

Individualization, The Interactive Process and Fundamental Alteration

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We ask you to join us in creating a culture that reflects...

Access and Inclusion

and

Civility and Respect

...this week and in all aspects of our organization.

Faculty (1)

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Process, Process, Processes

Fundamental Alteration

Undue Burden

Direct Threat to Health and Safety

A Big Deal:

The *Process* for Attaining Deference to Your Decisions

- Academic institutions, making academic decisions, like what is or not a fundamental alteration, if, within their areas of expertise, have received substantial deference from the courts and OCR
- We learned a moment ago, in a comparison of three cases, that deference will vary depending on whether accommodations that were authorized were provided, were authorized but were not fully provided, were requested but were denied.
- But what if there is a dispute and the accommodation the student requests you conclude, or a faculty member concludes, is a ***“fundamental alteration”*** in the nature of the program. Then what?

“Fundamental Alteration”

What is a Fundamental Alteration? (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), 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)

What is a Fundamental Alteration? (2)

- From OCR Section 504 regulation 104.44(a)-(b) we know that in college programs that are focused on attaining licensing, 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 will not entail accommodation of completion to degree requirements or “adaptation of the manner in which specific courses are conducted”
 - I *think* this means:
 - School 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
 - School doesn’t have to convert an interactive class or a team class to a passive lecture class; or 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
 - Brick and mortar to on-line/on-line to brick and mortar, in the era of COVID-19?

Are these Fundamental Alterations? (3)

- A student in a class 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 presentation
- A student with an intellectual disability wants to bring a “conduct monitor” with him/her to class to ensure his/her good behavior
- A student with PTSD that clearly impairs short term memory wants to take all tests open-note, although other students are not given that choice
- A student with severe AD/HD wants to record all classes in counselling incest survivors, including presentations by several survivors
- Does COVID-19 change the answers?

How Do You Decide, What is a Fundamental Alteration? ⁽⁴⁾

- The correct answer to each of these proposed questions is, “it depends.”
 - We need to know more
 - To be honest, in many instances, there is a large element of subjectivity
- So, what are we to do with difficult/complex fundamental alteration questions?
 - Let’s start with ***Wynne v. Tufts Medical Center*** and ***Guckenburger v. Boston University***

The Seminal Fundamental Alteration Process Cases

Wynne v. Tufts

Guckenburger v. Boston University

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
- 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

- Counsel for Tufts argued, based on First Amendment precedents, that it is the practice of courts to defer to academic decision-making and, especially in the case of a medical school, the *Wynne* court should do the same
- Counsel for Mr. Wynne argued that the court must not accept the conclusions of Tufts as beyond scrutiny by the court, 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 and many more OCR letters

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***.”

[***Ipse dixit*** is an arbitrary and unsupported assertion; the only evidence is the statement itself; maybe something often said but not inherently or necessary true]

- A three paragraph affidavit from the Dean to support dismissal of Wynne’s claims did not meet the above standard of the court
 - It was simply 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
- 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
 - Whether the accommodations proposed by Wynne or alternate accommodations identified by the Tufts lower or fundamentally alter 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

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

Wynne v. Tufts University II

- Things the court took into account in granting Tufts its dismissal:
 - Wynne didn't even identify his disability until he was in a dismissal process
 - Tufts did a lot to try to help Wynne, and there was no evidence of disability animus
 - Tufts, the second time around, produced a factual record “documenting its scrupulous attention to this obligation. [T]he effort requires more than lip service; it must be sincerely conceived and conscientiously implemented.”

Guckenburger v. Boston University II (1)

- 8 F. Supp. 2d 82 (D. Mass. 1998)
- A very different outcome from ***Guckenburger I*** case concerning unnecessarily rigorous documentation of disability requirements
 - BU had brought in a new President, Jon Westling, in part in response to fears that BU was being overrun with high functioning LD students
 - That President was very hostile to the LD community, falsely giving speeches about “somnolent Samantha” and making it nearly impossible to qualify as an individual with a disability entitled to exam accommodations
 - The district court was very critical of BU, found violations, and did the process did not put Westling in a good or credible light

Guckenburger v. Boston University II (2)

- BU II, was part of the same litigation, same students and law firm and it concerned Westling's discontinuation of course substitution for foreign languages
- Like Tufts, sought a dismissal on the highly academic nature of this decision, maybe because of all the court had learned earlier it sent BU back for a **Wynne**-like process
- The second time before the court on this issue, 976 F.2d 791 (1st Cir. 1992), as directed by the court, BU had followed the **Wynne v Tufts** process, and consequently, despite all that had gone wrong on the earlier issue, it earned enough discretion to prevail
 - The court concluded that the contrary practices of the other Ivy League schools did not prove animus or pretext by BU

How Boston University Did It Right

- Kept the discredited, Jon Westling, out of the process
- Used a multi-disciplinary committee
- Articulated the objective of a foreign language requirement
 - Identified alternatives to learning foreign language
 - Articulated why alternatives would not meet objective: unduplicatable intimacy with another culture
- Found new ways to teach foreign language!
- Presented court with a win/win, committing to teach foreign language in multiple ways

“Due Diligence” Morphs to Something Even Broader

Some courts have applied the *Wynne v. Tufts* process, or at least its standard of a *due diligence process* to a wide range of QSD 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, case study below, time permitting]
- *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*

A Few 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, Dominguez 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)**

What is the Relationship between the Concepts of “Essential Requirements” and Fundamental Alteration?

***OCR Letter to
George Mason University***

OCR Case No. 11-16-2083 (September 26, 2016)

OCR letter to George Mason

- Student approved for “flexible attendance”
- Syllabus included grading rubric with points for attendance/participation
- Attendance limit was 10% of days
- Didn’t get full participation points due to absences
- University defense was that 90% attendance was an essential element
- “Therefore, OCR reviewed the University’s determination that attendance in that course is an essential program requirement that cannot be modified.”

OCR letter to George Mason

- OCR gave deference to the department's determination that attendance was an essential element because of how that decision was made.
- But..."the Professor's interpretation of essential attendance—"I based the number of allowable absences for the course at 10% which reflects an industry ballpark number of the number of paid leave days (sick, holiday, vacation, etc) many employees receive"—does not appear to meet those same factors."
- "even affording deference to the academic decision on essential course requirements, OCR cannot find that the decision in this case was educationally justifiable under Section 504 because there was no evidence that decision-makers considered a series of alternatives for the attendance requirement, as well as whether the essential requirement in question can be modified for a specific student with a disability. Neither the curriculum materials nor the University's statements show any consideration of attendance alternatives."

OCR Letter to
University of North Carolina, Greensboro (UNC)
OCR Case Number 11-17-2001 (April 2017)

Background

- Highly redacted letter, hard to follow but...
- Student was a student with a disability receiving some accommodations (it is unclear what they were)
- The Student's allegation was regarding the University's failure to provide her with alternative learning options (appears to be independent study).
- Office of Accessible Resources and Services (OARS) said the requested accommodation would not be possible because it would be a fundamental alteration and encouraged student to ask Professors if they were willing to provide this accommodation.
- Professor said no due to budget and scheduling issues
- The Universities position is that OARS could not authorize independent study because it is a fundamental alteration and directed the student to discuss options with the Professor.

Finding

- “[T]here was ... a procedural flaw in the way the University handled the interactive process. Specifically, the University improperly placed the burden on the Student when determining whether XXXX was an essential requirement of the course of study and whether any waiver of the XXXX would constitute a fundamental alteration of the program.”
- “OARS should have been leading the efforts to request independent study or an alternative accommodation on behalf of the Student and to ensure that the Student’s disability was being taken into account by all decision-makers. Because the University caused a procedural flaw in the interactive process, OCR finds that the University was in violation of Section 504 and Title II.”

Finding-Fundamental Alteration

- Before a formal determination can be made as to what constitutes a fundamental alteration of an essential major requirement, the University must take into consideration:
- that decisions regarding essential requirements be made by a group of people who are trained, knowledgeable and experienced in the area, through a careful, thoughtful and rational review of the academic program and its requirements, and
- that the decision-makers consider a series of alternatives for the essential requirements, as well as whether the essential requirement in question can be modified for a specific student with a disability.
- factors to be considered in determining whether a standard is essential include the nature and purpose of the program; the relationship of the standard to the functional elements of the program; whether exceptions or alternatives are permitted; whether the standard is required in similar programs in other institutions; whether the standard is essential to a given vocation for which the program is preparing students; and whether the standard is required for licensure or certification in a related occupation or profession.

Finding-Fundamental Alteration

- if it is determined that a requested academic would result in a fundamental alteration, the University must then consider whether there are alternative academic adjustments that could accommodate a student without fundamentally altering the course.
- While OCR understands the University's position that OARS does not take the initiative to intervene unless a student requests them to do so, in some circumstances, such as the determination that an accommodation is a fundamental alteration to a program, OARS must take the initiative to lead a careful, thoughtful, and rational review of the academic program and its requirements. OARS should have been leading the efforts to request independent study or an alternative accommodation on behalf of the Student and to ensure that the Student's disability was being taken into account by all decision-makers.

*OCR Letter to
Simmons College*

OCR Case Number 01-16-2113 (August 2017)

Letter to Simmons College

- “As of the spring semester 2016, the College had a blanket policy pursuant to which no students could have “extended time for papers and projects” as an accommodation.”
- “the College did not offer extensions for papers and projects because, in certain classes, such extensions might alter the fundamental nature of a course. No one at the College would examine the requirements of the individual class, or consult with the instructor, to determine if such extensions would alter the fundamental nature of the course. Rather, because such extensions might have, in some cases, altered the fundamental nature of the course, no student was granted the accommodation in any course.”

Letter to Simmons College

- “instead of offering the accommodation, the College encouraged students to talk with their professors prior to the deadline, to see if they might be amenable to short extensions on some papers or projects.”
- “During the course of OCR’s investigation...the College circulated a memorandum acknowledging its practice of automatically assuming that certain academic adjustments would fundamentally alter the essential requirements of a course or program, and clarifying that *the College should not make such an assumption absent an assessment of the individual student and the individual course.*”

Letter to Simmons College

- “In determining what modifications are appropriate for a student with a disability, the recipient should familiarize itself with the student’s disability and documentation, explore potential modifications, and *exercise professional judgment*. Whether a recipient has to make modifications to its academic requirements or provide auxiliary aids is generally determined on a case-by-case basis. Section 504 contemplates a meaningful and informed process with respect to provision of accommodations, e.g., through an interactive and collaborative process between the school and the Student.”
- “the College had a blanket policy of not providing extensions on papers and projects. This policy obviated any individualized assessment of the Student’s needs or the requirements of the course, and effectively ended the interactive process, thereby discriminating against, and excluding a student with a disability from the education program in which she was enrolled.

Letter to Simmons College

- “The DSO apparently adopted its policy because it believed such extensions would fundamentally alter the nature of courses. While there may be courses for which an extension is a fundamental alteration, such a determination must be made on a course-by-course basis as part of an individualized assessment.”

“Undue Burden/Hardship” Substance and Process

Advice for a Undue Burden Process ⁽¹⁾

- Borrowing from a Title II regulation concerning “existing facilities” at 28 C.F.R. § 35.150, the following process makes good sense, whenever the undue burden defense is to be used:
 - “The decision that compliance would result in such [fundamental] alteration or burdens must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion.”
 - “If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public .”

Advice for a Undue Burden Process (2)

- When putting together a financial argument, for the rationale document, recommended in the previous slide, look at the factor- analysis guidance of the EEOC under Title I of the ADA:
 - “(1) The nature and cost of the action needed under this part;
 - (2) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site;
 - (4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities;
- “Whether financially based or feasibility based, the interactive process triggered by an individual's request for accommodation. An employer should still engage in this informal dialogue to obtain relevant information needed to make an informed decision.”

Advice for a Undue Burden Process (3)

- Whether financially based or feasibility based, the interactive process triggered by an individual's request for accommodation remains
- The diligent consideration standard would likely apply
 - What was done to look for alternative, equally effective accommodations?
 - What information was obtained from the student?
 - What information was obtained from the student's experts or treating professionals?
 - What information was obtained from other colleges and universities
- If this sounds similar to a ***Wynne/Southeastern*** process, it should

**“Direct Threat to Health and Safety:”
Substance and Process**

Stebbins v. Univ. of Arkansas

Example of how to conduct a QSD/direct threat analysis

What are the potential accommodations for an individual who is
“tactless,” allegedly due to his disability?

Stebbins Procedural Background

- Summary judgment for the University, not reported in F. Supp. judgment to university, [2012 WL 6737743](#) (W.D. Ark. 2012); affirmed on appeal, not reported in F.2d 543 Fed.Appx. 616 (8th Cir. 2013); ***certiorari denied***, 572 U.S. 1105 (2014)
- David Stebbins, an individual with Asperger's Syndrome and Intermittent Explosive Disorder, alleged a violation of Section 504:
 - Failing to allow him to re-enroll in 2010 after he was banned from campus in 2007 for misconduct
 - Failing to accommodate him
- He sought money damages and injunctive relief

Stebbins Fact Summary (1)

- Stebbins registered with disabled student service (CEA)
 - I have Aspergers
 - “[I] am tactless and can accidently mouth off....”
 - Accommodation requested: “[h]elp negotiating my tactlessness w/my professors.”
- Stebbins got seating a front of class and use of a laptop computer but not the above accommodation

Stebbins Fact Summary (2)

- Initial incidents:
 - Blew up on dorm employee for delay in delivering mail to point she filed an “information report” Her first report in 23 years.
 - Blew up a financial aid officer who also found incident serious enough to report
- Dr. Holland, the Discipline Officer, charged Stebbins with disorderly conduct due to verbal abuse.
- Stebbins elected a hearing. He was required to write a letter of apology which he did disingenuously, claiming slander

Stebbins Fact Summary (3)

- Later escalated events:
 - Stebbins told Holland that he daily “gets off” on the thought of cutting his father’s head and writing with his blood
 - December 2007, Stebbins showed up half an hour late for a medical appointment to renew a prescription and was told he’d have to reschedule. Stebbins went to Ombudsperson.
 - Eight months after Virginia Tech, he twice told the Ombudsperson, if he did not get his meds, “***there could be another Virginia Tech. incident.***” Ombudsperson reported the incidents and got Stebbins his med.

Stebbins Fact Summary (4)

- How did the school respond?
 - Placed Stebbins on interim suspension until a formal review during which he threatened suicide, an attack on the University Police Office and again referred to Virginia Tech
 - Stebbins given a full due process hearing with the opportunity to cross-examine witnesses
 - Stebbins suspended until the following Fall with conditions to return

Stebbins Fact Summary (5)

- Conditions of return
 - Obtain mental health care addressing the behaviors for which he was suspended
 - Sign a waiver so that University can confirm compliance with getting the necessary care
 - Continue counseling once reenrolled
 - One year conduct probation beginning with return
- At court trial testimony was provided that Stebbins didn't comply, stopped coming and blamed the rest of the world
- Stebbins' own psychologist concludes Stebbins "not safe"

Stebbins Facts Summary (6)

- The final escalation: email to the Chancellor's, received by Vice Chancellor, perceived as life threatening:
- “[I] was expelled because your f@#*ing staff couldn’t be bothered to accommodate my disability.” ... I didn’t threaten you. YOU TOOK IT THAT WAY.” ... You have sixteen business hours
- **** to remove my suspension.” *** If ... not, I will sue you in your individual capacity and collect \$50,000 in punitive damages from you.”

Stebbins Facts Summary (7)

- Threat assessment team convened:
 - Stebbins placed on a criminal trespass warning for a year.
 - Told all communications must go through security officer, Lt. Rice.

Analysis of the District Court

- This analysis was affirmed by the Circuit Court
- “Based on what student had done, including references to Virginia Tech and to injuring his father, and what team learned from Stebbin’s mother, the University’s conclusion was reasonable”

District Court's Analysis of Stebbins' Claims: He is Not Otherwise Qualified

- Stebbins was not otherwise qualified as he did not request accommodations that would have rendered him otherwise qualified
- “Assuming that what he wanted, not to be taken too seriously when he is tactless or makes a threat unless he intended to be taken seriously is not ‘reasonable.’”

District Court's Analysis of Stebbins' Claim: He's a Direct Threat to the University of Arkansas (1)

- Nature of the risk
 - Virginia Tech threat was more than just tactless
 - ***UA not required to prove what Stebbins intended but rather that it reasonably believed a threat was made***
 - A reasonable basis exists in his multiple statements

District Court's Analysis of Stebbins' Claim: He's a Direct Threat to the University of Arkansas (2)

- Duration of the risk:
 - Given everything Stebbins did and said, things were not likely to improve without an intervention
 - Thus duration is “indefinite.”
- The severity of the risk
 - The risk was severe
 - No reasonable administrator could overlook Stebbins statements

District Court's Analysis of Stebbins' Claim: He's a Direct Threat to the University of Arkansas (3)

- The probability of the risk:
 - A pattern of being enraged by minor annoyances
 - A reasonable basis to believe he would act on his Virginia Tech threats

- The email to the Chancellor was a punishable threat
 - Profanity and tone
 - Demands with a short deadline
 - A coercive threat to sue.
- Stebbins claims all fail

Eighth Circuit Affirms District Court in Stebbins

- “[W]e agree with the district court that the accommodation Stebbins sought—help with his “tactlessness”—was not related to the reason for his suspension, namely, outbursts of violent speech and threats about another “Virginia Tech incident.” See [Stern v. Univ. of Osteopathic Med. & Health Sci., 220 F.3d 906, 908 \(8th Cir.2000\)](#) (under Rehabilitation Act, reasonable accommodation requested must be related to disability). We agree further that accommodating such behavior would not have been reasonable: ***allowing Stebbins to threaten and harass others at the University would have placed an undue hardship*** on appellees to ensure the safety of the University's population. [Emphasis added] See [Peebles v. Potter, 354 F.3d 761, 767 \(8th Cir.2004\)](#) (plaintiff must show he requested reasonable accommodation that imposes no undue burden); [Kohl ex rel. Kohl v. Woodhaven Learning Ctr., 865 F.2d 930, 936 \(8th Cir.1989\)](#) (accommodation is not reasonable if it imposes undue financial or administrative burdens on defendant, or requires fundamental alteration in nature of defendant's program).

Session Evaluation

- Your feedback helps shape future programming.
- Thank you for attending!