

Identifying and Removing Barriers to Access: Using a Framework to Guide Considerations of Complex Requests

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Begin with the End in Mind

Why do we do the work that we do?

ACCESS

But what does that mean exactly?

What is the goal of access?

- To eliminate discrimination on the basis of disability
 - Cannot be excluded from participation in or be denied the benefits of any program, activity, aid, benefit or service
 - Must provide an opportunity to participate in or benefit from a service that is equal to or as effective as that provided to others
 - Cannot provide different or separate aid, benefits, or services unless such action is necessary to provide disabled people with aid, benefits, or services that are as effective as those provided to others;
 - Must afford equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

Equal Access Means No Barriers

Disabled students experience equal access when they are able to:

- Fully engage and participate in the same activities;
- Utilize the same information shared with everyone;
- Have the same opportunity to achieve;
- Enjoy the same campus services, benefits and experiences as a person without a disability.

Common College Environment Barriers

- Poor physical space and design
- Inaccessible electronic and digital information
- Time
- Space distractions
- Reading and writing demands
- Policies
- Communication, Engagement and Interaction
 - Captioning
 - Class presentations
 - Small groups
 - Expectations of meeting with professors and staff
- Attitudes and lack of awareness
- Disability office practices
- What else??

Necessary (Standards? Realities?) vs. Unnecessary Barriers

- Our goal is to remove the unnecessary barriers
- Some standards and assessments are necessary
 - University requirements
 - Degree requirements
 - Course requirements
 - Learning objectives
 - Technical standards for certain programs
 - The need for grades and evaluative measures
 - Decisions on how to evaluate students in the classroom
 - Deadlines

Why They Pay Us the Big Bucks

- We have to figure out which standards are essential and which barriers are unnecessary
- What would/does a specific accommodation address in X situation?
 - Equal access?
 - Success?
 - Barrier within the academic or physical environment?
 - Barrier at the intersection of disability and environment?
 - Internal barrier or personal behavior within the student?

Accommodations should remove barriers...

- Does the considered accommodation remove an actual academic barrier?
- Does the accommodation seem reasonable at face value? Does it pass the “smell test”?
- When is it our responsibility to remove the barrier with an accommodation?
- When is it the student’s responsibility to manage and address internal barriers and personal behaviors?

If implementing an accommodation allows the student to do less, then it may be not reasonable.

- Formula cards or note-sheet for tests (not available to all)
 - Allows students to learn/absorb less material at a lesser level than everyone else
- Individual project in lieu of a team project or presentation
 - Does working alone create a different experience and different learning outcomes than working with a team?
- Extended deadlines for out-of-class assignments
 - Does offering longer time frame to complete work as an accommodation reduce expectations for disabled students using this accommodation compared to all other students?

What Does “Necessary” Mean (from a civil rights perspective)?

- Most often cited cases:
 - ***PGA v. Martin***, S. Ct. (2001)[competitive sports] “the ‘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.”
 - ***Baughman v. Disney World***, 9th Cir. (2012)[mobility access --Segways] “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.”
 - ***Argenyi v. Creighton University***, 8th Cir. (2013) [academic program access]—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.”

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

- 900 F3d. 1270 (3rd Cir., August 17, 2018)
- Plaintiffs, claim that Disney's DAS 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 move through the attractions in the order they desire.
- 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 a like experience***”

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

- “To determine what is “necessary” requires multiple fact findings regarding these two disputed behavioral characteristics of plaintiffs’ disabilities. Until those fact findings are made in a bench trial, it cannot be determined what is or is not necessary under the ADA.”

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

- “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.

- Is there a universal design defense buried in this case?
 - Disney 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
 - 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.***”

- The term “universal design” is not used by either party.

*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
- 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, Plaintiff –
Appellant, v. COLONIAL WILLIAMSBURG FOUNDATION - Precedents*

- (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, Plaintiff –
Appellant, v. COLONIAL WILLIAMSBURG FOUNDATION – The Law (1)*

- “We make two observations”:
 - “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, Plaintiff – Appellant, v. COLONIAL WILLIAMSBURG FOUNDATION --“Reasonable”?

- “We turn now to the second inquiry under the ADA [reasonableness] — that is, whether the requested modification is reasonable [burden on 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.”

Critical Questions to Guide Review

- Would or do many or most students have the same experience, same concerns or same preferences such that the requested accommodation would be benefit to many, most or all?
- Is there a legitimate need for access or accommodations due to a substantial limitation in a major life activity? (Possible discrimination?)

- What accommodation is specifically sought?
 - What does the student say would be an ideal solution for the concern?
- Is the requested accommodation reasonable relative to the identified disability?
- Is there a clear connection between the academic barrier and the disability?
- Would the ability to use the accommodation fundamentally change essential course or program expectations or academic rigor required of all students to fulfill (academic standards)?

- Could the student do anything differently to alleviate the identified “concern”?
- Is the request more of a want (to increase comfort or ease) than a need to remove an academic barrier?
- Would the request, if facilitated, solely increase the student’s ability to be successful, more than or possibly without, advancing equal access?
- Would a possible accommodation remove an academic barrier or simply extend the impact of a personal challenge?

If the environment were designed differently, would the student be able to accomplish the academic goals without the specific concern in place?

Is the student not able to do what is required and/or would the student experience significant challenges in meeting the requirements regardless of the course/environment design...even with an accommodation?

If we can define a situation as a legitimate academic or campus environmental barrier, then we are likely responsible for removing it (with accommodations).

Condition, Manner or Duration:

**A useful framework for considering
complex accommodations**

Condition, Manner or Duration:

Condition and Manner

- “An impairment may substantially limit the “condition” or “manner” 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.***”

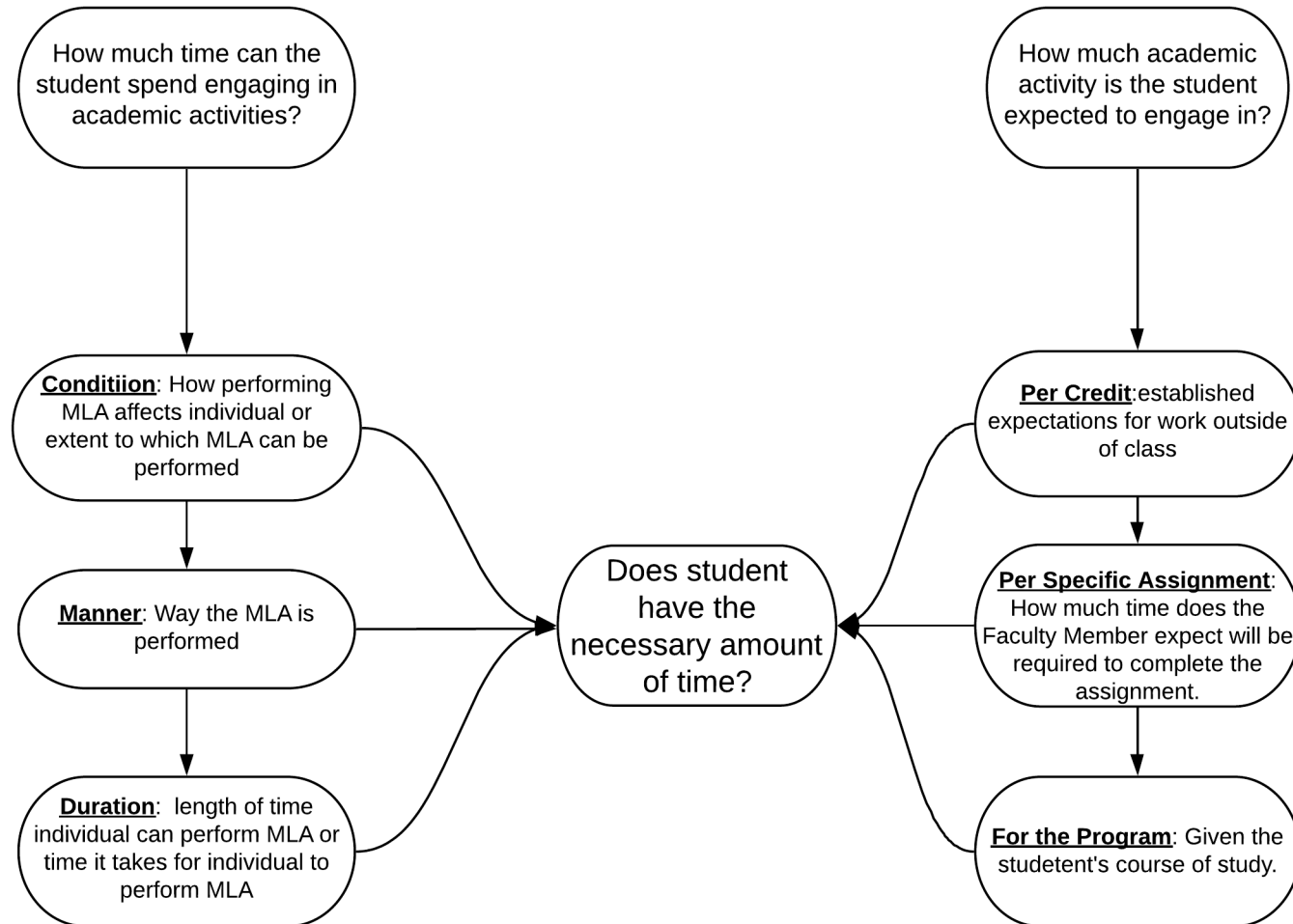
Condition, Manner or Duration: Duration

- “Duration” refers to the length of time an individual ***can perform*** a major life activity or the length of time ***it takes*** an individual to perform a major life activity...”

Condition, Manner or Duration

- “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.”

A Paradigm for deciding when extended time to complete assignments is “necessary”



A Paradigm for deciding when extended time to complete assignments is “necessary”

- **Is the barrier truly time.**
 - How much time can the student spend engaging in the academic activities required for the assignment?
 - Condition
 - Manner
 - Duration

A Paradigm for deciding when extended time to complete assignments is “necessary”

- **Is the barrier truly time.**
 - How much academic activity are students expected to engage in per:
 - Credit hour?
 - Full time status?
 - Program?
 - Specific Assignment?

A Paradigm for deciding when extended time to complete assignments is “necessary”

- **Is the barrier truly time.**

- Given the specific amount of time it is expected a student will be engaged in the academic activities required to complete an assignment

AND

- Your understanding of the condition/manner/duration in which the student can engage in the activities required to complete an assignment...

A Paradigm for deciding when extended time to complete assignments is “necessary”

- **Is the barrier truly time.**
 - Is there enough time provided in the “original” timeframe for completion of the assignment by this student?
 - Said another way: Does the student have enough time available to them to get the work done?

A Fundamental Question

What unnecessary academic (or institutional) barrier to equal access exists and would be addressed/removed if extra time for assignments was facilitated as an accommodation?

Is the Barrier Truly Time: An Example to Consider

- **Student information:**

- **AD/HD and Dysgraphia-**

- Writing activities (handwritten and typed) take the student twice as long.
 - Student can engage in activities requiring sustained mental effort for up to 45 min. before requiring a break.
 - Other than attending class, student can engage in four 45 min. periods of sustained mental effort per day.
 - After that, student can engage “briefly” in academic activities but becomes tired quickly and the quality of their work is poor.
 - Student will start the assignment when it is given and work within their ability throughout the time period provided per the syllabus.

Is the Barrier Truly Time: An Example to Consider

- **Student information:**

- **AD/HD and Dysgraphia-**

- Writing activities (handwritten and typed) take the student twice as long.
 - Student reports that their greatest difficulty with assignments is getting started. They often have little to no work completed by the due date.
 - Once they get started student can maintain focus on the activity for a few hours at a time
 - Student indicates that if given an extension of a few days to a week they can potentially get assignments completed, even if they have not started by the original due date.
 - This is true even if the original time period provided to complete the assignment is two to three weeks.

Other possible scenarios to consider

- **A student with a physical impairment that requires assistance from a personal care attendant to complete activities of daily living.**
- **A student with a reading disorder who is working on a project which involves significant amounts of research.**
- **A student with a visual impairment who is new to using assistive technology.**

Are there alternative accommodations to consider which might remove the barrier/provide more time?

- Reduced Courseload
- Assistive technology
- Priority enrollment
- Alternative Format Materials

A framework for making complex accommodation decisions

- **What is the identified barrier?**
 - Is it an access issue?
 - Barrier within the academic or physical environment?
 - Barrier at the intersection of disability and environment?

A framework for making complex accommodation decisions

- **Is the accommodation necessary to remove the identified barrier?**
 - Does it modify a non-essential standard or requirement which is beyond the students capacity?
 - Does it provide a like experience to that of nondisabled peers?
 - Does it provide meaningful access or an equal opportunity to gain the same benefit as nondisabled peers ?

A framework for making complex accommodation decisions

- **Is the accommodation reasonable?**
 - Does it make sense as stated?
 - Is it possible to implement?
 - Does it lower an essential program standard?
 - Does it fundamentally alter an essential program element?

Applying the framework to COVID-19 questions

- Remote attendance
- Removal of remote proctoring
- Backtracking on exams
- Exemption from requirement to wear a face covering
- Single room request due to anxiety over contracting COVID

Questions?

Thoughts?

Agree or Disagree?

Session Evaluation

- Access Session Evaluation at:
tinyurl.com/AHEAD2020-SessionEval
- Your feedback helps shape future programming.
- Thank you for attending!