part of the Settlement in *NMU*
[emphasis added]

These might be considered as models for you own campus!

"Policy Relating to Student Self-Destructive Behavior"

- "While a public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities, the public entity **must ensure that its safety requirements are based on actual risks, not on mere speculation**, stereotypes, or generalizations about individuals with disabilities. *See* 28 C.F.R. § 35.130(h)."
- "Within ten (10) calendar days, NMU will remove its Policy Relating to Student Self-Destructive Behavior from http://www.nmu.edu/policies and any other websites, handbooks, and other locations where the policy is located or referenced."

Withdrawal Policies, Practices and Procedures

- "NMU will revise its withdrawal policies. Specifically, NMU will revise its Voluntary Psychological Withdrawal Policy to include:
  - The length of voluntary psychological withdrawals and any conditions for **return will be based on an individualized assessment** of each student and the best available medical evidence, with careful consideration given to the opinions and recommendations of the student's treating physician or mental health professional, if available;
  - Any student who takes a voluntary psychological withdrawal for a set length of time or with set conditions for return **may seek early return from,** or an extension of, the set length of time, or a change in the conditions for return. This request will be considered after an individualized assessment of the student and appropriate medical evidence, as described above;"

Withdrawal

- "If NMU requires a student who seeks to return from a voluntary psychological withdrawal to submit medical information, it will be in the form of the Treatment Provider Form, attached as Attachment A [provided below in this Power Point]; and
- **Any student whose request to return from a voluntary psychological withdrawal is denied (1) will receive a detailed written explanation** of NMU's decision not to allow the student to return, and (2) **may appeal the denial of return**. The policy will describe the appeals process for students who wish to make such appeal."

Dean of Students' Webpage

- " NMU will modify the portion of the Dean of Students' webpage dedicated to "behavioral concerns." Specifically, NMU will **replace the term "behavioral concerns" with the term "conduct concerns"** on the Dean of Students' webpage and the accompanying form."
- "To the extent that of a report to the Dean of Students' office concerning a student's self-harming behavior, **the Dean of Student will do an individualized assessment of the student in order to evaluate actual risk before taking any action** against the student."

PART II: TO BE COMPLETED BY TREATMENT PROVIDER

- Name of Provider: _____ Degree: _____
  Address: _____ City: _____ State: _____
  Telephone: _____ Fax:_____
  Email: _____

- 1. Please describe the date(s) (i.e., beginning and end of treatment, and frequency) and type(s) of treatment provided.
- 2. (a) **Do you have concerns about the student's capacity to carry out substantial self-care obligations**?
- □ No concerns
  □ Minor concerns
  □ Moderate concerns
  □ Student is unable or unwilling to carry out substantial self-care obligations

Part II: Provider Part (2)

- If you have indicated moderate concerns or believe that the student is unable or unwilling to carry out substantial self-care obligations**, please explain below, including any recommendations on mitigating such concerns:**
- 2. (b) Do you have **concerns** about the student as it pertains to his or her **personal safety**?
- □ No concerns
  □ Minor concerns
  □ Moderate concerns
  □ Student presents an actual risk of serious self-harm
- If you have indicated moderate concerns or you believe the **student presents an actual risk of serious self-harm**, **please explain** below, **including any recommendations on mitigating such concerns**:

Part II: Provider Part (3)

- 2. (c) Do you have concerns about the student as it pertains to the **safety of others?**
- □ No concerns
  □ Minor concerns
  □ Moderate concerns
  □ Student poses a significant risk to the safety of others
- If you have indicated moderate concerns or you believe the student poses a significant risk to the safety of others, **please explain below, including any recommendations on mitigating such concerns:**
- 3. Please tell us if continuing treatment is recommended upon return to school. (Be sure to specify the type, frequency and duration of care you recommend, and the symptoms or functional difficulties that on-going treatment may need to address.)
- Dated: _____
- October 18, 2018

The Outcome in NMU Is Not Surprising!

- This settlement underscores the degree to which colleges and universities need to adapt to an era of easy and instant social media
  - Whatever is reported in social media is likely to need thorough, individualized consideration before serving as the basis for adverse treatment of a student
  - Disciplining students, just for expressing that they have had thoughts of self-harm, without conducting an individualized assessment of the immediacy or nature of the actual risk, is likely to be considered by DOJ a violation of the ADA.
- For similar reasons, under the circumstances of this case, DOJ does not seem to approve of behavioral contracts
  - This would not prohibit written notice to the student of conduct expectations and conduct procedures
  - As requiring a student to sign such an agreement doesn't seem like a good idea — maybe a signature acknowledging receipt of the notice would be O.K.

Settlement Between Six Named Students, the Mental Health and Wellness Coalition and Stanford University

N.D. Cal., October 7, 2019

Parties and Resolution

- Students and Coalition represented by Disability Rights Advocates of Berkeley, California and New York City, New York
  - WWW.DRALegal.org
- Agreement negotiated through the JAMS mediation service for binding resolution under the continuing jurisdiction of the Federal Court of the Northern District of California [Magistrate Judge]
- Complaint filed in May of 2018; signed October 7, 2019
- Stanford, without admitting to any violation of law, signed the agreement, including a revised leave policy and will pay Plaintiffs' attorneys' fees and costs totaling $495,000
- The Plaintiffs release Stanford from all related claims
- Future disputes about implementation of the agreement go to arbitration first, failing that, back to the Federal Court

The Big Picture with some Contradictions (1)

- DRA and Plaintiffs observed that Stanford failed to appreciate that the actions of some students for which the University imposed an involuntary leave of absence were manifestations of mental health disabilities
  - In these circumstances, the University failed to consider all the pertinent complexities that pertain to disability, including the availability of ameliorative reasonable accommodations and less punitive sanctions, such as a voluntary suspension
- This resolution agreement responds to DRA's concerns by requiring Stanford to first consider available reasonable accommodations and the opportunity for a voluntary leave of absence prior to the imposition of an involuntary leave of absence
- But, at the same time, it recognizes the right of the University to impose sanctions on students who violate the code of conduct and similar provisions, even when the misconduct is the manifestation of a disability
  - Might vary with the nature of the misconduct
  - Would vary if the conduct cannot be ameliorated by any reasonable form of accommodation

The Big Picture with some Contradictions (2)

- A rewritten “Involuntary Leave of Absence and Return Policy”
  - The process is described as not for disciplinary purposes but rather administrative in nature, a big paradigm shift
  - The new policy is very consistent with the definition and concept of when and whether a student is or is not an “otherwise qualified individual with a disability;” except that, it includes the option of imposing an involuntary leave of absence on a student when he or she is a “direct threat” to his or her own health and safety.
  - Note that use of the term direct threat is contrary to DOJ Title II regulations
  - As with the NMU settlement, the negotiated policy in the Stanford settlement contains very specific language and provisions that may be useful for developing or refining similar policies on your own campus

Summary of Most Notable Provisions of Settlement: Key Provision 1

- With limited exceptions for imminent emergencies:
  - No student will be subject to an involuntary leave of absence without the opportunity to first request a voluntary leave of absence
    - To reduce the chance of coercion by Stanford, this election may be withdrawn by the student within two business days
- There are advantages to a voluntary withdrawal
  - A cleaner record for seeking admission elsewhere or to graduate school
  - Easier terms of return to campus
  - More likely to enjoy certain privileges such as remaining in student housing, coming on to campus, continuing use of the Stanford email system

Summary of Most Notable Provisions of Settlement: Key Provision 2

- No student will be subject to an involuntary leave of absence without consideration of reasonable accommodations that may enable the student to avoid needing to take a leave of absence
  - The Stanford DSS office, the Office of Accessible Education (OEA), is explicitly included in this process and ***the expertise for making accommodation decisions is placed within OAE*** as new, additional staff
  - A non-preclusive, specific list of accommodations to consider is provided in the revised policy, including: a reduced courseload, changes after add/drop deadline, class recording of missed classes, extensions for assignments, extensions of time to respond to administrative requests, changing rooms, single rooms, and emotional support and service animal-related accommodations
    - This list is to be posted on the OAE website

Summary of Most Notable Provisions of Settlement: Key Provision 3 (1)

- Housing has been considered in prior self-injury related negotiations with DOJ, but the issue has not been highlighted as has been done in this settlement
- In this case, this was issue was critical to complainants
  - Original Plaintiff was not permitted to return to his dorm but required to get a hotel room in a very expensive geographic area
  - The assumption that a student can safely return to his/her home is false as conditions at home may be the original cause of mental health challenges
  - Expelled students may end up homeless on the street or in a car

Summary of Most Notable Provisions of Settlement: Key Provision 3 (2)

- Housing:
  - The OAE list of accommodations will include housing
  - "[S]tudents with medical disabilities (including mental health disabilities) that require University medical services may petition to remain in campus housing for one term while on leave"
  - "Students who leave the University before the end of a term may be eligible to receive refunds of portions of their housing charges"

Summary of Most Notable Provisions of Settlement: Process and Resources

- The process used to reach determinations provides for increased notice, transparency, individualized assessments including deference to students' treating providers, and reasonable accommodations throughout the leave, appeal, and readmission processes
- The transcripts of withdrawn students will only note a "leave of absence"
- The policy requires increased staff to assist students with mental health disabilities including in the Office of Accessible Education

Summary of Most Notable Provisions of Settlement: Preserved Processes and Practices

- Substantial staff training on implementation of the agreement
- Stanford retains its threat assessment team and its disciplinary process
- Stanford continues to participate in the JED Campus Program, designed to reduce suicide on college campuses
- Substantial data collection and reporting focusing on whether students get the opportunity to engage in a voluntary withdrawal

One More Argument to Consider

- ***Schuller v. Iowa State University,*** Iowa State District Court (2019)
  - Following a jury trial, parents awarded $630,000 [reduced by court to $315,000] for medical negligence in the suicidal death of their son, arguing in part that, Iowa State University was negligent for keeping "a stagnant level of health care professionals … with more students coming in and a higher need of mental health services …."
  - Record of the jury's findings and award could not be located on WestLaw or Pacer

IV. Equal Communication
[and a Supplement concerning Public Accommodations] ©

Two Case Studies:

- ***Payan and Mason v. Los Angeles Community College District,*** 2019 WL 3298777 (C.D. Cal. July 21, 2019)
- ***National Association of the Deaf (NAD) v. Harvard University,*** 2019 WL 1409302 (D. Mass., March 28, 2019); *terms of settlement: https://creeclaw.org/wp-content/uploads/2019/11/NAD-v-Harvard-Consent-Decree.pdf*

Public accommodations supplement:

- ***Robles v. Domino's Pizza,*** 2017 WL 1330216 (C.D. Cal. April 12, 2017), 913 F.3d 898 (9th Cir. January 15, 2019); Petition to grant certiorari denied, 140 S.Ct. 122 (Mem), October 7, 2019
- ***Thurston v. Midvale, Corp.,*** No. B291631, 2019 WL 4166620 (Cal. Ct. App. Sept. 3, 2019)

Payan and Mason v. L.A. Comty. Col. Dist.

- Federal Central District of California (2019) – Judge Hon. Stephen V. Wilson
- Section 504 of the Rehab. Act of 1973 and Title II of the ADA, as amended
- Brought by NFB on behalf of two blind students (Roy Payan and Portia Mason)– court explicit that its decision applies only to blind students
- Complex procedural history
  - Judge issues ruling on multiple summary judgement proceedings, finding some violations and setting others for trial: April 23, 2019
  - Bench Trial Findings and Conclusions: 2019 WL 2185138 (C.D. Cal. May 21, 2019)
  - Jury Trial Verdict on damages: June 20, 2019
  - Permanent Injunction: 2019 WL 3298777 (C.D. Cal. July 21, 2019)
  - Note: This is not simply a remedial agreement negotiated between counsel for the students and LACCD

Judge's Overall Analytical Approach (1)

- Key analytical paradigm: whether, contrary to requirements of the ADA Title II regulation, 28 C.F.R. § 35.160, "which mandates that disabled individuals must receive equal opportunity and effective communication," there was a denial of "meaningful access" to the information provided to nondisabled individuals by the particular challenged sources of information, e.g. a textbook, handout, website, or web-based program?

Judge's Ruling on Plaintiff's Request for Summary Judgement: MyMathLab (1)

- April 23, 2019
- Note: Through-out *ad hoc,* just in time, student initiated solutions were not acceptable to the court
- For example, violation was found in math classes for use of MyMathlab without effective alternatives for a student, Payan, who is blind
  - "LACCD's undisputed failure to ensure that Payan received his equivalent math textbook assignments ***prior to or at the same time*** that sighted students received their MyMathLab assignments constituted disability discrimination as a matter of law" … "There is no question that a student without timely access to the textbook and homework assignments for a course is denied meaningful access to the benefits of that course." Emphasis added
  - Judge does not buy argument that LACC should be excused because it tested MyMathLab before deploying it "There is simply no basis to conclude that merely testing technology for accessibility once is enough to shield LACCD from liability for any accessibility issues that arise in the future."
  - Judge would not place responsibility on the student to get each substitute print assignment put in alternate format

Judge's Ruling on Plaintiff's Request for Summary Judgement: MyMathLab (2)

- Court rejects Ad Hoc solutions for auxiliary aids and services
  - "LACCD ignores its affirmative obligations under Title II and Section 504 to ensure in the first instance that all services and materials offered to students with disabilities are provided in an accessible format at the same time as all other students."
  - "Nothing more is required for the Court to conclude as a matter of law that LACCD's …. procedures requiring ad hoc conversions of course materials upon request by a student with disabilities disparately impacted Payan and denied Payan meaningful access to his math courses"

Judge's Ruling on Plaintiff's Request for Summary Judgement: Website & PeopleSoft

- Blind students at LACC were denied meaningful access to the LACC website and a program available through that website
  - Students alleged that PeopleSoft was not accessible interfering with their ability to register and schedule classes, get their grades, file for student aide or access their transcripts
  - Largely due to navigability problems, experts agreed
  - The fact that one component of a website is accessible does not save another inaccessible component from becoming the basis for a finding of noncompliance (again rejecting the "program as a whole" standard)
  - The fact that a student can register, e.g., with assistance from DSS, does not establish compliance --- at least as to services available through PeopleSoft, lack of an independent alternative is a factor in compliance
    - "By making the accessibility of enrollment management resources dependent on third-party assistance [DSS staff], LACCD discriminates against its blind students regarding their ability to manage their education independently."
- At this stage court agrees there is noncompliance but concludes that it has not been provided with a reasonable modification that will solve the problem and pushes this issue on to the bench trial

Judge's Ruling on Plaintiff's Request for Summary Judgement: Library

- Blind students at LACC were denied meaningful access to the LACC library data bases
- "LACCD discriminated against blind students as a matter of law by failing to ensure that the LACC library databases were equally accessible to blind students through JAWS as they were to sighted students."

Judge's Ruling on Plaintiff's Request for Summary Judgement: Remainder

- All other remaining issues were set for a bench trial because
  - Not enough shown to prove a meaningful denial of effective communication
  - More important, Plaintiffs thus far have not identified a reasonable modification that would remedy the noncompliance
    - Appropriate to the scope of the violation
    - Would be effective for students who are blind
    - Would be feasible

Jury Trial on Damages

- June 20 Special Verdict Form
- Not enough evidence to find deliberate indifference on:
  - In accessible website, including failure to modify PeopleSoft program with the website
  - Teacher-developed and provided inaccessible handbook in abnormal psych
  - Inaccessible library databases
- Deliberate indifference was found with regard to use of MyMathLab without any effective alternative provided to students who are blind

Remedies (1)

- June 21 order
- The court's final order, a permanent injunction, requires, a number of remedial steps including:
  - Appointment or designation of "a dean of educational technology" for Los Angeles Community College District
    - Responsible for enforcing accessibility policies
    - Remediation of the LACC website so that it complies with ***WCAG 2.1 Level AA***
      - One year to make the PeopleSoft component accessible
        - N.B.: This will not be easy to do, experts say
        - N.B.: Could be seen as a message to the industry?

Remedies (2)

- Evaluation of educational technology for accessibility prior to procuring it; if inaccessible, LACCD shall either:
  - (a) decline to acquire the resources or
  - (b) acquire the inaccessible technology but establish alternative means of providing access to the equivalent benefits of the inaccessible resources to blind students in a timely manner, *i.e.,* prior to or at the same time sighted students are provided access to those resources, including outside of the classroom;

Remedies (3)

- Determine whether library system website and software is accessible to blind students and if not, LACC must either
  - 1) Discontinue inaccessible resources; or,
    - Note: removing use from nondisabled individuals of inaccessible resources is a very rare remedy
  - 2) Within one year, establish alternate means of providing equivalent benefit of library resources to blind students
    - Materials must be available at the same time as they are available to others
      - Note: this will limit considerably the kinds of alternate means to access that may be available for implementation

Remedies (3)

- Pay one of the named plaintiffs $40,000 plus interest
  - As determined by the jury trial on deliberate indifference
- As the "prevailing party," plaintiffs are entitled to reasonable attorney's fees and costs
  - NFB now has an outstanding claim for $2.2 million in attorneys fees and $174,000 for costs such as expert witness fees
  - NFB fee and cost claims are quite likely to be challenged by LACC

What about About Captioning?

National Association of the Deaf (NAD) v. Harvard University,

2019 WL 1409302 (D. Mass., March 28, 2019);

Terms of Settlement: *https://creeclaw.org/wp-content/uploads/2019/11/NAD-v-Harvard-Consent-Decree.pdf*

See also, ***National Association of the Deaf v. Massachusetts Institute of Technology,***

Terms of Settlement Agreement filed D.Mass, February 18, 2020, case 3:15-cv-30024-KAR Document 195-1

Preliminary Approval of Class Action Settlement: 2020 WL 1495903 (D.Mass. March 27, 2020); narrative description of settlement by NAD
https://www.nad.org/2020/02/18/landmark-agreements-establish-new-model-for-online-accessibility-in-higher-education-and-business/

"Having Access is Powerful"

Howard A. Rosenblum CEO of NAD

Procedural Background

- In 2015, a complaint was filed by the National Association of the Deaf (NAD) and three named students with the support of five law firms including DREDF and Massachusetts Protection & Advocacy (The Disability Law Center [DLC])
- The complaint alleged that Harvard [and MIT] was required by Title III of the ADA and Section 504 to caption all of its on-line video content and that Harvard had failed to do so
- Two motions (2016 & 2019) for a dismissal ("judgment on the pleadings") by Harvard failed, but did narrow the scope of Harvard's potential liability
- Note: This litigation focuses on Harvard [and MITs] "publically facing" available information and instruction, not auxiliary aids and services to individual students in brick and mortar classes to which a higher or different standard may apply

First Issue for the Court (Magistrate) in 2019: What is a "Public Accommodation?"

- As Harvard is a private school, it is not a "public entity" subject to Title II of the ADA and Title II's strong equal communications requirements
- Harvard, ***in the brick and mortar sense***, is subject to Title III of the ADA as a "public accommodation" --- as it something open to the public, like a hotel, store, or restaurant
- Harvard argued that in the 1st Circuit, the content of ***its websites*** is covered only if there is a nexus to its brick and mortar programs
  - Court concludes that in the 1st Circuit a website that acts as a "service establishment" [e.g. a travel agency or insurance company] is "public accommodation" even without a physical presence (same test as 7th and 2nd Circuits)
  - Moreover, many of the websites of Harvard have a nexus to brick and mortar programs such as videos of classes, seminars, and public events and forums taking place at Harvard (test applied in the 3rd, 5th, 6th, and 9***th*** Circuits) -- [magistrate did not really distinguish various sites]
  - Moreover, Harvard is bound to the make all its programs and activities accessible under Section 504 of the Rehabilitation Act as Harvard is a recipient of Federal Financial Assistance
- Note: Whether or which kind of virtual sites are "public accommodations," under Title III is a question that will ultimately have to be settled by the US Supreme Court

Second Issue: What is the Scope of the Duty to Caption Video Content on Harvard's Websites?

- The DOJ and ED regulations pertaining to the duty to provide auxiliary aids and services to persons with hearing impairments contain no exception for websites, ***except for the fundamental alteration and undue burden defenses and no general exception for content that originated with a third party [emphasis added]***
  - "[T]he DOJ regulations [cannot] be read to state the general principle – argued for by Harvard – that a public accommodation has no obligation to make content that originates with a third party accessible to disabled individuals. The DOJ regulations simply do not limit a public accommodation's obligations as to online content that it chooses to host on its websites and platforms."
  - Note this does not address information produced by other parties, not contractors of Harvard or otherwise at its behest, that is conveyed simply by imbedded code

There is a Duty to Caption Video Content on Harvard's Websites, Except (1)

- Fundamental alteration and undue burden are affirmative defenses
  - They must be proven on a case by case basis by Harvard, not appropriate for pretrial resolution
  - And if something is undue, a second-best standard applies
  - Note this is NOT about third-party materials that Harvard merely ***links to*** within its own posted work – ***discussed further below***

There is a Duty to Caption Video Content on Harvard's Websites, Except (2)

- There is an exemption under 47 U.S.C. §230(c)(1) (§230 of the Communication Decency Act [CDA]).
  - This law is well-known to individuals who litigate the intersection between the First Amendment and the Internet, but not so much to individuals who focus on access for individuals with disabilities
  - In pertinent part the Act provides, "no provider or user of an interactive computer service shall be treated as the publisher … of any information ***provided by another information content provider"*** [emphasis added]
    - This Act provides protections for a "good Samaritan," that refuses to post or removes offensive materials *created by others*, such as an advertisements for by sex traffickers
    - Conversely it protects websites from liability for failing to remove offensive materials *created by others* such as an advertisement by sex traffickers ***Jane Doe No. 1. v. Backpage.com****, LLC,* 817 F.3d 12, 18 (1st Cir. 2016)

There is a Duty to Caption Video Content on Harvard's Websites, Except (3)

- Relying on the CDA, Harvard successfully argued that it has no duty to caption certain materials:
  - "Third party content" that it did not "create, produce or substantially alter"
  - "Embedded content" hosted on third-party sites that do not belong to Harvard, that is linked in its existing form to content on a Harvard site
- This being an affirmative defense Harvard could still required to prove that a challenged posting is not "its content"
  - "This will be a particularly fact bound determination with regard to the information on its platforms created by Harvard students or faculty members even when linked to other platforms"

The Bottom Line

- Nothing in this decision suggests an exception to the rule that individual students with sensory impairments attending Harvard and MIT are entitled to auxiliary aids and services for their classes under Title II, Title III, or Section 504
- As to its websites:
  - Harvard was held responsible for captioning all video and audio that it produces, creates or substantially alters, that it posts on a "Harvard website," unless Harvard can prove doing so would be an undue burden or a fundamental alteration in which case a second-best standard would apply
  - Harvard is responsible for captioning all video and audio content that it contracts to have produced or created, which it posts on a "Harvard website," unless an undue burden or a fundamental alteration can be proven by Harvard in which case a second-best standard applies
  - In its public websites, under the protection of the CDA, Harvard is not required to caption any video or audio content that it did no produce and rather, is conveyed by an imbedded link
    - Note: many imbedded links are not visible to the website user, they just carry-out their functions automatically, they are nonetheless entitled to the protections of the Communications Decency Act
  - Not as clear, but certainly arguable, if Harvard rather than linking to the works of others, cuts and pastes the content of that work into its own website, the CDA does not exempt Harvard from its duty to caption posted videos and audios
- The same principles and interpretations of law apply to MIT, as well

No Surprise: A Negotiated Settlement and Consent Decree

- Following its mixed results before the magistrate in March, in April Harvard began developing a new media policy and entered into negotiations with NAD
- In November 2019 the parties successfully reached a negotiated settlement agreement
- They agreed to jointly submit the agreement for court approval and monitoring no later than no later than November 27, 2019
  - Not clear whether the required “fairness hearing” has yet been held

The Basic Duty Set Forth in the Agreement

- Caption all current content:
  - Harvard will caption all new video or audio content
    - created on or after December 1, 2019
    - produced at [or by] Harvard, [or at its direction by one of its vendors]
    - posted on a University Website

Three Timelines

- For all materials produced after December 1, 2019, current content will be captioned as produced, ***not after the fact*** [no ad hoc compliance!]
- For all video and audio materials produced January 1 to December 1, 2019, caption as soon as practicable, unless requested by an individual who is unable to access the specific content, in which case 5 business days is provided to produce the captioned materials
- For all video and audio materials produced before January 1, 2019, captioning is required only when requested by an individual who is unable to access the specific content, in which case 5 business days is provided to produce the captioned materials
- Note: These timelines may well become a precedent for future settlements

An Important Additional Captioning Duty

- Harvard will provide “industry-standard” live captioning for:
  - University-wide events (such as Commencement, ceremonies for special honor ands, and presidential installations),
  - for which video and/or audio are live-streamed over the Internet.
  - Any such video and/or audio of the University-wide event that are later posted to the Internet will meet the above standards for captioning of video and audio content

Scope of Duty (1)

- What is a “University Website”?
  - “Any public-facing website or web-based application within a Harvard-controlled domain used to conduct University Business by Harvard faculty and staff.”
  - This includes
    - The official Harvard YouTube channel
    - The official Vimeo channel
    - The official SoundCloud channel
    - If the principal channel maintained and curated for a unit’s university business is moved to a newly-developed Third Party Platform, then the new video or audio content created and produced at Harvard and posted on such channel

Scope of Duty (2)

- The term “website” encompasses “any public-facing website or web-based application within a Harvard-controlled domain used to conduct University Business by Harvard faculty and staff including websites operated by:
  - All MOOCs
  - All of Harvard’s Schools (11+) and Academic Departments
  - News Organizations
  - Administrative Offices
  - Museums
  - Libraries
  - Academic Centers
  - Initiatives, and Programs
  - Gardens and Historic building programs

Scope of Duty (3)

- Quality:
  - Video files:
    - "Industry standard" overlay or externally embed synchronized visual text for speech and, consistent with WCAG 2.1 AA
    - Provide non-dialogue audio information needed to understand the program content
    - Equal in quality to that offered by a vendor captioning services such as 3PlayMedia
  - Audio only files:
    - A text-only transcript
    - An easily identifiable link to such transcript near to the content that is online
- Note: Another important precedent that may well be applied in future settlement negotiations

Administrative Matters

- Harvard does not admit to any violation of law
- Decree will last three and one-half years
- Harvard has no captioning duties beyond those set-forth in the agreement
- All members of the settlement class, release and forever discharge Harvard for all claims asserted
- Monitoring: Harvard must report to NAD and the Disability Law Center statistics on the number of captioning requests or similar pertinent information
- Harvard will not oppose Class Counsel's motion for attorneys' fees and costs in the amount of $1,575,000
- Before any Party approaches the Court to assert a violation of this Consent Decree, the Parties must first engage in and complete the Dispute Resolution Process set forth in the agreement

NAD v. MIT

- ***National Association of the Deaf v. Massachusetts Institute of Technology***
  - *Terms of Settlement Agreement filed D.Mass, February 18, 2020,* case 3:15-cv-30024-KAR Document 195-1
  - Preliminary Approval of Class Action Settlement: 2020 WL 1495903 (D.Mass. March 27, 2020); narrative description of settlement by NAD may be found at *https://www.nad.org/2020/02/18/landmark-agreements-establish-new-model-for-online-accessibility-in-higher-education-and-business/*
  - *Actual settlement agreement obtained through Disability Rights Education Defense Fund of Berkeley California*
    - *Virtually identical terms of settlement*
    - *Note that MIT has an exceptionally large array of public-facing websites including free educational programs*

Captioning-Related Resources Provided by NAD

- National Deaf Center: Why Captions Provide Equal Access
- National Deaf Center: Creating Offline Captions
- Described and Captioned Media Progra: Captioning Key Guidelines
- 3Play Media: State of Captioning Report
- Morton Ann Gernsbacher's research "Video Captions Benefit Everyone"
- Wisconsin Technical College System Captioned Media Guide

Supplement For Title III Entities

"Public Accommodations": Websites and Phone Apps.

Three Standards for Website Coverage for Public Accommodations Under Title III of the ADA (1)

- The "narrow position," taken by the Third Circuit, is that the websites of "public accommodations" (stores, hotels, restaurants, etc.) are excluded from coverage, as "[T]he plain meaning of Title III is that a public accommodation" does not "refer to non-physical access."
- The "intermediate position," taken by the 6th, 9th, and 11th Circuits, holds that websites are covered by the ADA only if there is a nexus between the website and access to the physical place of business, as in ***Robles v. Domino's Pizza*** (9th Cir. 2019)
  - The "nexus courts" explain that discrimination occurring off the brick and mortar site violates Title III ***if*** it prevents individuals with disabilities from enjoying services the business offers at a physical place of public accommodation, e.g., ordering medications that you subsequently pick up at a pharmacy

Three Standards for Website Coverage for Public Accommodations Under Title III of the ADA (2)

- The "expansive position," held by the 1st, 2nd, and 7th Circuits, finds that a "place of public accommodation" need not be a physical space and a nexus to a physical space is not required to create jurisdiction under Title III of the ADA
  - The express terms of Title III of the ADA extend coverage to "services ***of*** a place of public accommodation"
    - Not the more confining concept that might be conveyed by terms not chosen by Congress such as the terms ***"in"*** or ***"at"*** a place of public accommodation
  - Congress intended for the ADA to be construed expansively – the more restrictive interpretations contradict the plain language of the statute
  - Congress intended for the ADA to "keep pace with the rapidly changing technology of the times" (*See* H.R.Rep. No. 101-485, 2d sess, p. 391 (1990))

Three Standards for Website Coverage for Public Accommodations Under Title III of the ADA (3)

- NB: Right now, this is a very big issue in disability law
  - But not necessarily for private institutions of higher education that are covered by Section 504 of the Rehab. Act of 1973 and subject to its implementing regulations including those pertaining to the provision of related aids and services 34 C.F.R. section 104.44(d)

Robles v. Domino's Pizza, LLC

- Mr. Robles is an individual who is blind and could not access the website of Domino's Pizza for ordering, etc., using JAWS or the Domino's mobile phone application and common telephone access apps
- Robles filed a lawsuit under Title III of the ADA (public accommodation) and the Unruh Act

Thanks to Minn Vu and Barry Taylor for their authoritative explorations of this issue. Both sources were used to prepare this discussion of ***Robles***

Robles v. Domino's: Federal District Court (1)

- 2017 WL 1330216 (C.D. Cal. April 12, 2017)
- The ADA ***does*** apply to Domino's website and mobile app
- ***Nonetheless***, the District court dismissed the lawsuit, without prejudice, before discovery, on the grounds that:
  - Holding Domino's in violation of the ADA when there are no legal technical standards for public accommodations websites would be violation of due process

Robles v. Domino's: Federal District Court (2)

- Under the "primary jurisdiction doctrine," courts should hold off on deciding cases when enforcement agencies with special expertise, like that of DOJ, should weigh in first
  - Congress needs to amend the law or DOJ needs to issue regulations "for the benefit of the disabled community, those subject to Title III, and the judiciary"

Robles v. Domino's: Federal Appellate Court (1)

- 913 F.3d 898 (9th Cir. January 15, 2019)
- The ADA applies to Dominos' website and app because the ADA requires places of public accommodation (like Domino's) to provide "effective communication"
  - Domino's is a place of public accommodation
  - It doesn't matter that the services are provided through a website or mobile app because the ADA applies to services ***of*** a place of public accommodation not just services ***in*** a public accommodation
- "Nexus" remains a necessary element in 9th Circuit website/app. cases:
  - The question is whether the "alleged inaccessibility of Domino's website and app impedes access to the goods and services of its physical pizza franchises – which are places of public accommodation."

Robles v. Domino's: Federal Appellate Court (2)

- It is not necessary to delay this matter until Congress or DOJ act on this with amendments or additional regulations
  - Given withdrawal of ANPRM, delay is going to be inevitable
  - Courts are "perfectly capable" of determining whether plaintiff had "effective communication"

Robles v. Domino's: Federal Appellate Court (3)

- There is no due process violation:
  - The ADA is ***not*** impermissibly vague
  - DOJ has been clear on its position that the ADA applies to websites since 1996
  - Robles didn't ask the Court to find that Domino's violated the law because its website did not comply with a technical standard, WCAG 2.0.
    - Robles merely sought compliance with WCAG 2.0 as a possible remedy
  - Lack of regulations doesn't eliminate a statutory requirement
  - But, the lack of regulations may impact the remedies -- "due process constrains the remedies that may be imposed."

Robles v. Domino's: Federal Appellate Court (4)

- The Ninth Circuit concluded that it was not expressing an opinion about whether Domino's website or mobile app comply with the ADA
- The Appellate Court instructed the District Court to:
  - Proceed with discovery
  - Decide whether Domino's website and app comply with the ADA's effective communication and full and equal enjoyment provisions

- N.B.: In contrast to ***Payan v. LACC***, the Circuit Court left open the possibility that a 24/7 toll-free phone line could be a way to provide access as an alternative to an accessible app or website.
  - "[T]he mere presence of a phone number, without discovery on its effectiveness, is insufficient to grant summary judgment in favor of Domino's."

Robles v. Domino's: U.S. Supreme Court

- Domino's filed its petition for writ of certiorari with the U.S. Supreme Court on June 13, 2019
  - Asked the Court to review and overturn the Ninth Circuit's decision.
  - Domino's characterized the issue to be litigated as: "Whether Title III of the ADA requires a website or mobile phone application that offers goods or services to the public to satisfy discrete accessibility requirements with respect to individuals with disabilities."
- Petition to deny certiorari was filed on August 14, 2019
  - It is in everyone's interest including the defendant's and the Court's to wait.
  - "[F]or this Court to rush in to "clarify" the rules in this area would be highly imprudent. Justices have repeatedly called for caution before this Court rules broadly in areas of advancing technology. … This Court's typical reliance on the process of percolation is particularly apt here."
- Petition to grant certiorari was denied on October 7, 2019

Thurston v. Midvale Corp. (1)

- No. B291631, 2019 WL 4166620 (Cal. Ct. App. Sept. 3, 2019) --- this is a California State Appellate Court decision
- Title III of the ADA and the California Unruh Act apply to websites connected to a physical place of public accommodation
  - Court finds too theoretical question of whether Title III may apply to virtual only spaces ***but does not preclude that interpretation for the future***
- Title III applied to Whisper Lounge Restaurant website, which had menus and took reservations 24/7
- The lower court did not improperly conflate ADA requirements with WCAG consortium's guidelines
  - Guidelines are not enforceable as a measure of compliance
  - The proper measure is the ADA Title II regulations and that was the measure used by the court and addressed in the Plaintiff's evidence

Thurston v. Midvale Corp. (2)

- The restaurant's provision of telephone number and e-mail address were not auxiliary aids that ensured "effective communication" as required by the Title III regulations:
  - Address and telephone number could not be located on the website by someone relying on JAWS
  - "[T]he provision of an email or phone number does not provide full and equal enjoyment of Defendant's website (42 U.S.C. § 12182(a) [Title II]), but rather imposes a burden on the visually impaired to wait for a response via email or call during business hours rather than have access via Defendant's website as other sighted customers. Thus, the email and telephone options do not provide effective communication 'in a timely manner' nor do they protect the independence of the visually impaired. (28 C.F.R. § 36.303(c)(ii) [Title II regulation].)"

IV. But Is It "Necessary"? ©

Two Case Studies:

- ***A.L. by and through D.L. v. Walt Disney Parks and Resorts US, Inc.,*** 900 F3d. 1270 (3rd Cir., August 17, 2018)
- ***J.D., by his father and next friend, Brian Doherty v. Colonial Williamsburg Foundation,*** 2019 WL 2306266 (4th Cir. 2019)

How We Got Here

- Prior to the ADA Amendments Act of 2008 (Public Law 110-325, the ADAAA), the best defense to a claim of disability discrimination was that the plaintiff was not an individual with a "disability"
- When this defense was no longer so likely to succeed defendants had to find new defenses—most likely that any accommodation in dispute would constitute a fundamental alteration (often effective) or impose an undue burden (rarely effective)
- Following the decision of the Supreme Court in ***K.C. Martin v. PGA*** (S. Ct. 2001) another effective defense is revealed, the rather logical assertion that the accommodation in question **is not necessary**

Just to Remind You

- In the beginning, God lit a burning bush near the 17th fairway at the Augusta National Country Club, handed Moses two stone tablets which, near the end, state: “there shall be no use of electric carts at the top levels of PGA competition;” a rule, written in stone with no history of exceptions, ever.
- KC Martin, a top professional golfer who must wear painful compression stockings to pump blood back to his heart, due to Klippel-Trenaunay Syndrome, had the temerity of asking the PGA for use of an electric cart at top level competition
- Failing to realize how many elderly justices play golf, the PGA fought vigorously to the end and lost on each of the contested issues
- The Supreme Court concluded that Martin could use a cart
- So far, so good

Lessons from *K.C. Martin v. PGA* (1)

- One lesson from the high court's decision is that even a long standing, written rule, one for which there has never been an exception, still may be subject to modification or exception as a required form of accommodation under the ADA
- According to a majority of the Court, the essence of golfing is "shot-making" and thus use of a cart would not necessarily represent a fundamental alteration
- The Supreme Court has explained that [Title III] "'contemplates three inquiries' for determining whether a requested modification to a public accommodation's procedures is required.
  - (1) whether the requested modification is 'reasonable';
  - (2) whether the requested modification is 'necessary' for the disabled individual; and
  - (3) whether the requested modification would "fundamentally alter the nature' of the public accommodation [such as the PGA]"

Lessons from *K.C. Martin v. PGA* (2)

- "The fact that Martin gets this form of accommodation takes into account the severity of his disability on an individual basis, the fact that is necessary for him does not mean it is necessary for others."
- "'[T]he 'necessary' inquiry requires an individualized inquiry into the plaintiff's capacity. Only after identifying the extent of the disability can we determine what accommodations are necessary for that "particular person's disability." 532 U.S. at 688, 121 S.Ct. 1879.

Previously Covered Cases Following *Martin* (1)

- ***Argenyi v. Creighton Univ***., 703 F.3d 441 (8th Cir. 2013) (applying §§ 12182(b)(2)(A)(ii)–(iii)) [RTC for a deaf doctor] and ***Baughman v. Walt Disney World Co***., 685 F.3d 1131 (9th Cir. 2012) (applying § 12182(b)(2)(A)(ii)) [Segway for a woman with substantial mobility impairment who did not want to use a scooter instead].
  - "Both decisions used "a like experience" standard in evaluating whether the plaintiff's requested modification was "necessary" to provide an equal benefit and full and equal enjoyment. …. Facilities must "help disabled guests have an experience more akin to that of nondisabled guests."
  - ***Featherstone v. Pac. N.W. Univ. of Health Sciences,*** D.C.E.D. Wash., No. 1:CV-14-3084-SMJ (2014); unreported, 2014 WL 36408 [temp injunction ordering the immediate provision of auxiliary aids granted to deaf Osteopathic student];
  - See also, ***Silva v. Baptist Health S. Florida, Inc.,*** __ F.3d___, No. 16-10094, 2017 WL 1830158 (11th Cir. May 8, 2017) [deaf hospital patients] [quality of the communication process, not whether the hospital committed malpractice is the measure of compliance] Note: the amount of proof necessary to establish that this noncompliance was the result of "deliberate indifference" in violation of Section 504, is a much higher standard; harder for plaintiffs to meet. 2019 WL 2754478 (S.D. Fla. 2019).

Previously Presented Cases Following *Martin* (2)

- "Because it had "never determined the definition of 'necessary' under Title III," … the Eighth Circuit [in ***Argenyi***] held that Title III, like Section 504 of the Rehabilitation Act, requires a public accommodation to provide a disabled individual with "meaningful access or an equal opportunity to gain the same benefit as his nondisabled peers."
- The Eighth Circuit, [in ***Argenyi***] pointed out that under a ***"meaningful access"*** standard, an entity's "aids and services 'are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons,' but they nevertheless 'must afford handicapped persons equal opportunity to ... gain the same benefit.'"

New Case Studies concerning "Necessary"

A.L. by and through D.L. v. Walt Disney Parks and Resorts US, Inc.

J.D., by his father and next friend, Brian Doherty, Plaintiff – Appellant, v. Colonial Williamsburg Foundation

Neither case takes place in the higher education setting

Both are decisions are interesting and instructive

A.L. by and through D.L. v. Walt Disney Parks and Resorts US, Inc - Background

- 900 F3d. 1270 (3rd Cir., August 17, 2018)
- Plaintiffs, claim that Disney's Disability Access Service (DAS) card program does not adequately accommodate their autism as they may be required to wait more than 30 minutes to ride or re-ride a Disney attraction or not be able to move through the attractions in the order they desire.
- The district court concluded that plaintiffs' requested modifications to the DAS Program were unnecessary for three main reasons:
  - (1) Disney provided plaintiffs an opportunity to gain a "like benefit" from its parks that is enjoyed by nondisabled individuals;
  - (2) plaintiffs can all wait in a car or a plane to get to Disney's parks, and therefore plaintiffs can wait virtually with a DAS Card to access rides at scheduled times; and
  - (3) DAS is an existing means to equal access

A.L. by and through D.L. v. Walt Disney Parks and Resorts US, Inc. – The Law (1)

- Third Circuit reversed the District Court, holding that summary judgement should not be issued as "… factual disputes still exist about behavioral features of plaintiffs' impairments that make it more difficult to evaluate whether the DAS program provides them with a "like experience":
  - "Plaintiffs' evidence posits that waiting for rides in the over-stimulated environment of a theme park, even virtually with the DAS Card, is beyond the capacity of plaintiffs given the specific and severe nature of their disabilities."
  - "Plaintiffs' expert and lay evidence indicates that specific neurologically-based manifestations of plaintiffs' disabilities are: (1) that they have no concept of time, cannot defer gratification, and cannot wait for rides; and (2) that they must adhere to routine, visit the same ride repeatedly, and visit rides in the same order as in prior park visits."
  - "Plaintiffs' evidence indicates that prompt and pre-set access to rides is "necessary" to prevent meltdowns and afford them an equal experience at and enjoyment of Disney's parks. Plaintiffs explain that the DAS Card addresses only where they must wait, not that they must wait."

A.L. by and through D.L. v. Walt Disney Parks and Resorts US, Inc. – The Law (2)

- Disney raises an unreasonableness defense:
  - "In response, Disney argues that even if more than the DAS program is necessary, plaintiffs' proposed fix is unreasonable because it is the functional equivalent of Disney's previous system, which Disney avers was discontinued due to *fraud and abuse. ….* This is but one example of knotty issues that must be sorted out before a court could decide whether plaintiffs' requested accommodation, if proven necessary, is reasonable, and if so, whether it would fundamentally alter the park experience."
- Since more evidence on these points is needed, summary judgment of district court is reversed

A.L. by and through D.L. v. Walt Disney Parks and Resorts US, Inc. – a UD Defense? (1)

- Is there a "***universal design***" defense buried in this case?
  - The term "universal design" is not used by either party
  - Disney points out that between its three parks it admits 75,000 person per day
  - It contends that its DAS system is designed to address the needs of its most "severely disabled" customers and therefore the needs of all customers with autism

A.L. by and through D.L. v. Walt Disney Parks and Resorts US, Inc. – a UD Defense?(2)

- The Court says that if Disney can prove that its system satisfies the needs of its most severely disabled customers, it *may* have a solid defense.

  "Under the factual circumstances of this case, we conclude that Disney's generalized issuance of DAS Cards, in and of itself, does not violate the ADA. This is not a case where a plaintiff guest has been denied accommodations across the board. This is a case where a public place has many thousands of guests each day and provides an identifiable and quantifiable accommodation based on its assessment of its most severely disabled guests. If an accommodation actually provides all necessary modifications for a severe disability across the board, it does not violate the ADA. The critical inquiry here is whether Disney's DAS program adequately accommodates the most severely disabled guests and provides them an equal benefit and a like experience to that of nondisabled guests." [Emphasis in original]

A.L. by and through D.L. v. Walt Disney Parks and Resorts US, Inc. – a UD Defense? (3)

- Note: at the locations ("Guest Relations") where Disney hands out DAS passes, there are live persons with authority to supplement the DAS pass with more individual ride waiting-line exception tickets
- Hence, Disney isn't quite arguing that one size fits all.
- Moreover, Disney is also pointing out that there may be other interests to balance, like ticket fraud (an indication that the accommodation proposed is not reasonable or feasible and may be an undue burden)
- Stay tuned. Final briefs have been filed. 2020 WL 1433050 (March 2020)

J.D., by his father and next friend, Brian Doherty, Plaintiff – Appellant, v. Colonial Williamsburg Foundation - Background

- 2019 WL 2306266 (4th Cir. 2019)
- Student with severe gluten allergy and his dad wanted to eat lunch with his classmates in a historic, themed, Williamsburg dining facility, Shield's Tavern
- The chef met with father and student and offered to cook student a gluten-free lunch
- JD and his father declined as, ***based on prior adverse restaurant experiences***, they did not trust that the chef could actually deliver a completely gluten-free meal
- As student declined meal, he and his father were required to sit outside the dining facility

J.D., by his father and next friend, Brian Doherty v. Colonial Williamsburg Foundation - Precedents

- From these cases as precedents, [***A.L. v. Walt Disney*****,** 900 F.3d at 1296; *accord* ***Argenyi v. Creighton*** *Univ.*, 703 F.3d 441, 451 (8th Cir. 2013); ***Baughman v. Walt Disney World Co.*****,** 685 F.3d 1131, 1135 (9th Cir. 2012)] the Fourth Circuit asked two questions:
  - (1) Looking at the plaintiff, individually what is the nature of his/her disability and does it make the requested accommodation "necessary"?
  - (2) Is the requested accommodation "reasonable," not a fundamental alteration or an undue burden

J.D., by his father and next friend, Brian Doherty v. Colonial Williamsburg Foundation --"Necessary"?

- "[T]he 'necessary' inquiry requires an individualized inquiry into the plaintiff's capacity. Only after identifying the extent of the disability can we determine what accommodations are necessary for that "particular person's disability." ***K.C. Martin v. PGA*,** 532 U.S. at 688, 121 S.Ct. 1879.
  - "The evidence shows that J.D. repeatedly became sick when exposed to gluten at restaurants, whether from cross-contamination or from human error in following protocols. And this happened despite his parents' best efforts to ensure gluten- free meals."
- "At summary judgment, viewing all facts and drawing all inferences in the light most favorable to J.D., we believe there is a genuine dispute on whether eating out is beyond J.D.'s capacity."

J.D., by his father and next friend, Brian Doherty v. Colonial Williamsburg Foundation --"Reasonable"?

- "We turn now to the second inquiry under the ADA — that is, whether the requested modification is ***reasonable*** [emphasis added; burden of proof on the plaintiff]:
  - "Although not dispositive, the fact that Colonial Williamsburg granted a similar request [birthday cakes and baby food] speaks directly to the reasonableness of J.D.'s request"
  - "On one hand, as Colonial Williamsburg argues, food service is an essential aspect of Shields Tavern. Indeed, it's *the* essential aspect. Thus, a jury could reasonably find that requiring the Tavern to allow outside food would fundamentally alter the nature of this service."
  - "On the other hand, a jury could reasonably conclude that granting J.D.'s specific request would not have affected the experience of the other patrons in the restaurant"
  - "[Moreover,] there is no evidence that Colonial Williamsburg has been deluged with requests from people seeking to bring in outside food such that it couldn't give "individualized attention to the handful of requests that it might receive." ***K.C Martin,*** 532 U.S. at 691, 121 S.Ct. 1879.
- Thus, a jury could reasonably find that accommodating the occasional request of someone with severe food sensitivities would not fundamentally alter the Tavern's business model, especially if other family members purchase food or (as happened here) if the meals are already paid for as part of a group rate."

J.D., by his father and next friend, Brian Doherty v. Colonial Williamsburg Foundation -- The Dissent

- "[The opinion of the majority] forces restaurants to allow customers to bring in food prepared off the premises, in who knows what conditions, containing who knows what ingredients. It exposes the restaurants' patrons to public health risks, subjects the restaurants themselves to legal liability, and deprives servers of much needed tips."
- "The accommodation requested in this case was not necessary because of the Tavern's offer of a gluten-free meal prepared in house, which is what the district court and magistrate judge so found."
- "I would certainly uphold their judgment, and additionally I would hold that the requested modification was unreasonable."

V. Food Service Accommodations ©

Case Study and Resources:

- ***Settlement Agreement between the United States of America and Rider University***: DOJ 202-48-32

  https://www.justice.gov/usao-nj/press-release/file/1133851/download
- ***Learn to Get Started*** www.foodallergy.org/education-awareness/community-resources/college-and-university-staff/make-your-campus-food-allergy-friendly (updated June 6, 2019)

Rider Background

- Private nonprofit university with approximately 5,100 students in Lawrenceville and Princeton, NJ
- Rider is a "public accommodation" subject to 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, …. of any place of public accommodation by any private entity …."
- DOJ's own investigation concluded that Rider failed to comply with Title III of the ADA in several ways, including that:
  - it did not provide adequate information on its website for students seeking to obtain reasonable modification...;
  - has improperly delegated [contracted away] responsibility for accommodating students with [food-related] disabilities to a food service provider;
  - did not readily offer exemptions from its meal plans for students seeking exemption due to a food allergy or food-related disability."

Terms of Rider Resolution: Implementation (1)

- The University implemented a variety of changes:
  - Identify a Student Services Disabilities (SSD) point person to register students, and to document individualized plans
  - Ensure requests are addressed in as integrated a setting as possible
  - Employ a full-time dietitian to help these students develop diets or meal plans
  - Designate a safe food preparation area free of the top 8 allergens (including egg, milk, wheat, shellfish, fish, soy, peanut, tree nut products) :
    - Staffed by a dedicated chef
    - Which will provide meals to a variety of locations
    - Will consist of a separate kitchen and food preparation area with glass walls, a counter, refrigerator and freezer space for perishable items and separate cooking pots, pans and utensils utilized exclusively to prepare allergen free items.

Terms of Rider Resolution Agreement: Implementation (2)

- Additional changes to implement:
  - Ensure foods that are made without allergens are labeled, nutritionally comparable, and properly prepared to reduce cross-contamination risk
  - Identify who is qualified to answer food-allergy related questions in each dining location
  - Provide an online pre-ordering service option for registered students – with incentives for use
  - Post menus online clearly identifying allergen friendly options
  - Make food made without allergens available at all locations that accept the university's meal plan
  - Implement a comprehensive food service training plan for all food service managers and staff

Terms of Rider Resolution Agreement: Responsible Persons

- Additional changes to implement:
  - Train employees and contractors in Residence Life and SSD who have contact with students on their obligations under the Americans with Disabilities Act
  - Clearly communicate broadly new policies and protocols through emails, the website, and posting on bulletin boards
  - Will advise students seeking reasonable modifications to responsible person to review requests
  - Responsible person will meet with the student individually to work cooperatively to fashion individualized plan

Terms of Rider Resolution Agreement: Exemption

- Additional changes to implement
  - Depending on the situation, ***will allow meal plan exemption***
    - This provision is carefully limited to registered students with food allergies that are disabilities
    - Food allergies are defined as: an individual with any physical or mental impairment that substantially limits one or more major life activities, such as eating, or a major bodily function, including the digestive system. *See* 28 C.F.R. § 36.105(a)(1)(i) & (c)(1)(i)-(ii). An individual's allergic reaction to food constitutes a disability under the ADA where the allergy substantially limits an individual in one or more major life activity. *See* 42 U.S.C. § 12102.

Terms of Rider Resolution Agreement: Appeal System

- Additional changes to implement:
  - Provide a limited due process appeal system:
    - After the student has engaged in the interactive process, the student may request a review by the General Counsel
    - Appeals of this review are heard by the University Appeal Officer
    - Nothing limits students from also filing with external agencies a complaint of disability discrimination

Terms of Rider Resolution Agreement: Contracting

- Rider can't contract out of compliance with this agreement
  - "This Agreement shall be binding on the University and its successors in interest, assigns, agents, employees, and contractors. The University has a duty to notify any and all successors in interest of this Agreement and the duties and responsibilities it imposes on the University. In the event the University seeks to transfer or assign all or part of its obligations under its meal program, and the successor or assignee intends to carry on some or all of the University's responsibilities, the University shall, as a condition of the transfer or assignment, obtain the written accession of the successor or assignee to any obligations remaining under this Agreement for the remaining term of this Agreement."
- Timelines
  - Most implementation timelines are short (30 days or less)
  - Agreement will last for 3 years
- Published Rider University agreement, unlike Lesley University agreement, makes no mention of damages for any students

Other Food Service Accommodation Resources

- Rider agreement***:*** https://www.justice.gov/usao-nj/press-release/file/ 1133851/ download
- Rider Press Release: https://www.justice.gov/usao-nj/pr/us-attorney-s-office-reaches-agreement-rider-university-resolve-allegations
- ***Questions and Answers About the Lesley University Agreement and Potential Implications for Individuals with Food Allergies*** https://www.ada.gov/q&a_lesley_university.htm (January 2013) [Last visited June 2019]
- The actual agreement between DOJ and Lesley University https://www.ada.gov/lesley_university_sa.htm
- Food Allergy and Research Education (FARE) www.foodallergy.org
  - An organization with which both OCR, DOJ and AHEAD collaborate
  - ***Learn to Get Started*** www.foodallergy.org/education-awareness/community-resources/college-and-university-staff/make-your-campus-food-allergy-friendly (updated June 6, 2019)
- The National Celiac Association www.nationalceliac.org
- Gluten Free Friends www.gfreefriends.com

QSD Flowchart

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This is a narrative version of the flowchart from the PowerPoint presentation (slide 2).

Step 1

1. Does the individual have a disability? If **yes**, proceed to Step 2.

Step 2
The following are the three primary analytical paradigms to consider. We are only exploring the Qualified Student with a Disability paradigm.

1. Is there Disparate Treatment? *(not analyzed)*
2. Is this Highly Regulated? *(not analyzed)*
3. Is this a Qualified Student with a Disability?
    a. If **yes**, proceed to Step 3.

Step 3

1. Does the student meet the Academic Standards?
    a. If **yes**, proceed to next question. If **no**, proceed to Outcome A.
2. Does the student meet the Technical Standards?
    a. If **yes**, proceed to next question. If **no**, proceed to Outcome A.
3. Is the student a Direct Threat?
    a. If **no**, proceed to Step 4. If **yes**, proceed to Outcome A.

Step 4

1. Does the student qualify Without Accommodations?
    a. If **no**, proceed to Step 5. If **yes**, proceed to Outcome B.

Step 5
The following questions pertain to a Student's Burden of Proof in Litigation.

1. Does the student qualify With Accommodations?
    a. If **yes**, proceed to next question. If **no**, proceed to Outcome A.
2. Is the Accommodation Necessary?
    a. If **yes**, proceed to next question. If **no**, proceed to Outcome A.
3. Is the Accommodation Facially Reasonable?
    a. If **yes**, proceed to Step 6. If **no**, proceed to Outcome A.

Step 6

The following questions pertain to an Institution's Burden of Proof in Litigation.

1. Does the Accommodation result in a Fundamental Alteration?
    a. If **no**, proceed to next question. If **yes**, proceed to Outcome A.
2. Does the Accommodation result in an Undue Burden?
    a. If **no**, proceed to Outcome B. If **yes**, proceed to Outcome A.

Outcomes

Outcome A

1. Student **is not** Qualified.

Outcome B

2. Student **is** Qualified.