

2019-2020 Legal Year in Review

Court Decisions, Settlements, Agency Guidance and Legislative Initiatives ©

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Caveat

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Part One of a Three-Part Series

More next week:

Legal Q & A Session (July 21)

Individualization, The Interactive Process and Fundamental Alteration (July 23)

See also, Students with Anxiety and Disability (July 21)

OCR Year in Review (July 21)

Topic 1: Two Elephants in the Room ©

Black Lives Matter (BLM) and Disability Rights
COVID 19

A Perspective on BLM (1)

- As a witness to and participant in American civil rights history, a disability rights attorney, a former Oakland Police officer/civil rights policy advisor, I feel compelled to recommend that, as a community of people with disabilities we do two things:
 - 1) ***Right now***, “listen patiently and empathetically,” and add our support to the Black community, as well as other communities of color
 - See ***AHEAD Statement*** posted 06-04-2020
<https://www.ahead.org/blogs/ahead/2020/06/04/a-message-to-the-ahead-community>
 - ***See also:***
<http://www.ahead-archive.org/SIGS/Diversity/AHEAD's%20Commitment%20to%20Diversity%20Statement.pdf>;
[http://www.ahead-archive.org/SIGS/Diversity/Committment2TransStudents%20\(1\).pdf](http://www.ahead-archive.org/SIGS/Diversity/Committment2TransStudents%20(1).pdf)
 - 2) ***At the appropriate time***, seek a place at the table as people with disabilities
 - Particularly, representation by people of color with disabilities
- Disability must not be a way to further marginalize people of color!
 - Let me explain, briefly

A Perspective on BLM (2)

- We must begin with some humility: disability rights would not exist but for sacrifices made and lessons learned from communities of color; particularly African Americans, nor is intersectionality a new concept to the disability rights movement, indeed it has proven to be a key to advancement of disability rights
- In two critical ways disability rights would not exist without intersectionality
 - 1) Intersectionality in the law
 - Legal precedents that supported the concept that identical treatment is not always equal treatment
 - ***Lau v. Nichols***, 414 U.S. 563 (1974) [Educational rights of monolingual Cantonese-speaking school children in San Francisco Public Schools includes non-identical instruction that takes into account their unique national origin-based linguistic characteristics]

A Perspective on BLM (3)

- 2) Intersectionality in our own political and social movements
 - We learned organizing and civil disobedience tactics from race, sex, and national origin movements that preceded us
 - The critical 504 Sit-In was diverse as to:
 - Race, national origin, sex, sexual-orientation and religious faiths of the leadership and participants
 - Kinds of disability
 - Directly supported by the Black Panthers, the Butterfly Brigade, Cesar Chavez and more
 - See the Netflix movie ***Crip Camp***
 - If it ever becomes available again, enroll in Axelrod, Grossman, and Vance: ***Introduction to Post-Secondary Disability***

Brad Lomax with Judy Heumann



Brad Lomax, Howard University graduate, Washington D.C. Black Panthers leader and organizer with MS, center of picture. Next to Lomax is Judy Heumann at a rally in 1977 at Lafayette Square. Subsequently they were colleagues at the 504 Sit-In in San Francisco and its conclusion in Washington DC. Lomax arranged for the strategic logistical support of the Oakland Black Panthers at the 504 Sit-In.

<https://www.nytimes.com/2020/07/08/obituaries/brad-lomax-overlooked.html>

Credit...Hollynn D'Lil

A Perspective on BLM (4)

- Join the movement!
 - America is in the midst of its largest civil rights movement (BLM), ever
 - 15 to 26 million estimated participants
 - One key aspect is the highest level of intersectionality in US civil rights history
 - 95 percent of counties that had a recent demonstration are majority white
- Buchanan, Bui, and Patel, ***Washington Post***, July 3, 2020
- In my hometown Oakland, CA., signs on boarded-up stores include “Farsi Power honors Black Power” and “The Yellow Peril salutes BLM”
 - There are also national organizations like #Asians4Blacks as well as other third world activists supporting solidarity with #BlackLivesMatter

A Perspective on BLM (5)

- And then, ***at the right time***, ask for a place at the table?:
 - “With regard to police violence, the combination of disability and skin color amounts to a double bind”
[Helping Educate to Advance the Rights of Deaf Communities](#) (HEARD)
 - One in five Americans has a disability, yet, roughly a third to a half of all people killed by police are disabled, add in substance abuse, the number runs closer to 80%
The Ruderman Foundation, ***Media Coverage of Law Enforcement Use of Force and Disability*** (covering the period of 2013-2015) https://rudermanfoundation.org/white_papers/media-coverage-of-law-enforcement-use-of-force-and-disability/
 - Many of the best-known cases of African Americans killed by the police were individuals with disabilities, including: George Floyd [heart condition, hypertension]; Freddie Gray [ID]; Eric Garner [asthma, diabetes, heart condition], Tanesha Anderson [“mental health crisis”] and Sandra Bland [epilepsy and depression]
The Guardian, ***The toll of police violence on disabled Americans***
<https://www.theguardian.com/commentisfree/2020/jun/09/sandra-bland-eric-garner-freddie-gray-the-toll-of-police-violence-on-disabled-americans>

A Perspective on BLM (6)

- ***At the right time***, three remedial ideas to consider:
 - The risk of being killed by law enforcement is 16 times higher for individuals with untreated serious mental illness than for other civilians
<https://www.treatmentadvocacycenter.org/overlooked-in-e-undercounted>
 - “Reducing encounters between law enforcement and individuals with the most severe psychiatric diseases may represent the single most immediate, practical strategy for reducing fatal police shootings in the United States”
Ruderman, *Ibid.*
 - Redirecting funds to non-law-enforcement solutions such as unarmed mental health/social workers
- All police training needs to include: mental health crisis intervention training, detecting and responding to disability [deaf or blind persons], basic physiology, and training **by** persons with disabilities including persons with autism
- Along with collecting and reporting police shooting data on race, national origin, and sex, type-specific disability data needs to be collected, as well
Vance, Mary Lee, research review of existing statistical bases on police violence

Elephant 2: COVID-19

Is a Student Who Has or Had the COVID-19 Virus
an “Individual with a Disability?” ©

Caveat

- This presentation, an initial consideration of COVID-19 as a “disability” under Section 504 and the ADA, is to help colleges and universities think about and plan to address a rapidly developing, complex question
- This should be considered only a first look at this question
- This question is so novel (pun intended) that the opinions expressed on these slides will likely be subject to change as agencies, courts, and expert commentators weigh in on COVID-related legal and scientific issues <https://www.cdc.gov/coronavirus/2019-ncov/index.html>; <https://www.coronavirus.gov>; <https://www.nih.gov/coronavirus>
- A big factor complicating the ability to answer confidently legal questions pertaining to COVID-19 is what is unknown about the impact of COVID-19 on our bodily systems and, in turn, our daily living activities:
 - Long term or transitory?
 - In a minor fashion or in an intense manner?
 - Bodily systems that **may** include: acute respiratory distress such as by pneumonia, lung damage, loss of taste (a neurological symptom), mental confusion, anxiety, depression, and post-traumatic stress, nausea, vomiting, diarrhea, loss of appetite, strokes, blood clots, seizures, liver damage, kidney damage, multisystem inflammatory syndrome (MIS) in children, and “COVID toes” <https://health.clevelandclinic.org/are-covid-toes-and-rashes-common-symptoms-of-coronavirus/>

So Far, There Are No Authoritative Answers from the United States Government (1)

- Is COVID-19, in any form, a disability?
- To date, Federal guidance has fallen into two categories:
 - Addressing the *other* civil rights protections that may pertain to persons with COVID-19; such as:
 - US ED OCR Fact Sheet --***Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students***, guidance to school districts, colleges and universities that they must not allow concerns over the origin of COVID-19 to serve as the basis for discrimination against students who are of a particular national origin (March 16, 2020)
<https://www2.ed.gov/about/offices/list/ocr/docs/ocr-coronavirus-fact-sheet.pdf>
 - US ED OCR Questions and Answers -- ***ED guidance on continuation of services or compensatory services for students who are on IEPs***
<https://www2.ed.gov/policy/special/guid/idea/memosdcltrs/qa-COVID-19-03-12-2020.pdf> (March 2020)

So Far, There Are No Authoritative Answers from the U.S. (2) (More Addressing Other Rights)

- Most on point, but equivocal and brief, ED OCR: ***Questions and Answers for Post Secondary Institutions regarding the COVID-19 National Emergency*** (May 12, 2020)
<https://www2.ed.gov/about/offices/list/ocr/docs/20200512-qa-psi-covid-19.pdf>
 - Colleges and universities are still required to comply Section 504, Title II, and Title IX
 - But OCR will cut them some slack for what is impossible or infeasible, if you will provide a second-best creative alternative
 - Some focus on the challenges in accommodation of students with sensory impairments
- Other ED OCR resources:
 - OCR Year in Review Plenary Session at AHEAD, July 21, 2020 11:30 Eastern Time
 - OCR National Web Accessibility Team – OCRWebAccessTA@ED.GOV
 - Questions and Technical Assistance – OPEN@ed.gov including valuable advice like “be creative”
 - ***OCR Short Webinar on Online Education and Website Accessibility*** (May 17, 2020)--
<https://www.youtube.com/watch?v=DCMLk4cES6A&feature=youtu.be>
 - Also pertinent, OCR advice about enforcement of Title IX during the pandemic, which includes a presumption that Title IX sex harassment investigations will not be postponed

So Far, There Are No Authoritative Answers from the U.S., Second Type of Guidance

- Addressing COVID-19 ***as if*** it is a disability, but never actually stating such a conclusion; such as, EEOC guidance about what are or are not permissible actions for employers to take in the workplace to limit the spread of the COVID-19 virus among their workforces at home or when returning to work
https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm
 - ***Of note, the EEOC's treatment of COVID-19 as a "direct threat to the health and safety of others."***
 - ***"Masking questions" will be effected by this conclusion as it means a direct threat - interactive communication – reasonable accommodation analysis should take place if someone is an individual with a disability*** *See e.g.,* https://www.indianagazette.com/news/local/bolivar-woman-sues-parks-over-mask-policy/article_bdc0155a-c37b-11ea-9372-c370030c8ec3.html
 - See the analysis by Bill Goren, J.D. of this EEOC guidance at <https://www.williamgoren.com/blog/2020/03/24/eeoc-guidance-coronavirus-influenza/>
- Keep checking the EEOC website as updates are frequent: www.eeoc.gov/coronavirus

Answers and Guidance: See Also

- Guidance of HHS OCR for medical science and healthcare educational programs
- American College Healthcare Association (ACHA) Guidelines – “***Considerations for Reopening Institutions of Higher Education in the COVID-19 Era***”
- The analyses by Bill Goren, J.D., reviewing EEOC guidance, for example <https://www.williamgoren.com/blog/2020/03/24/eec-guidance-coronavirus-influenza/>
- Looking back over all the material I have reviewed, in the main, EEOC guidance seems the most useful but remember that employee and student law are not identical (respectively, Title I vs. Titles II and III)

Are There any Judicial Precedents Explicitly Concluding that COVID-19 is a disability?

- At this time, no Federal court decision that I am aware of has explicitly identified COVID-19 as a disability under the ADA or Section 504
 - But they come close as in *Faour Abdalla Fraihat, et al. v. U.S. Immigration and Customs Enforcement, et. al.*, EDCV 19-1546 JGB (SHKx) (C.D. Cal., April 20, 2020) [In light of COVID-19, ICE detention conditions, in many facilities, are unconstitutional]
- Jo Ann will know better!

Even if COVID-19 is Not A Disability

- It is possible that, in some instances or states, COVID-19 (coronavirus disease 2019), will be a disability within the meaning of Section 504 of the Rehabilitation Act of 1973 [Section 504] and the Americans with Disabilities Act of 1990 [the ADA], and in other instances, it will not -- largely depending on the impact of the virus on an individual plaintiff/student's major life activities, such as breathing ("respiratory"), immunity, blood-related ("hemic") or circulatory systems
- Even if an individual's case of COVID-19 does not qualify as a disability, under Section 504 and the ADA, its manifestations and/or accompanying social isolation and distancing may impact a known or documented condition (impairment) that is a disability within the meaning of Section 504 and the ADA, for example:
 - A person with a disability on the basis of Chronic Obstructive Pulmonary Disease (COPD) may find their breathing even more impaired, so much so that, it now substantially limits their mobility, requiring new or additional accommodations <https://resphealth.org/coronavirus-effects-copd>
 - Persons with depression may find the depth of their depression greater or their cyclical depression triggered to the point where they can no longer complete academic assignments, requiring new or additional accommodations <https://www.nami.org/covid-19-guide>; <https://www.who.int/publications-detail/mental-health-and-psychosocial-considerations-during-the-covid-19-outbreak>

An *Interim* Best Practice Recommendation for Consideration by You and Your Counsel

Until more is known about COVID-19,
treat every student who has or had COVID-19,
symptomatic or asymptomatic ,
as an individual with a disability

See Law 360, Expert Analysis-Opinion: Gary Phelan, J.D., ***EEOC Should Classify COVID-19 As A Disability Under ADA*** <https://www.law360.com/articles/1280583/eec-should-classify-covid-19-as-a-disability-under-ada>

Foundation

- Section 504 and the ADA protect individuals from discrimination on the basis of disability who (1) have a physical or mental impairment that substantially limits one or more major life activities, (2) have a record of such an impairment, or (3) are regarded as having such an impairment [“the three prongs”]
 - In the short run, distinguishing prongs might not be the best use of resources in the midst of a crisis
- In the long run, these prongs may make a difference
 - Prong 1: accommodation
 - Prong 2: accommodation but likely of a lesser scope; primarily, focused on preventing the impairment from returning
 - Prong 3: no accommodation but entitled to protection for adverse treatment on the basis of disability such as exclusion for a program on the bases of bias, stereotype or myth
- With COVID, it could get complicated!

Impairments Are “Disorders”

- The effects of COVID-19 will likely meet at least one of several of the types of physical impairments under the ADA, which the EEOC regulations provide: "any physiological disorder ... affecting one or more body systems, such as respiratory ... cardio vascular, ... immune, circulatory, [or] hemic [systems]."
- For some individuals COVID-19 will also like meet the definition an impairment, such as a mental, emotional, or psychological disorder

Major Life Activities

- Major life activities ... include, but are not limited to, caring for oneself..., breathing, learning, ... concentrating, thinking, communicating, and working
- Major bodily functions ... including but not limited to, functions of the immune system, ... digestive, bowel, bladder, neurological, brain, respiratory, circulatory, ... and reproductive functions
 - Why we need to know more
- Many treating physicians are observing an impact on mental health including the emergence of anxiety, depression, and post-traumatic stress
 - With the exception of “anxiety,” these are psychological conditions that DOJ and the EEOC have determined are “virtually always” disabilities

Substantiality Limit (1)

- When determining whether an individual is substantially limited, the “condition, manner and [or] duration” of the impairment and its effect on the individual's performance of the major life activity should be considered
 - Under the ADAAA, impairments should be considered in their unmitigated state. 29 C.F.R. 1630.2(j)(1)(vi)
 - The determination as to whether a person with COVID-19 has a disability will need to be considered without the use of any kind of treatment
 - However, the adverse side effects of medication or other medical treatment should also be taken into consideration. 29 C.F.R. § 1630.2(j)(4)(ii)
 - For example, the drug Remdesivir, might cause liver damage in some patients Schmidt, Megan ***What Is Remdesivir, the First Drug That Treats Coronavirus***, [www.discovermagazine.com](https://www.discovermagazine.com/health/remdesivir-the-first-drug-that-treats-coronavirus) (May 6, 2020)

“Substantially Limit” (3)

- Following a “condition, manner, and [or] duration” analysis, as required by the ADA, it may be that the Federal agency guidance and the courts might draw a distinction between:
 - Asymptomatic individuals who never knew they had COVID until tested long after exposure, and
 - Asymptomatic individuals who knew they were COVID-positive only due to testing and quarantining themselves, and
 - Symptomatic individuals with mildly and temporarily impacted major life activities, e.g. a persistent cough or symptoms like an ordinary flu or cold, and
 - Symptomatic individuals with a substantially limiting, chronic and long-term, even life-long, impact on their major life activities, and
 - Symptomatic individuals requiring extensive hospitalization, intubation, ventilation with a medically- induced coma, other forms of life support, etc.
- But do you want to have to finely document and make these distinctions?
 - On an interim basis, maybe not
 - Long term you may want to as each prong has different entitlements

“Substantially Limits” and Asymptomatic Individuals

- The answer is not simply that this is a “transitory and minor” condition [temporary, short-term and minor] like the ordinary flu or a cold and hence not covered by ADA or Section 504
- The transitory and minor exception applies only to the “regarded as” prong [prong III] of the definition of disability
- As to prong III, something that is transitory “an impairment with an actual or expected duration of 6 months or less,” but it **will still be covered if it is not minor** in its impact on a major life activity
 - Under the ADAAA regulations, “[T]he duration of an impairment is only one factor in determining whether the impairment substantially limits a major life activity, and impairments that last only a short period of time may be covered if sufficiently severe”

More Than Six Months or If Not minor

- Asymptomatic individuals may:
 - May have impairments that substantially limit major life activities, though only discovered later
 - Due to quarantine requirements, asymptomatic individuals, at least those diagnosed, may be substantially impaired as to:
 - Learning
 - Working
 - Communicating
 - Reproduction (this is a historically important one)
 - The measure of whether something is minor or not is objective, in this case a question of medical expertise and science, not what a particular professor or dean may believe

Precedents: How much like Tuberculosis (1)?

- Tuberculosis (TB) precedent of value?:
 - ***School Bd. of Nassau Cty. v. Arline***
 - Section 504 of the Rehabilitation Act of 1973 (Rehab Act)
 - Even though Arline had recovered from her third bout of active TB and was still physically able to teach, her condition remained potentially contagious, at times, a direct threat to the health and safety of her students and colleagues at school – sometimes asymptomatic, sometimes active
 - An individual with contagious disease who is considered a “handicapped individual” is entitled to the protections of the Rehab Act as the Act protects those “regarded as” disabled, as well as those who are actually physically impaired, because “people’s fears and misconceptions about disability can be as limiting as an impairment itself.”

Precedents: How much like Tuberculosis (2)?

- Finding that the contagious effects of a disease cannot be distinguished from the disease's physical effects on a person, the court concluded that Arline was protected by the Rehab Act and could not be suspended or terminated --- “
 - ***Unless*** she was not otherwise qualified because, at the time in question, ***even with reasonable accommodation***, she represented a direct threat to the health and safety of others

Precedents: How Much Like AIDs (1)?

- ***Bragdon v. Abbott***, 524 U.S. 624 (1998)
 - 5-4 decision
 - Abbott, a woman, went to a dentist, Bragdon, D.M.D. to have a cavity filled
 - Dr. Bragdon refused to fill her cavity in his office because Ms. Abbott disclosed she had HIV
 - Dr. Bragdon offered to fill the cavity at a hospital for no extra dental fee, but Abbott would be responsible for the cost of the hospital's facilities
 - Abbott sued for a violation of Title III of the ADA
 - Dr. Bragdon argued that people with HIV who were not yet manifestly ill (asymptomatic) did not meet the ADA's definition of "disability."

Precedents: How Much Like AIDs (1)?

- **Even as asymptomatic**, HIV would qualify Abbott to claim protection under the ADA as even in its asymptomatic state, HIV substantially limits a major life activity
 - Reproduction qualifies as a major life activity under the Americans with **Disabilities** Act (ADA)
 - Because of the risk of infecting her partner and her child (even though Abbott never testified that she wanted a child)
 - This makes understanding the secondary impacts of COVID critically important!
- Is there a distinction in that asymptomatic COVID-19 might never become active?
 - Maybe, but even in its inactive state, isolation is still required, reproduction and consortium (sex) is unwise, and secondary effects are no yet known
- Is COVID-19 comparable to any other known diseases?
 - Will COVID-19 be like Polio, initially understood, if survived, to have no new active symptoms, but later revealed to adversely effect many additional bodily functions and major life activities (post polio syndrome) <https://www.ninds.nih.gov/Disorders/Patient-Caregiver-Education/Fact-Sheets/Post-Polio-Syndrome-Fact-Sheet>
 - Will COVID-19 turn out to be like the herpes simplex virus or the chicken pox virus reactivated as shingles? <https://www.webmd.com/vaccines/features/shingles-chickenpox#1>

Relationship Discrimination

- The ADA also prohibits employers from discriminating against "a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association" 42 U.S.C. § 12112(b)(4)
- While this provision primarily focuses on employees' association with family members with disabilities, the EEOC regulations provide that it extends to business, social or other relationships 29 C.F.R. § 1630.8
- This provision prevents purposeful discrimination but does not create a right to any form of accommodation!

Three More Thoughts on COVID-19

- 1) How much will the range of accommodations considered reasonable by OCR and the courts change?
 - As Wendy Harbor suggested in her excellent plenary presentation, *is this THE moment to push for universal design?*
 - Last year, I presented ***Gati v. Western Kentucky University***, 283 F. Supp. 3d 616 (W.D. Ky. 2017)
 - A veteran with injuries that prevented driving long distances wanted as an accommodation classes over ITV.
 - Though the district court in *Gati* did not dismiss the case without asking the University for its rationale, ultimately, the 6th Circuit, 762 F. App'x 246 (6th Cir. 2019) ruling for the University was persuaded by the following testimony:

“[Vice President for Student Affairs] Bailey [stated] that he would not be able to determine a student’s mastery of the course content via television. Further, [head of the Counseling Program Dr. William] Kline testified that ... ‘The faculty believed that the kinds of class interactions that students have with each other, the activities that are conducted in classes and the skills development procedures used in these classes could not be delivered via ITV.’ According to Kline, the classes at issue required students to ‘get in small groups and look at each other in the presence of one another’ so that they could have ‘direct counseling interactions ... and receive immediate feedback.’ Counseling students needed to learn about body language, posture, and communication style, which would be ‘very difficult to discern when somebody is sitting behind a table pushing a button on a microphone.”

Three More Thoughts

- If Gati had made his claim in May of 2020, do you think OCR or the courts would have been as convinced by the testimony and rationale of the Western Kentucky University administrators?
- How might your administrators testify as to the unique elements of in-classroom, live instruction, if students were suing for tuition rebates on the grounds that on-line education is not as effective, meaningful, or substantive as in-classroom education?

Three More Thoughts

- 2) Given the disproportionate impact of COVID-19 on communities of color, according everyone with COVID-19 the protections of Section 504 and the ADA is one way to extend an important set of legal protections to these communities
 - Nationally, African-American deaths from COVID-19 are nearly two times greater than would be expected based on their share of the population. In four states, the rate is three or more times greater
 - In 42 states plus Washington D.C., Hispanics/Latinos make up a greater share of confirmed cases than their share of the population -- in eight states, it's more than four times greater
 - White deaths from COVID-19 are lower than their share of the population in 37 states and the District of Columbia
 - <https://www.npr.org/sections/health-shots/2020/05/30/865413079/what-do-coronavirus-racial-disparities-look-like-state-by-state>
 - It may also help focus further the public's attention on healthcare inequities

One Last Thought: A “Third Rail”

- 3) What if a student is pretty much compelled to return to campus or is refused accommodation in the form of on-line/remote/ITV services and, as a consequence, the student becomes injured or dies?
 - Currently, this is largely a matter of State Law
- Will the cases that I presented to you last year on the “special relationship” between colleges and universities and their students apply?
 - ***Regents of University of California v. Superior Ct.***, __ P.3d.__, 2018 WL 1415703 (S.Ct. Cal., April 22, 2018) [duty to protect and warn students from violent students with psychological disabilities]
 - ***Nguyen v. Massachusetts Institute of Technology***, S.Ct. Mass., SJC-12329 (May 7, 2018) [duty to intervene with a student to prevent suicide]
 - Might counsel for such a student argue that, now, the duty to protect students from injury is even greater as the coercive power, authority and discretion of the post-secondary institution is even greater?

Topic 2: Since We Are All On-Line

“Technology advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some successful employment. Such advances also may enable attainment of these goals without imposing undue financial and administrative burdens upon the State.” ***Southeastern Community College v. Davis, 1979*** (442 US 397, 413-14)

Communication with Individuals with Disabilities that is as Effective as it is with Others ©

Two Cases and Remedial Precedents for You, Your Campus and Your Counsel to follow:

- ***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>
 - For this presentation, the focus is limited to the remedial order in ***Payan*** and the court approved settlement in the two ***NAD*** cases
 - The claims, facts, and procedural histories of these matters have been presented in previous AHEAD webinars and at AHEAD plenary events

My *Opinion* Based on *Payan and Mason v. LACCD* as well as the *NAD v. Harvard and MIT* Cases (1)

- It would be wise to implement a procedure similar to the ones adopted by Harvard, MIT and the LACCD
 - Consult with your counsel
 - With regard to all materials, posted on-line by or for your university or college, implement the steps necessary to achieve compliance with WCAG 2.1 Level AA
 - A review of the last 10 OCR web access letters, December 2019 to March 2020, as a remedy require WCAG 2.1 Level AA compliance Axelrod, Jamie
 - *But see* the United States Web Accessibility Initiative (W3C) <https://www.w3.org/WAI/policies/united-states/> and the California Accessibility Guidelines <https://www.ca.gov/accessibility/> which continue to use WCAG 2 Level AA See **DSPS Solutions** <http://www.dspssolutions.org/resources>
 - Note that a standard by which compliance is measured and a standard for implementation of a remedy are not necessarily the same, the remedial standard generally being the more rigorous of the two
- It would be wise to caption all video and audio materials posted on a website of the college or university, produced by or for your college or university, including secondary websites like YouTube, Vimeo, and Sound Cloud channels of your college or university

My *Opinion* Based on *Payan and Mason v. LACCD* as well as *NAD v. Harvard and MIT* Cases (2)

- At a minimum, except where the content is solely an imbedded link to material [Communications Decency Act] not produced by or for your institution:
 - Caption any video or audio that is on a public-facing website operated by or for the college or university; such as, your welcome pages, admissions sites, class registration sites, student life sites, health-care sites, and public events like graduation, etc.
 - Caption all audio and video content of all classes that are open to the public, where you don't have accurate knowledge of who is attending the class and who might need an accommodation in the form of captioning, as may happen with regard to MOOCS
 - IF [only if], you can arrange to add captioning very promptly, for example for a student who registers late, caption those closed classes where you have students who require captioning as an accommodation but not necessarily those classes where you have no reason to believe someone is registered who requires captioning
 - If you cannot quickly arrange to add captioning services to a class, when the need arises, caption all on-line closed classes as well
 - Note that state law, your school's policies, court orders or settlements pertaining to your school may require more or less than is contained in this recommendation

Topic 3: Important Updates to Two Cases:
A.L. by and through D.L. v. Disney Parks and Resorts
and
Guerra v. West Los Angeles College©

If You Only Read One Decision This Year:

A.L. by and through D.L. v. Walt Disney Parks and Resorts US, Inc., on remand from the ***Third Circuit***, 900 F3d. 1270 (August 17, 2018), back to the District Court, 2020 WL 3415008 (June 22, 2020 M.D. Florida)

The Plaintiff, an adult with autism, lost, but the decision is a teachable moment as it explains many key terms, including: “necessary”, “reasonable” and “fundamental alteration”

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

- Plaintiffs claim that Disney's Disability Access Service Card (DAS) program, which replaced the Guest Assistance Card (GAC) does not adequately accommodate individuals with Autism Spectrum Disorder (autism) as they may be required to wait more than 20 to 30 minutes to ride or re-ride a Disney attraction or move through the attractions in the order they desire
 - The cancelled GAC program gave it holders and their families, unlimited, immediate access to expedited, Fast Pass lines for all rides – lines usually 20 minutes or less in length
 - Basically, the new DAS program gives holders, and their companions, immediate access to three expedited Fast Pass+ lines and at the discretion of Disney Guest Services two more "readmission" passes for a total of five expedited-entrance rides; good for even the most popular rides
 - DL an autism advocate, on behalf of her adult son, AL, wanted as a reasonable accommodation ten passes, so that her son and his family might be able to ride somewhere between 13 to 19 of his favorite rides in the order he desired in a single day's visit to the park

A.L. by and through D.L. v. Walt Disney Parks and Resorts US, Inc. – Back to the District Court (1)

- 2020 WL 3415008 (M.D. Florida June 22, 2020), *on remand* from the 11th Circuit, 900 F.3d 1270 (August 17, 2018)
- The district court assigned burdens of proof to the parties in accord with well-established case law:
 - The plaintiff, A.L., bears the initial burden of establishing that the desired accommodation is reasonable and necessary
 - The defendant, Disney, bears the burden of showing that the desired accommodation would fundamentally alter the nature of the program
 - ***J.D. by Doherty v. Colonial Williamsburg***, 925 F.3d 663, 671(4th Cir. 2019)

A.L. by and through D.L. v. Walt Disney Parks and Resorts US, Inc. – Back to the District Court (2)

- Following this set of judicial rules, the district court resoundingly found for Walt Disney Parks and Resorts
 - To begin, in a battle of experts, the court concluded that the evidence was mixed as to whether, the desired accommodation, was **necessary** for A.L (and similarly situated individuals with autism) to have a “like experience” and “equal enjoyment” of Disneyworld, Orlando
 - Individuals who supposedly “would melt down” if required to wait more than 15-20 minutes, sat in planes, buses, and cars for much longer times
 - Disney’s experts suggested that, learning to wait a little might be good for A.L. and that many rewards to reinforce this message were available at the Park, like shows, food, as well as meeting and greeting characters
 - In this regard, the court seemed somewhat condescending to the parents of the individuals with autism

A.L. by and through D.L. v. Walt Disney Parks and Resorts US, Inc. – Back to the District Court (3)

- Through the extensive use of data, Disney presented evidence that to return to a system like the GAC system would **not** be **reasonable**, very adversely impacting the opportunity for nondisabled guests to ride more than a small number of rides, particularly the newest most popular rides
 - For example, according to Disney:
 - “[A] 1 % increase in daily DAS [pass use] would cause the standby wait time at Seven Dwarfs Mine train to increase by nearly an hour, from 69 minutes to 124 minutes”
 - When Toy Story Mania was the most popular new ride, the typical GAC pass user could ride it three times in a day, the nondisabled individual had a .3% chance of riding it once
 - This statistical assertion was reinforced by historical experiences that suggest that there would be a high likelihood of fraudulent use of a GAC-like system
 - The GAC system had six levels, at the end of the program, 99% of GAC users claimed they needed level 6, generally reserved for terminally ill children
 - At the end, more people had GAC passes than there were people in the longer-waiting standby lines
 - Ads were placed in the newspaper offering to provide Park tours using GAC passes

A.L. by and through D.L. v. Walt Disney Parks and Resorts US, Inc. – Back to the District Court (4)

- These circumstances would provide riders with disabilities (and cheaters) with an advantage beyond ***equal use and enjoyment***, as they would get to ride many more rides than participants without disabilities
- Again, using extensive data, Disney demonstrated that this adverse impact on nondisabled Park visitors would do serious injury to its business model, with many participants, becoming “dissatisfied guests,” deciding to not to return, or stay again at a Disney resort, dine or buy souvenirs
 - Disney depends highly on repeat business
 - Disney knows that it is access to its newer, more popular rides that is the key to new and repeat business
 - Thus, even if the proposed accommodation were ***necessary*** for A.L. to experience equal enjoyment at Walt Disneyworld, the proposed accommodation would constitute a ***fundamental alteration*** beyond the scope of Disney’s duty to accommodate A.L.

Lessons Learned from *A.L. v. Disney Parks and Resorts* (1)

- The final opinion suggests that a proposed accommodation/modification can be established as “**unreasonable**” on three bases:
 - 1) It changes the experience of everyone not just the individuals who seek accommodations
 - By analogy to ***PGA v. Martin***, the court asked, in a game where the fundamental activity is “shot-making” is the accommodation requested by A.L. more like an electric cart to take you from shot-making location to shot-making location, or more like enlarging the circumference all of the putting cups?

Lessons Learned from *A.L. v. Disney Parks and Resorts* (2)

- 2) The proposed accommodation is injurious to the ***reasonable expectations*** of nondisabled individuals
 - Disney's evidence on the impact on other Park participants
 - See ***US Airways, Inc. v. Barnett***, 535 US 391 (2002)
 - A higher ed. analogy about a class on coastal ecology
- 3) The proposed accommodation constitutes a ***fundamental alteration***
 - In the commercial setting, a ***fundamental alteration*** includes a proposed accommodation that reliable evidence, including hard data and prior experience, establishes would likely materially harm the business model of the public accommodation (Disney Corp.)

Lessons Learned from *A.L. v. Disney Parks and Resorts* (3)

- It is a wise accommodation strategy to “give what you can, deny what you must”
 - Disney did provide a valuable form of accommodation/modification
 - Expedited access to 3 – 5 rides per day with no penalty for showing up late
 - No ban on using all the passes to repeatedly ride the same ride
 - The DAS card still advantaged its users: “The testers with DAS [cards] experienced, on average, 45% more attractions than those without DAS, and waited in queues for half as much time as those without DAS cards”
 - Training by D.L. for Disney Park employees on patrons with cognitive disabilities
 - Affirmative outreach to D.L., as an autism advocate, to get her feedback on the DAS system
 - On-line information on how to make the most of the DAS system for persons with cognitive disabilities
 - Assistance on efficient route planning by guest services
- With these accommodations, Disney did not look to the court like one of its ogre characters

Lessons Learned from *A.L. v. Disney Parks and Resorts* (4)

- Disney was willing to go to the mat to oppose having to provide an accommodation/modification that reliable historical and statistical evidence established would hurt its business model
- Disney's currency is customer satisfaction; what is the currency of higher ed?:
 - Enrollment profiles and numbers?
 - Graduation rates?
 - Academic integrity?
- Would your school be able to collect and analyze that level of data?
- Would you even want to?
- Could we all be making better use of data both to support the need for certain accommodations and the denial of others?

Guerra v. West LA College

When is a program “readily accessible “in its entirety”? Or not?

Is an on-campus accessible shuttle service
a required form of accommodation to achieve this goal?

Foundation

- Under the regulations implementing the 2010 Accessible Design Standards at 28 C.F.R. section § 35.150, absent circumstances that qualify as “new construction” or an “alteration,” (post 1992), the responsibility of public entities with regard to “existing facilities” is to operate each program “so that ... the program, ***when viewed in it entirely*** [or as a whole], is readily accessible to ... individuals with disabilities; not “necessarily requir[ing] [that] each existing facilit[y] is accessible [emphasis and bracketed language added]
- This regulation applies when the problem is that an inaccessible facility or “path of travel” makes it difficult or impossible for a student to get access to a program or class in that facility
 - For example, a person with a mobility impairment, needs to take an English class and all sections are offered only in an inaccessible building, not altered since 1965

More Foundation: A Problematic Precedent - *Kirola v. City of San Francisco*

- 860 F.3d 1164 (9th Cir. 2017)
- Presented at AHEAD and CAPED two years ago
- In ***Kirola*** the Federal district court concluded that programmatic inaccessibility, ***as a whole***, was not established on the basis of:
 - Uneven sidewalks, cracked pavement and potholes
 - 1,358 allegedly inaccessible curb ramps in a city of 7,200 intersections
 - The inaccessibility of some portions of some city parks—13 parks out of 220
 - Some of the city’s pools were inaccessible while others were accessible
 - Importantly, no class member testified that there were locations in the City that such class member could not reach because of access barriers and the City operates a website that gives information on the accessibility of its various parks, information that can help disabled persons plan which parks to visit
- The judgment of the district court was affirmed by the Ninth Circuit raising the question what is or is not “good enough” to constitute ***access as a whole*** to programs located in public facilities with access barriers

In the Ninth Circuit, a Flexible View of the Meaning of “Program as a Whole”

- “Kirola argues that certain parks offer unique benefits, and that when those parks are inaccessible, the existence of other, accessible parks does not provide an adequate substitute. For example, she asserts that Golden Gate Park provides inaccessible benefits such as a Model Yacht Clubhouse, a Rose Garden, and a Shakespeare Garden, among other amenities, that are unique to Golden Gate Park.”
- “But program access does not operate at such a narrow level of review... There may be something unique about every park and every facility. But 28 C.F.R. § 35.150 requires only that the ***program as a whole be accessible***, not that all access barriers—and not even all of those at the most iconic locations—be remedied.” [emphasis added]

Impact of the Decision in *Kirola*:

Guerra v. West L.A. College (WLAC)⁽¹⁾

- The decision of the Federal district court in ***Guerra***, in favor of the college, summarized below, has been reversed!
- ***Guerra v. W. Los Angeles Coll.***, No. CV 16-6796-MWF (KSX), 2018 WL 4026452 (C.D. Cal. Aug. 20, 2018),
 - Three students with substantial mobility impairments challenged under Section 504 and Title II of the ADA the cessation of an accessible on-campus shuttle service at West LA College (Community College for Culver City, California; 16-19,000 students)
 - The students argued that absent the shuttle service they were denied access to programs and classes in many buildings spread across the 70 acre campus (even if the buildings, themselves, were accessible)

Impact of the Decision in *Kirola*: *Guerra v. West L.A. College* ⁽²⁾

- The district court found for the college:
 - No regulation or court precedent explicitly provides that there is a duty to provide students with disabilities with paratransit services
 - This is accurate unless the campus has a transit system accessible only to person without disabilities
 - Following the precedent and reasoning of *Kirola*, the program of West LA College is “accessible in its entirety”:
 - The City and County of LA provides bus and paratransit services that place students close to where they need to attend class, despite the limitations and inconveniences of buses and para-services, it’s good enough
 - Several plaintiffs could use a combination of driving and motorized scooters available through Voc. Rehab but have declined to do so
 - “The Court rejects Plaintiffs’ arguments that the LA County bus and Access paratransit services are not viable solutions because Plaintiffs find them to be inconvenient or otherwise *less than ideal*”

Reversal by the Ninth Circuit: Existing Public Paratransit Does Not Let WLAC Off the Hook

- No. 18-56236, 2020 U.S. App. LEXIS 16011 (9th Cir. May 19, 2020)
- Finding “markedly severe deprivations” for the mobility impaired Plaintiffs, the 9th Circuit stated, in pertinent part:
 - “Guerra and Chrystal have not had meaningful access to WLAC’s programs and services since the shuttle service ended. The record belies Defendants’ [WLAC] assertion that Guerra and Chrystal could achieve that access by taking the Los Angeles paratransit service from their homes to WLAC, and then traversing the campus using motorized scooters or on foot.”
 - “First, the paratransit service is not a viable means to getting to WLAC for those two plaintiffs. The evidence shows that the service is unpredictable and time-consuming because it gives riders an imprecise pick-up window and frequently picks up and drops off other riders along the route. The commute times for Guerra and Chrystal would therefore increase dramatically and they would risk missing portions of class. Moreover, because rides must be reserved at least a day in advance, Guerra and Chrystal would not have the flexibility to adjust their schedules—for example, they would not be able to stay late if a class runs long unexpectedly or to participate in impromptu school activities.”

Not Good Enough to Constitute Program as a Whole Access

- “Requiring students with disabilities to access their education in this way “disproportionately burdens [them] because of their unique needs.”
- “Second, neither Guerra nor Chrystal can presently rely on motorized scooters to get around campus.”
- “Third, the record is clear that Guerra and Chrystal cannot currently access all relevant parts of the WLAC campus by walking.”
- “Because we conclude that Guerra and Chrystal have been denied meaningful access to WLAC’s programs and services, we reverse the judgment as to those two Plaintiffs and remand for further proceedings consistent with this disposition.”

Lessons Learned from *Kirola and Guerra* (1)

- ***Kirola v. San Francisco*** is a precedent dangerous to the rights of persons with mobility-impairments and needs to be confined to path of travel and facility access-related cases only
 - For example, in ***Payan and Mason v. Los Angeles Community College District***, discussed above, the district court rejected use of ***Kirola*** by the LACCD on the grounds that it was not pertinent to questions of website access but **only** to matters of facilities access
- As case precedents develop, we will learn where is the distinguishing point between permissible “less than ideal” circumstances (***Guerra*** district court) and impermissible “markedly severe deprivations” (***Guerra*** 9th Circuit court) with regard to program access litigation

Lessons Learned from *Kirola and Guerra* (2)

- I don't read ***Guerra*** as placing a responsibility on a college or university to provide accessible transit services to and from campus, unless done so for students without disabilities
- Does ***Guerra v. WLAC*** mean that Section 504 and the ADA require on-campus paratransit shuttle services?
 - ***Guerra*** provides you with a great excuse to provide such services
 - ***Guerra*** is one decision, unreported, by a Circuit court marginalized by some other more conservative circuits; albeit, in the 9th Circuit, the decision is authoritative guidance
 - If you have a campus as large as WLAC, or on difficult terrain, or one poorly served by public transit, ***Guerra*** is a warning precedent that your campus should seriously consider providing an on-campus paratransit shuttle system