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A Virtual Event
July 6-24, 2020

## July 23, 2020 AHEAD Plenary Session:

# Individualization, The Interactive Process and Fundamental Alteration

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# Presenters

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Colker and Grossman, ***The Law of Disability Discrimination For Higher Ed. Professionals***, Carolina Academic Press

# Caveat

These materials are provided for informational purposes only and are not to be construed as legal advice. You should seek independent or house 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 your college's legal counsel prior to implementation.

# USE AND PERMISSIONS

# Session Evaluation

- Link to Session Evaluation Form
  tinyurl.com/AHEAD2020-SessionEval
- Your feedback helps shape future programming.
- Thank you for attending!

# Presentation Objective

- Are these fundamental alterations?:
  - A student who has very limited use of his/her hands asks to take a written test rather than demonstrate the ability to properly insert a needle into a vein
  - A student with severe anxiety disorder wants to tape his/her presentations for a speech class with no audience during the recording
  - A student with PTSD that, clearly impairs short term memory, wants to take all tests open-note
- Our objective is to give you procedural tools and substantive knowledge to answer these questions yourselves and do so in a way that will withstand scrutiny by OCR and the courts

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# A): Fundamental Alteration as Part of the Litigation Process

# Fundamental Alteration in a Procedural Sense (1)

- In litigation, generally, there is an "order and allocation of burdens of proof"
- ***In cases pertaining to reasonable accommodation***
  - The student must establish that he/she meets prong I or prong II of the definition of disability; and,
  - With the benefit of an identifiable accommodation, one that is reasonable, one that the student requested, the student would be qualified to participate in the program of instruction, but the identified accommodation was denied or promised but not received

# Fundamental Alteration in a Procedural Sense(2)

- If the student cannot meet his/her initial burden, the court likely will issue summary judgement in the college's favor
- If the student can meet his/her initial burden, the college or university must then meet its burdens:
  - The student is not disabled
  - The student never requested an accommodation
  - The only accommodation suggested by the student or otherwise logically evident would not be reasonable as it:
    - ***Is a fundamental alteration***
    - Is an undue burden (usually not successful)
    - Would represent a direct threat to the health and safety of others (successful but only if properly applied)

# Fundamental Alteration in a Procedural Sense (3)

- What if the student never requested an accommodation?
  - The student must persuasively argue that going forward if a particular reasonable accommodation were to be provided, it is likely or logical (not merely speculatively promising) that the student would be qualified to participate in the program of instruction
    - OCR and many courts will not consider this prospective argument, unless:
      - The college hid the ball about how to request an accommodation
      - Faculty told the student, "I'll take care of it" (detrimental reliance)
      - The college was on notice from the student but ***failed to engage in the interactive process*** with the student in order to identify a feasible and effective reasonable accommodation
      - An identified accommodation was denied without engaging in a proper "***diligent"*** consideration process, as first identified in ***Wynne v. Tufts I & II***, respectively, 932 F.2d 19 (1st Cir. 1991); 976 F.2d 791 (1st Cir. 1992)

## Fundamental Alteration in a Procedural Sense (4)

- Thus, in the procedural sense, "fundamental alteration" is an affirmative defense that colleges may use to establish that a plaintiff is not a "qualified student with a disability" because any necessary, proposed or denied accommodation would entail a fundamental alteration
- Thus, in general, fundamental alteration is the single best defensive tool available to colleges in accommodation cases
- Consequently, getting deference from OCR or the courts that a particular accommodation entails a fundamental is a matter of great consequence

**But, this deference must be earned!**

# Fundamental Alteration in a Procedural Sense (5)

- Academic institutions, making academic decisions ***within their areas of expertise,*** have received substantial deference from the courts and OCR
- In case of dispute, this deference is very valuable, particularly as to questions of fundamental alternation
  - Whether your school gets deference may easily make the difference between losing in litigation or earning summary judgement in your favor early in litigation

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# B): Fundamental Alteration in Substance

We will get to the process that earns deference, shortly

But first we need to explore "fundamental alteration" in substance

# Fundamental Alteration in Substance (1)

- A "fundamental alteration" is a change that is so significant that it alters the essential nature of a course or a program of instruction.
- From ***Southeastern Community College v. Davis*** (S.Ct. 1979), a case about a deaf woman who wanted to get advanced education in nursing, we can infer that a fundamental alteration ***may be***:
  - Removing or waiving acquisition of a skill that is considered essential
  - Removing or waiving acquisition of a skill that is directly related to the health and safety of others
  - Lowering an academic standard
- From ***Southeastern Community College v. Davis*** we can infer that a fundamental alteration ***is not***:
  - Mere reliance upon tradition or existing rules may not be a sufficient justification for refusing to implement a requested accommodation (*See* ***PGA v. Martin, S.Ct. 2001)***
  - A pretext (excuse) for discrimination
  - The absence of diligent consideration of the question including consulting with other faculty, teaching institutions or licensing agencies
  - A failure to consider the impact of technological advances (e.g., changes in stethoscopes)

# Fundamental Alteration in Substance (2)

- From ***U.S. Airways, Inc. v. Barnett***, 535 US 391 (2002)
  - An employment case, decided by the Supreme Court, concerning how to harmonize seniority rights of employees and the right of an employee with a disability reasonable accommodation in the form of reassignment to a vacant employment position
  - The proposed accommodation is injurious to the ***reasonable expectations*** of nondisabled individuals
  - A higher ed. analogy about a class on coastal ecology
  - This is not authority for the argument that, "extra-time would be unfair to others"

# Fundamental Alteration in Substance (3)

- From OCR Section 504 regulation 104.44(a & b) we know that in licensing programs, a fundamental alteration includes excusing or waiving requirements directly related to licensing requirements
- From the same OCR regulation, we know that generally a fundamental alteration would include waiver of completion to degree requirements or "adaptation of the manner in which specific courses are conducted"
  - I *think* this means:
    - College doesn't have to waive any core or essential course or skill acquisition requirements e.g., acquiring a second language in an international business degree program
    - A college is not required to convert a traditional college-level class to one for persons with impaired intellectual skills e.g., substituting didactic credits for clinical credits in an MSW program

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# C): The Magic Sauce for Earning Deference and Making Good Accommodation Decisions

## *The "Wynne v. Tufts Process"*
## *OCR and Court Decisions that Follow Wynne*

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# *Wynne v. Tufts University Medical Center I & II*

- Respectively, 932 F.2d 19 (1st Cir. 1991); 976 F.2d 791 (1st Cir. 1992)
- About Mr. Wynne
  - A very spotty academic record
  - Difficulty with multiple choice exams
    - Good in analysis
    - Good in practicum
    - Weak in retrieval
- Thanks to help from Tufts, Wynne discovers that he has a learning disability which may explain his difficulties on multiple choice exams
- Tufts denies his request to take all exams in an essay format

# The Dilemma for the Court

- Tufts argued, based on First Amendment precedents, that the court must defer to academic decision-making by Tufts, including accommodation decisions
- Wynne argues that the court must not accept the assertions of Tufts as conclusive truths, as that would render the requirements of Section 504 meaningless

# The Key Solution

"[D]eference is earned through adherence to a 'diligent' consideration of the request and 'alternative means' to achieving the fundamental program objective, resulting in a "rationally justifiable conclusion."

***Wynne v. Tufts University; Guckenberger v. Boston University; Zukle v. Regents of Univ. of Cal.; Wong v. Regents of Univ. of Cal.; and more court decisions***
***See also, Southeastern v. Davis***

# *Wynne v. Tufts University [round] I*

- "[T]hus far Tufts obligation [is to demonstrate] that no reasonable way existed to accommodate Wynne's inability to perform adequately on written multiple-choice examinations was a reasoned, professional academic judgment, not a mere ***ipse dixit***."

  [an arbitrary and unsupported assertion; the only evidence is the statement itself; maybe something often said but not inherently or necessarily true]
- A three paragraph affidavit from the Dean to support dismissal of Wynne's claims did not cut it
  - Conclusory
  - No evidence of consideration of alternatives
  - The rationale did not address the specific circumstances that the school should have considered as to Wynne's particular situation
    - Not interactive or individualized [my words]

# *Wynne v. Tufts University I*

- The court denies a motion for summary judgement and directs Tufts to go back and reconsider Wynne's request through a specific process
- Factors for the process the court wants:
  - Relevant officials
  - Identify the objective of the requirement
  - Consider the requested accommodation in light of those objectives
  - Consider alternative means
    - Cost
    - Effect on the academic program
    - Lowers or fundamentally alters academic standards?
- Do the above and get "qualified immunity"
  - In other words, a rational explanation resulting from the above process, free from pretext, will then be accepted as enough to get a dismissal of Wynne's claims of disability discrimination

# *Wynne v. Tufts University [round] II*

- Second time before the court, Tufts gets academic deference and its motion to dismiss prevails
  - Tufts has now demonstrated that it reached "a rationally justifiable conclusion" that granting the requested accommodation would lower academic standards, and that there is no evidence from the plaintiff that this reasoning was a pretext from discrimination, or asserted in bad faith
  - Tufts has "demystified" its rationale.
  - Its rationale is now "plausible," but "not necessarily ironclad."
    - The court is not requiring Tufts to make an overwhelmingly convincing case; this is the advantage that comes from having earned the deference of the court to Tuft's decision-making
- See also, ***Guckenburger v. Boston University*** II, 8 F. Supp. 2d 82 (D. Mass1998)

# "Due Diligence"

**Some courts have applied the *Wynne v. Tufts* process, or at least its standard of a *due diligence process* to a wide range of qualification-related questions, including in a series of complex medical school cases as well as fundamental alteration questions**

- *E.g.,* ***Wong v. Regents of Univ. of Cal.*** 192 F.3d 807 (9th Cir. 1999) [***Wong*** I – [*due diligence not demonstrated*]; compare, ***Zukle v. Regents of Univ. of California***, 166 F.3d 1041 (9th Cir. 1999) [*due diligence demonstrated*]; ***Featherstone v. Pac. N.W. Univ. of Health Sciences,*** D.C.E.D. Wash., No. 1:CV-14-3084-SMJ (2014); unreported, 2014 WL 3640803 [no due diligence by the University results in an order against]
- *See also,* ***Bied v. Cty. of Rensselaer, Hudson Valley Community College,*** No. 115CV1011TJMDEP, 2018 WL 1628831 (N.D.N.Y. Mar. 30, 2018) [process for requesting exam accommodations]; ***Gati v. Western Kentucky University***, ***et al.***, No. 3:14-CV-544-DJH-CHL, 2017 WL 4288749 (W.D. Ky. Sept. 27, 2017)[scope of accommodation for student with disability who could not travel to main brick and mortar campus]

# Individualize, Interact, Follow *Wynne*
# Some of the OCR Precedents

- OCR Letters to ***Tulsa Community College***, 07-09-2064 (June 2011); ***Wright State College***, 15-13-2011 (October 2013); ***California State University, Dominquez Hills***, 09-15-2463 (December 2016); ***Gateway Community College***, 08-16-2199 (February 2017); ***University of North Carolina***, 11-17-2001 (April 2017) ***Irvine Valley College***, 09-17-2090 (April 2017); ***Rio Salado College, 08-16-2082*** (April 2017); ***Central Washington University***, 10-16-2203 (July 2017); ***Surry Community College, 11-16-2165 (December 2017)***

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# Mr. Nima PAHLAVAN, Plaintiff,
# v.
# DREXEL UNIVERSITY COLLEGE OF MEDICINE, Defendant.
# CIVIL ACTION No. 16-1715

# (E.D. Penn. 2019)

# Basic Overview

- Medical school program: 2 years “didactic” followed by 2 years “clinical”
- Student with AD/HD
- Requested accommodations during first term: Granted
- Requested additional accommodations during his tenure:
  - Some granted formally through ODS
  - Some granted informally through the medical school

# Basic Overview

- Failed 3 clinical rotations during third year which triggering review by the "Clinical Promotion Committee"
- Committee reviewed entire record during the program and decided to dismiss him.
- Pahlavan appealed his dismissal and requested a 1 year leave of absence
  - During the leave he was provided one on one "clinical skills refresher" with the Associate Dean
- After year of leave
  - Passed a "fitness for duty" evaluation (Title I standard?)
  - Evaluator expressed doubts about his ability to succeed but cleared him anyway
    - "he is quite indecisive and that trait is inimical to success as a medical student or doctor"
-

# Basic Overview

- Additional accommodations for return to clinicals (informal):
  - Template for presenting patient evaluations
  - One on one mentor
- Additional Accommodations from ODR (formal):
  - Double time on exams
  - Alternative Format Materials
  - Clinicals in Philadelphia area so he could continue treatment for his AD/HD
- Reviewed with him the conditions of return
  - 1 strike and your out

# Basic Overview

- Redux of 3rd year Clinicals:
  - Passed Surgery
  - Failed Internal Medicine for failure to demonstrate clinical skills- Appealed grade
  - During appeal he failed OB/GYN
- Appeal of Internal Medical Grade:
  - Went through 3 levels of appeal
    - Clerkship director
    - Chair of Department
    - Vice-Dean's designee
- Lost all 3 levels of appeal:
  - Upon the court's review Drexel appears to concede that ***none of the appeals considered his disability or accommodations***

# Basic Overview

- Clinical Promotion Committee dismisses him again based on the two clinical failures
- He appealed in writing but never mentioned disability or accommodations
- Appealed in person before the committee but was again denied and again did not mention disability or accommodations
- Appealed to the Dean but was again denied-that was the final appeal

# Court's Analysis: Primary dispute

- Was he "qualified," with or without reasonable accommodation, to meet the program's essential standards?
  - When did the alleged discrimination take place?
  - Is the court compelled to defer to Drexel's assessment of his qualification?
  - If the court does not give deference to Drexel, it will need to review the record and make its own determination of qualification.

# Court's Analysis

- When?
  - During his last set of clinical rotations
- Deference?
  - Did the institution seek suitable means of reasonably accommodating him?
  - Did they submit a factual record of undertaking that obligation "*conscientiously*"?
  - Did that lead to a "rationally justifiable conclusion"?

# Court's Analysis

## No Deference

Drexel had apparently conceded that in two of the three levels of the grade appeal and in the dismissal process, *his disability and accommodations had not been considered*.

# Court's Review of Qualification

- Can the plaintiff establish that there were reasonable accommodations that would have allowed him to meet the program standards?
  - Program literature states the standards
  - Drexel provided numerous formal and informal accommodations
  - Even with those accommodations he continued to fail his clinical assignments

# Court's Review of Qualification

- Plaintiff put forth a list of accommodations that he believed would permit him to meet program standards if provided
  - Court review finds the proposals speculative
    - There was no "guarantee" that they would be effective

(Is the standard "provide an opportunity to benefit" or "guaranteed to be effective"?)

# Outcome

- Given the “plethora” of accommodations provided, the amount of due process afforded and the failure to articulate additional accommodations that would “ensure” his ability to meet the program standards:
  - Court finds he is not “otherwise qualified”
  - Grant’s summary judgment to Drexel

# Lessons Learned

- When you “give what you can”, it goes a long way towards demonstrating that you tried to assist the student and that a decision to dismiss them is not a mere pretext for discrimination.
- If you are aware of a student’s disability status, be sure it is part of the consideration during appeals and other official processes which effect the student’s enrollment status. Not doing so can cost you the deference of the court.

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# GRACE GILFILLAN, Plaintiff,
# v.
# BRADLEY UNIVERSITY, Defendant.
# Case No. 18-1297-MMM

**Filed 05/19/2020**
**(C.D. Ill. 202)**

# Basic Overview

- Doctor of Physical Therapy program
- 3 year pre-planned curriculum
  - Cohort model
  - Autonomous practitioner
  - No grade lower than a C or you are dismissed

# Basic Overview

- Gilfillan is a Student with Major Depressive Disorder
- Throughout her tenure she requested and was approved for numerous accommodations including:
  - Audio recording
  - Extra time on exams
  - Distraction reduced environment
  - Extensions on assignments (“if possible”)
  - Requested “Incompletes” in 4 courses due to disability
  - Alternative Format Exams (text to speech)

# Basic Overview

- Throughout program, Gilfillan had difficulty
  - Incompletes
  - In clinicals:
    - Unprepared
    - Poor evaluation and treatment
    - Not independent
    - Frequently late
- Fall 2017
  - Dismissed at the end of the term
    - 5 grades of C and one D
    - Unsuccessful didactic performance
    - Ongoing non-academic issues

# Court's Analysis: Primary dispute

- Was Gilfillan otherwise qualified?
- Qualified means-
  - A student with a disability who:
    - With or without reasonable accommodations meets the essential academic and technical standards for admission or continuing participation in the program

# Court's Analysis

- Bradley says:
  - Student was provided all of the reasonable accommodations she was entitled to
  - Even with these, she failed to meet the standards
- Gilfillan says:
  - I can only meet the standards with accommodation
  - I would have met them had I been provided:
    - Note taking
    - Extended time on exams
    - Ability to complete coursework after the term (Incompletes)
    - Academic Coaching
    - Extended time to complete the program

# Court's Analysis

- "Record is replete with examples of":
  - Extensions of time on assignments
  - Ability to start coursework early (where did that come from???)
  - Change in academic advisor
  - Recording lectures
  - Provision of "Incompletes" in 4 courses
  - Many opportunities to improve academic and non-academic performance
- Bradley's decision to dismiss came:
  - 18 months after provision of accommodations "to help her succeed" (standard???)
  - Standards were clearly stated and reinforced

# Outcome

- “Plaintiff fails to demonstrate-by a large margin-she was otherwise qualified to maintain enrollment in the program, even with the accommodations she was granted.”

# Takeaways

- It pays to show that you consistently worked with the student and took appropriate steps throughout their tenure to search for accommodations and supports.

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# *R.W. v. Columbia Basin Coll., Lee Thorton in his official and Individual Capacities and* RALPH REAGAN, in his official and individual capacities (E.D. Wash. 2019)

**Is the Student with a Disability (R.W.)**
**Viewed as Not a Qualified Student**
**Because**
**He is a Direct Threat to the Health and Safety of Others**
**or**
**Because He Makes Faculty Feel Uncomfortable?**

# Preface

- NO: 4:18-CV-5089-RMP, E.D. Wash (October 4, 2019) https://casetext.com/case/rw-v-columbia-basin-coll; petition to appeal to the 9th Circuit denied, 2020 U.S. App. LEXIS 2750 (9th Cir. Jan. 28, 2020)
- The decision of the Federal district court is unreported and cannot be located in WestLaw or Lexis Nexis
- This case nonetheless has value as it explores and addresses many of the most daunting aspects of the application of the direct threat affirmative defense to the question of whether a post-secondary student with a mental health disability is an otherwise qualified student with a disability

# 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 own 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 named 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 the three professors were warned about R.W. by campus security
  - R.W. never communicated these feelings or fantasies to any of the faculty members who were the object of his ideation
- **The faculty were told that RW was in the hospital and not an "immediate threat" but they stated that what they were told "made them afraid" to have R.W. in their classes**

# Factual Background (3)

- While he 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)
- R.W. wants his trespass order lifted and to be returned to the nursing program without having to repeat any courses

# 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 was **denied** as the key question remained was 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 QID
  - ***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)(A)

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

- R.W. can point to the fact that:
  - He made no threats to anyone at CBC
  - R.W. 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 his violent 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."***

# Lessons Learned: Direct Threat Analysis Must Include (1)

- Analysis of whether a student with a mental health (or other) disability represents a direct threat to the health and safety of others must include:
  - Consideration of reasonable accommodations that are likely to reduce the level of risk to others created by the manifestations of the student's disability
  - The Supreme Court's specific articulated elements for the direct threat test, including "the nature, duration, and severity of the risk"

# Lessons Learned: Direct Threat Analysis Must Include (2)

- A process that is truly individualized, taking in account:
  - The imminence of the threat
  - The student's commitment to voluntarily cooperate and participate in necessary medical care
  - The student's level of self-awareness and ability to distinguish right from wrong
  - The distinction between restricting the presence of the student on campus because of:
    - The irrational fears that he creates in others,
    - The fear in others that he purposely incites, and
    - The fear in others owing to objective considerations

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# Lindsay ROGERS, Plaintiff-Appellant,
# v.
# WESTERN UNIVERSITY OF HEALTH SCIENCES, Defendant-Appellee.
# No. 18-55003
# (9th Cir. 2019)

# Basic Overview

- Osteopathic Medicine program
- Rogers is a student with a Specific Learning Disability
- Rogers requested 16 accommodations from the Accommodations and Resources Center
- Two of the requests included a “potential” modification to her course schedule.

# Basic Overview

- In response to Rogers' request the AARC engaged her in an interactive process and approved:
  - Double Time on Exams
  - Distraction Reduced Testing environment
  - A reader for Exams
  - Alternative Format Materials
  - A Note Taker

# Basic Overview

- The AARC did not approve a number of the requests for specified reasons:
  - Use of a computer for exams with a lot of writing (essays)- Western did not give essay exams
  - Assistance with scantron bubbling or large format forms-Western did not use scantrons on exams
- The following requests were not approved because they were not “necessary” as accommodations, since all students had access to them:
  - Earplugs during exams
  - Breaks for food, water and use of the restroom during exams
  - Use of a ruler or blank paper on exams
  - Access to tutors and learning specialists
  - Permission to record lectures
  - Permission to sit in the front row

# Basic Overview

- The District court granted summary judgment to Western because:
  - "The record shows a highly interactive process in which Defendant consistently and in good faith worked with Plaintiff to approve, implement, and adjust her requested accommodations."
- BUT…The 9th Circuit Court of Appeals reversed, in part, the summary judgment and sent it back to the district court to take more evidence.

# Court's Analysis: Primary dispute

- Did western deny Rogers reasonable accommodations for her learning disability?
  - Western did approve and adjust many accommodations throughout Rogers' tenure
  - When Rogers requested a schedule change so that she would not miss part of a course or an opportunity for tutoring due to taking an exam with extended time, the faculty member said "Let's see how the next exam goes"
  - While the AARC approved Alternative Format Materials, it "directed Rogers to resources where she might be able to get them at her own expense"

# Court's Analysis

- The District court erred when it:
  - Deferred to Western's decision not to grant Rogers' request for a schedule change as there was no evidence 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."
  - Concluded that there "was no triable issue of fact as to whether Western appropriately handled Rogers's request for alternative texts when it refused to provide alternative texts directly and instead told Rogers where she might be able to get them from third parties, at her own expense."

# Outcome

- The District court's summary judgment was reversed in relation to Rogers request for a change in schedule and alternative format materials

# Takeaways

- Process, Process, Process-
  - Even though Western granted numerous accommodations and worked closely with Rogers, when the burden of proof shifted to them to explain the one thing they denied, they couldn't show that they followed a diligent process and came to a reasoned conclusion.