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Another opportunity to review what we will cover today: Laws, Policies and Processes

- Coming soon!
- Edited by Mary Lee Vance, Ph.D. and Tom L. Thomson
- Chapters:
  - Introduction/Preface, Mary Lee Vance, Ph.D.
  - The Legal World of Students with Disabilities, Paul Grossman, J.D.
  - Definition of Disability, Jamie Axelrod, M.S.
  - Paradigms, Paul Grossman, J.D.
  - Preeminent Processes, Paul Grossman, J.D. and Jamie Axelrod, M.S.
  - The First Deaf-Blind Student at Harvard Law School with Case Studies, Haben Girma, J.D.
  - Managing Up, Beth Lessen, Ph.D.
  - External and Internal Reviews, Tom L. Thompson
  - Summary and Universal Design Benefits in Higher Education, By Tom L. Thompson

I. Our Rights Were Not Just Handed to Us!

Following Earlier Movements:
We Organized
We Fought
We Risked Our Lives
Crowd Gathering for 504 Sit-In

Picture of 250 individuals with disabilities, gathered at 50 United Nations (UN) Plaza, in April, 1977 listening to speeches from State Senator Tom Hayden, Rev. Cecil Williams, the Black Panthers, feminists, unions, the gay community, and other Civil Rights groups.

“Welcome to Hotel California”

- Picture of an empty wheelchair with two individuals sleeping on a futon in a stairway at 50 UN Plaza (several marriages resulted from the Sit-in)
- Being Heumann suggests that the Sit-in, beginning on April 5, 1977, was not entirely spontaneous
- Occupation by over 100 people lasted 26 days, a record

“And the Beat Goes On”

Picture of mobility-impaired persons without braces or crutches, one of 60 persons, crawling up the 83 stairs of the inaccessible US Capitol as Congress debates the ADA, passed four months later—July 26, 1990.
II. Federal Laws Prohibiting Disability Discrimination against Students with Disabilities

Legal Authorities

1. Hierarchy of authority:
   - US Constitution and court decisions interpreting the US constitution
   - Court decisions interpreting laws and regulations
   - Law
   - Regulations
   - Regulatory guidance, e.g.:
     - Notice of Proposed Rulemaking (NPRM) [OCR right now]
     - Final notice with section-by-section comments
     - Dear colleague letter, Q & As, enforcement guidance
   - OCR/DOJ consent decrees, compliance letters, and settlements

   - Based on FFA, applies to colleges and universities by contract
   - Enforced by US ED OCR, DOJ and private plaintiffs
   - No exhaustion
   - Attorney and expert fees to the prevailing party, by allocation
   - The 504 regs are the place to go for most post-secondary questions (to not read these regs and their appendices is malpractice)
Legal Authorities

• Title I of the Americans with Disabilities Act (ADA) – 30 years old
  • Applies to all college and universities with more than 25 employees
  • Enforced by the EEOC and private plaintiffs after EEOC exhaustion
• Title II of the ADA – 30 years old
  • Applies to public entities, such as community colleges, Cal. State system, and the UC system
  • Enforced by OCR, DOJ, and private plaintiffs
  • No exhaustion
  • Only DOJ can impose fines or get other money but anyone may sue for injunctive relief
  • The Title II regs are the place to go for most post-secondary questions concerning students with hearing or visual impairments including digital access

• Title III of the ADA
  • Applies to public accommodations including private colleges and universities like Stanford
  • May be investigated by OCR but is enforced by DOJ and private plaintiffs
  • Only DOJ can get money under Title III
  • Again, there is always attorney and expert fees
  • And injunctive relief is always potentially available
  • Website coverage split of jurisdictions, 504 clear
  • Title III regs and guidance is the place to go for documentation of disability and test accommodations, even for public entities
  • 2010 ADA Standards for Accessible Design (facilities not programs) issued as Title II and Title III regulations

• Section 508 of the Rehab. Act
  • Applies to public accommodations including private colleges and universities by derivative state law
  • Other Federal laws pertaining to housing, privacy and healthcare including the Fair Housing Act if you operate or contract for student housing
  • Other state and local laws and ordinances, particularly important in California as another route to get monetary damages
III. Coverage

These Laws Apply Broadly
- Any “program or activity” of the college or university: academic and non-academic settings, on or off campus
- Programs and activities receiving “significant assistance” – e.g., a child care program
- Clinical and field placements, must cease referral if not resolved at host institution
- Includes athletic & school sponsored social events
- Includes the “virtual world” that is developed or maintained for or by a college or university (jurisdiction is more clear as to public entities)
- Generally not overseas (except in U.S. aspects of study abroad) – a contrary interpretation may exist based on Title IX precedents and this may change with the 504 Update

These Laws Protect a Wide Range of Individuals
- Students/program participants in the brick and mortar world and the virtual world
- In most regards, applicants and “explorers”
- Parents and visitors to programs and activities, e.g., a deaf parent visiting campus with an applicant or a graduation ceremony
- All employees: faculty, adjuncts, visitors, resident scholars, administrators, employees, work study students, interns, residents etc.
- Invitees to programs and activities like concerts, a speaker series, and graduation
IV. Mechanisms for Enforcement of Section 504 and Titles II/III of the ADA

Federal Law Carries the Greater Authority

- Provided there is a clear conflict and harmonization is not achievable, Federal civil rights laws are superior to campus practices, policies, handbooks, and union contracts, as well as state laws
- All valid (not ultra vires) Federal regulations implementing these laws are similarly superior (but see West Virginia v. EPA, S.Ct. (June 30, 2022)
- Less formal forms of Federal agency guidance will be valued on a case-by-case basis; e.g., a "dear colleague letter" from OCR, "enforcement guidance" from DOJ or the EEOC (a way around the NPRM)
- These lesser sources of guidance are becoming a target for conservative courts that seek to diminish Federal authority

How OCR Enforcement Works: 504 (1)

- Any student may file a complaint with OCR, without cost to the student, or the student may hire his/her own attorney and file in court (no exhaustion required)
- OCR will open all complaints that state a claim and proceed, either to investigation or negotiation for a resolution
- Resolution with OCR primarily entails "injunctive relief" and actual "out-of-pocket" expenses; e.g., tuition
- No individual liability except for retaliation, though termination of an employee may be a subsequent action of a college
- If brought as a private suit, attorney and expert fees may run typically from $20,000 to $1.5 million
How Enforcement Works: 504

- If no settlement: admin hearing or a court trial will ensue
- In a hearing: ultimately in jeopardy ever last dime of Federal funding and a freeze while the prehearing process drags along
- In court, large punitive damages possible for "deliberate indifference" and fines if prosecuted by DOJ, plus attorney and expert fees even if no indifference shown

How Enforcement Works: Titles II & III of the ADA

- Title II, if all else fails, pursue matter under 504 only or refer Title II and 504 claims to DOJ for enforcement in court
- Title III will not be cited or used by OCR but may be reason a case is referred to DOJ
- Enforcement by DOJ
  - Actual costs
  - Strong comprehensive injunctive relief
  - Fines are possible
  - Remedies may be negotiated under court supervision

V. Documentation of Disability
Three States or “Prongs” of Disability

• 1) You are an individual with a substantial impairment of a major life activity
   • Eligible for accommodation

• 2) You have a record of being an individual with a substantial impairment of a major life activity
   • Eligible for accommodation (often preventative)

• 3) You are regarded as such (having an impairment)
   • Must be more than transitory (the flu) or minor; could be transitory but major
   • Not eligible for accommodation
   • Eligible for protection against disparate treatment or impact discrimination
   • Need not be registered with DSS

Virtually Always Impairments

• A number of impairments (medical conditions) qualify as “virtually always” a disability
  - Deafness (hearing)
  - Blindness (seeing)
  - Intellectual disability (brain function)
  - Missing limbs and mobility/wheelchair use (musculoskeletal)
  - Autism (brain function)
  - Cancer (normal cell growth)
  - Cerebral palsy (brain function)
  - Diabetes (endocrine function)
  - Epilepsy (neurological function)
  - HIV infection (immune function)
  - Multiple sclerosis (neurological function)
  - Major depressive disorder, bipolar disorder, post traumatic stress disorder, obsessive compulsive disorder and schizophrenia (brain function) 29 C.F.R. § 1630.2(j)(3).

“Spectrum” Impairments

• Other impairments are “spectrum”-based, requiring individual analysis of the degree to which the impairment interferes with an identified major life activity
  • For prongs I & II, the impairment, at least, must be substantial
  • Common examples are allergies, a “bad back,” specific learning disabilities, and AD/HD
  • “To the extent that condition, manner, or duration are relevant, that inquiry may itself include many factors, including, among other things, the difficulty, effort, or time it takes the individual to perform a major life activity; whether the individual experiences pain when performing a major life activity; the time for which a major life activity can be performed; and/or the effect the impairment has on the operation of a major bodily function.” See 29 C.F.R. § 1630.2(j)(4)
Is COVID a disability?

- It is unlikely that COVID will ever be classified as a “virtually always” disability, like blindness or bipolar disorder
- Long haul COVID comes close to being a “virtually always” disability
- Simple, short-term quarantining, without more, not likely to qualify
- Tipping point or totality of circumstances COVID has qualified

VI. Three “Theories of Liability” That Are Well-Accepted the Courts

Disparate Treatment
Disparate Impact
Denial of an Accommodation

1) Disparate Treatment (1)

- For the purpose of preventing intentional discrimination
- There are regs that authorize this theory of liability including those that prohibit the “denial of a benefit on the basis of disability” and those that prohibit unnecessary segregation
- Similarly situated individuals should be treated the same
  - If not, there is a rebuttable inference of intentional discrimination
  - The rebuttal cannot be something made up, just as an excuse, pretext, or cover-up for discrimination
  - A student with PTSD came back to housing drunk and broke a bathroom mirror and was expelled.
    - How was a non-disabled individual who had done the same thing three times treated?
    - Why was the non-disabled individual treated better?
1) Disparate Treatment

- Retaliation and hostile environment on the basis of disability also fall under this theory of liability
- The Plaintiff/student need not necessarily be registered with DSS to be covered and may only qualify as disabled under Prong III (considered to be an individual with a disability)
- Being a person with a disability and the disability is the reason for the misconduct may not be a viable defense for the student, except in some cases of denial of an accommodation; e.g., denial of a reduced course loads.


2) Disparate Impact

- For the purpose of addressing "benign neglect" of persons with disabilities, generally, as a class
- There are several regs authorizing this theory of liability
  - "Method of administration"
  - Selection criteria that "tends to screen out" people with disabilities
- But use of these regs. by private plaintiffs is under attack CVS Pharmacy v. Doe, cert. granted (2021) but CVS settled with advocates and plaintiffs; Payan v. LACCD, plans to seek cert; abandoned, but matter has returned to district court (2022)
- This is a way to address the discriminatory effects of rules, policies, or recurring practices that are neutral on their face, but tend to injure persons with disabilities and do not have a good justification.

Examples

- "No vacancy shall be filled from the outside until the vacancy announcement has been published in-house for three weeks"
- The district develops and maintains websites that do not comply with WCAG 2.0
- All English classes are taught in the historic "Founders Building"
- These are usually class claims, looking for a class remedy as in Payan v. LACCD and Guckenberger I, II & III
- Again, not necessarily about a student registered with DSS.
3) Denial of an accommodation

- Usually an element of a QSD question, as presented below in Section VII
- Unlike disparate impact, usually to solve an individual issue on a student-by-student basis
- Nearly always, student will be registered with DSS
- There are regs for this including the ones calling for academic adjustments, auxiliary aids and reasonable modifications to rules and policies
- Generally easier to prove than claims under the other two forms of liability but scope of the remedy will be more limited

3) Denial of an accommodation

- To open this claim, student alleges that he or she:
  - Has a documented disability
  - Requested a reasonable accommodation
  - There is a logical nexus between his/her disability and the accommodation he/she is seeking
  - The requested accommodation is reasonable "in the ordinary run of cases" (not an apparent fundamental alteration or undue burden)

3) Denial of an Accommodation

- The accommodation was denied or was authorized but not implemented
- Might add:
  - The college did not engage in an interactive process to discuss an accommodation or look for an alternative
  - The college asserts a fundamental alteration defense, but never went through a proper process nor offer to me an equally effective alternate accommodation
  - The college knew about this, but did nothing and consequently is guilty of "deliberate indifference" [but as to 504, see Cummings v. Premier Rehab Keller]
VII. Two Tools:
1) Paradigms [QSD]
2) Processes ["Interactive" & Wynne]

VII.A.: Introduction to Two Tools (1)
- There is no way possible to anticipate every question that will arise on your college campus
- The law addresses this challenge in three ways
  - 1) Precedents – how similar circumstances have been analyzed and concluded in the prior court (or OCR) opinion (letters of finding)
  - 2) Paradigms
    - Analytical structures, with elements, often based on a definition, such as the definition of a "qualified student with a disability" (QSD)
    - Disparate treatment, disparate impact and denial of an accommodation, covered above are also paradigms
  - 3) Processes to follow and complete in utilizing a paradigm including the "interactive" and Wynne v. Tufts/Guckenberger v. Boston University processes

Introduction to Two Tools (2)
- There are differences between the litigation and office settings as to how paradigms are processed
  - Burden and order of proof
    - Burden and order of proof matters greatly in litigation; what the student must prove and what the college must prove is relatively fixed by precedent
    - In your office, a paradigm is a way to think through a problem
      - To be thorough and careful, as a compliance officer, you may have to assume or think through all the analytical burdens of proof; especially if your role is to get to the truth
      - Or, at least anticipate what might happen in the circumstances of an OCR complaint or litigation against your college
Introduction to Two Tools

- Processes
  - In higher ed. law, process, particularly the “interactive” and Wynne/Guckenberger processes, may be more important to a court and will nearly always be important to OCR as, when followed, these processes facilitate or earn academic deference and when not, the school may have an uphill battle to fight with OCR or in court
  - It would be best to plan, in advance:
    - How can the interactive process be sustained
    - When should the Wynne or “fundamental alteration” process be implemented?
    - Who should be involved?
    - What are the steps to be followed?

VIII: Tool One:
A Paradigm: “Qualified Student with a Disability (QSD/QID)”

VIII.A.: Who is a QSD?
• "Otherwise qualified students with disabilities (QSDs)" are protected from discrimination on the basis of disability by Section 504 of the Rehabilitation Act of 1973 as well as Titles II, & III of the Americans with Disabilities Act of 1990.

• Except, on a short term basis for emergencies pertaining to the safety of self or others, if a student is a QSD, a college may not suspend, expel, or terminate that student on the basis of disability.

• If a student is not a QSD, he or she may be sanctioned the same as any other similarly-situated student.

• The fact that a student’s disability is the cause, even the sole cause, of not being qualified does not make the student immune from being held to the essential academic and technical standards of the college.

It’s Good to be a QSD, but …

Clarifying the Definition of a QSD

• To be a QSD, the student must be able to meet the essential, academic and technical standards of the college.

• Though not on the face of the Section 504 regulation, the requirement of taking reasonable accommodation into account before determining qualification was made clear in two Supreme Court decisions: Alexander v. Choate, 469 U.S. 287 (1985) and School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987) and in subsequent ADA statute provisions and EEOC Title I regulations (employment) and DOJ regulations implementing Titles II (public entities) and Title III (public accommodations).

• This would be a particularly good matter to clarify in the 504 Update.

Where in the Section 504 regs. is Any Duty to Reasonably Accommodate?

• 104.44 Academic adjustments.

   • (a) Academic requirements. A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted (emphasis added).

   • Also see subsection (d) which includes the duty to provide auxiliary aids.
Reasonable Accommodation and Qualification

• The purpose of a reasonable accommodation, reasonable modification, academic adjustment, testing accommodations, auxiliary aid or service, special rules, etc., is to remove the unnecessary barriers that prevent a student with the potential to be a QSD from becoming a QSD.

Examples of Academic Standards

• Passing progress tests in a nursing program
• Completing all assignments
• Maintaining a certain GPA to stay in a program
• Completing a certain set of courses to advance to higher level classes or to get a degree.

Examples of Technical Standards (1)

• Ability to safely and effectively place a needle into a vein or lift a certain amount of weight in a nursing program
• Ability to observe and record the behavior of children in a child development class
• Ability to sense heat and distinguish between sweet and sour in culinary course.
Examples of Technical Standards (2)


- This is one reason why all colleges should have a well-written code of conduct

Examples of Technical Standards (3)

- Irrespective of what is otherwise in a college’s code of conduct, another implicit technical standard that, must be met, is, with or without accommodation, the ability to not represent a “direct threat to the health and safety of others.” School Bd. of Nassau County, Florida v. Arline (S.Ct. 1987)

- The term “direct threat” means a “significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation”

- A two-edged sword protecting against negative stereotype discrimination but enabling the suspension or dismissal of someone with a disability who is truly dangerous, even when the dangerous behavior is on account of his/her disability Michaela Bied v. Cty. of Rensselaer, Hudson Valley Community College, No. 115CV1011TJMDEP, 2018 WL 1628831 (N.D.N.Y. Mar. 30, 2018); R.W. v. Board of Regents, Univ. of Georgia

Elements of the Direct Threat Analysis

- Borrowing from EEOC Title I guidance and Arline, supra, in deciding whether a direct threat exists, a college should consider:
  - the duration of the risk
  - the nature and severity of the potential harm
  - how likely it is that the potential harm will occur, and
  - how imminent the potential harm is

- N.B.: This is not just a standards, it is also a process
VIII.B.: What Are QSD Claims?

Application of the QSD Paradigm: Circumstances and Settings
• This paradigm is applicable to a wide range of circumstances and settings concerning academic or conduct-based suspension or dismissal, for example:
  • A student with a dyslexia and ADHD who fails to maintain the minimum GPA in a nursing program
  • A student with a psychiatric disability who fails to comply with the code of conduct or seems unable to distinguish between fantasy or reality in an internship setting
  • A student who wants to be excused from a long-standing academic requirement, like completion of a certain number of credits in a foreign language to get an associate’s degree or a BA

Application of the QSD Paradigm:
1) Accommodation Requested in a Timely Manner
• Sample, “timely,” QSD/accommodation allegations:
  • “If you had given me the accommodation I had requested, even if I might not be a QSD now, I would have been one”
  • “If you had timely and fully implemented the accommodation you approved, I would be a QSD”
  • Likely to pertain to alternate media & auxiliary aids and services for students with sensory impairments (Deaf/HH – Blind/LV)
Applications of the QSD Paradigm:

2) “Could Have Been Timely if the School Had Done its Job” Claim

- I never went to DSS because I didn’t have notice of it or what it does
- Had I known I would have been accommodated
- With that accommodation I would have been a QSD
- Given all that you knew about me, had the DSS office engaged in a genuine individualized interactive process, when I came to DSS, it should have realized that I needed extra time as one of my accommodations
- This claim is not about a student who never came to DSS!
- This claim presumes a duty on the part of DSS that may not exist in any regulation
- but OCR and the courts may buy into such a claim depending on how evident the needed accommodation
- Courts are more sympathetic to this claim for individuals with an ID or on the Autism Spectrum
- Likely the student did get some accommodations, maybe exactly what he/she received in high school but nothing different from that
- This type of claim arises when DSS offices are forced to get too “cookie cutter”

Application of the QSD Paradigm:

3) Prospective Sequence Claim

- Sample “prospective sequence” QSD/accommodation allegations
- “Even if I am not a QSD now and never requested any accommodation, going forward, I would be a QSD if you give me accommodation X” [a “second bite at the apple”/“second chance” doctrine]
- No sale for OCR, provided the college didn’t “hide the ball”
- Courts may or may not entertain this kind of claim
- But generally, if the court will hear the student out, the student loses as it is not evident
- How the accommodation would work to effectively address the student’s disability-related limitations
- The “putative [proposed] accommodation” would be a fundamental alteration and an undue administrative burden
- This is more likely to come up in conduct than academic matters
- Nonetheless, it is best to be prepared to respond to such a claim as, once in a while, it will be successful

VIII.C.: The Original QSD Case:

Southeastern Community College v. Davis

Who is Qualified?
Southeastern Community College v. Davis

- 442 U.S. 397 (1979)

- Question: Does it violate Section 504 to impose a physical qualification standard (the ability to hear) on an academically-qualified deaf candidate for admission to a nursing (RN) program?

- Answer: A college may impose an academic or technical qualification standard (in this instance a technical one) even though the standard, ability to hear, pertains to a disability (bilateral, sensorineural hearing loss), if the standard is essential to the program of instruction and legitimate.

- In this case, the technical standard applied to deny Ms. Davis admission to Southeastern Community College was essential:
  - it was necessary to accomplishing a core purpose of the program, obtaining a state R.N. license;
  - was related to the safety skills associated with an R.N. license including operating room practice; and,
  - the standard could not be modified (accommodated) without a fundamental alteration in the nature of the program, like waiving operating room training or practice.

- The standard was legitimate as the process that Southeastern followed in reaching its conclusion demonstrated a lack of disability animus or discriminatory purpose.

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Process Mattered Even in the Very First 504 Decision of the Supreme Court

- Before denying Ms. Davis admission, Southeastern consulted with:
  - The student, Ms. Davis
  - The State Director of Nursing, who advised that Davis would not be licensed on grounds of safety
  - Other schools

- Following this process, Ms. Davis was denied admission

- After Ms. Davis appealed her denial
  - The school again contacted the State Director of Nursing who affirmed her prior conclusion
  - The school assembled full faculty to discuss possible accommodations
  - The School again came to the conclusion that Davis was not qualified for the program

- Ms. Davis was denied admission and sued.

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What Bothered the Court the Most

- It concluded that Ms. Davis was seeking a fundamental alteration.

  "In light of respondent's inability to function in clinical courses without close supervision, Southeastern, with prudence, could allow her to take only academic classes. Whatever benefits respondent might realize from such a course of study, she would not receive even a rough equivalent of the training a nursing program normally gives. Such a fundamental alteration in the nature of a program is far more than the "modification" the regulation requires." 442 U.S. at 410.
Why Southeastern Prevailed in the Supreme Court

- Fundamental alteration would be required to accommodate Ms. Davis
  - No way to do it safely – the college looked
  - Would have to waive skills expected of all nurses in North Carolina
  - Would require lowering standards
  - Academic freedom includes reasonable physical qualifications for nursing even if they cannot be met due to disability

- Southeastern used a very interactive process for reaching its conclusion that did not suggest that it had an illegitimate or discriminatory purpose
  - Nothing arbitrary
  - Heard her out
  - Heard the faculty out
  - Reached out other schools
  - Reached out to the State Board of Nursing

IX. Tool Two:
Processes that Earn Deference

The best way to decide if an accommodation is necessary and potentially effective or unreasonable (a fundamental alteration or an undue administrative burden) and to have OCR or the Courts defer to or affirm that decision is to engage the right process – an individualized interactive process or a Wynne v. Tufts process

IX. A: Distinguishing Processes [1]

- The interactive process, akin to what happened in Southeastern v. Davis, is for determining whether a student is an individual with a disability, needs accommodation(s), and what those accommodations might be (as proposed by the student or the college), selecting the accommodations and arranging for their implementation
  - The communication element is a mutual responsibility and many courts judge it under a standard of “good faith”
  - Engaging in the interactive process may well be an on-going expectation, where persistence in looking for accommodations that work or alternative accommodations pays off for the college as in Kling v. University of Pittsburgh, School of Medicine
Distinguishing Processes

- The *Wynne v. Tufts* process is for deciding whether an academic standard or rule is "essential" and whether a proposed accommodation would represent a fundamental alteration if implemented
  - More faculty and administration involvement
  - Likely less student involvement
  - Generally, less DSS involvement
  - More about diligence than good faith

Common to Both Processes

- Are subject to conflation by OCR
- Going forward engage in a *Wynne v. Tufts* – like process
- Require some time and resource balancing discretionary analysis
- Should involve DSS but more so for the interactive process
- Aren’t mentioned in the current 504 or ADA Title II/III regulations
- Earn deference from the courts and OCR – more so *Wynne* process
- Will not be credited if, in reality, a pretext, cover-up or excuse for discrimination
- Should entail looking for alternate accommodations when the one proposed by a student is a fundamental alteration or requires the lowering or waiving of an essential standard

IX.B.: The Seminal Case

*Wynne v. Tufts*
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
  - Good on essays but much difficulty with multiple choice exams
  - Good in analysis
  - Good in practicum
  - Weak in retrieval
- When Wynne was under consideration for dismissal but not yet dismissed, Tufts conducted and paid for a psychoeducational evaluation. Wynne and Tufts discover 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 and dismisses Mr. Wynne
- Wynne sues Tufts for disability discrimination

The Dilemma for the Court in Wynne

- A clash of two legitimate interpretations of the law:
  - Tufts Medical Center argued, based on First Amendment precedents, that it is the practice of courts to defer to academic decision-making and that exam format is the essence of an academic decision
  - Wynne argued, that the court must not accept the assertions of Tufts as conclusive truths, as that would render the requirements of Section 504 meaningless and Tufts process for reaching this conclusion shows that it did not carefully deliberate on it

The Key Solution to the Court’s Dilemma

- “[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 [emphasis added]”
- This is the opposite of a quick or hasty, arbitrary decision based on the way it has always been done
Wynne v. Tufts University [round I](1)

- "[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," 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 meet the expectations of the court as articulated above
  - Conclusion
  - 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
  - The process was not interactive or individualized (my words)

Wynne v. Tufts University I (2)

- The court denies a motion for summary judgement and directs Tufts to go back and reconsider Wynne's request through a specific process
- Elements of 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?
- These elements are subsequently called a "Wynne v. Tufts process"
- 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](1)

- Second time before the court, Tufts shows that it carefully followed the order of the 4th Circuit and consequent gets academic deference and its motion to dismiss prevails
  - 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” [emphasis added]
  - Adhering to this process, Tufts had now demonstrated that it reached “a rationally justifiable conclusion” that granting the requested accommodation would lower academic standards
  - Tufts has “demythologized its rationale.”
  - Its rationale is now “plausible,” but “not necessarily irrefutable.” [emphasis added]
  - The court did not require Tufts to make an overwhelmingly convincing case; this is the advantage that comes from having earned the deference of the court to Wynne v. Tufts decision-making
Wynne v. Tufts University II

- Wynne’s one last chance to rebut Tufts would have been that Tufts went through the process but in bad faith; that the process was a shame with the outcome predetermined against Wynne.
- Wynne did not make this showing.
- Indeed, in granting Tufts its dismissal motion, there were additional things the court took into account, that served to demonstrate to it that the process and its outcome where not a pretext (an excuse or shame) for discrimination:
  - Tufts did a lot to try to help Wynne
  - Wynne was given multiple second-chances
  - There was no evidence of disability animus found by the court
  - Wynne didn’t even identify his disability until he was in a dismissal process (to some degree a sequential issue)
- Similarly, see Guckenburger v. Boston University, 8 F.Supp. 2d 82 (D.Mass. 1998)

The OCR progeny of Wynne (and Guckenberger)

- For a sample of many OCR Letters see 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, 09-17-2990 (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)

VIII.C.: OCR Case Study: Gateway Community College

- A teacher, after receiving notice from DSS, refused to provide a student with extra-time on in-clinic, transcription exams
- The teacher provided multiple justifications, that sound logical:
  - The exam in question tests a “core competency” of the program as the purpose of the course was to teach transcription skills
  - The skill being tested, transcription, could not be administered in a testing center
  - A purpose of the test is to measure the student’s transcription speed and must be done in a certain amount of time to simulate what actually happens in the work place
OCR Case Study: GateWay Community College (2)

- Focusing on process, OCR bought none of the teacher’s justifications
- Not citing Wynne, but following its text nearly verbatim, OCR states: “If an institution believes that a requested accommodation would constitute a fundamental alteration of its program … the law requires the institution to make such a determination through a process that includes the following:
  1) the decision is made by relevant officials, including faculty members;
  2) the decision makers consider a series of alternatives, their feasibility, cost and effect on the academic program, and
  3) after a reasoned deliberation, the decision makers reach a rationally justifiable conclusion that the available alternatives would result either in lowering of academic standards or requiring substantial program alterations.”

X. In Litigation: How It Will Unfold
Burdens of Proof

X.A.: Student’s Prima Facie Case

- I am an individual with a disability
- Because of my disability, without accommodation, I cannot meet an academic or technical standard of the college
- This has led to some sort of adverse treatment
- I asked for an accommodation that is reasonable in the “ordinary run of cases”
  - A “facial showing” that the proposed accommodation is possible and would have allowed or enabled me to meet the essential academic and technical standards
  - Logically effective
  - Logically implementable
- The accommodation was denied or not implemented
- This should be enough to shift the burden to the college and avoid a motion for summary judgment against the student
X.B.: Initial Responses Available to a College

• Generally as part of a motion to dismiss or a motion for summary judgement, the college will seek to establish that:
  • The student is not an individual with a disability
  • The student never requested an accommodation or refused/failed to participate in the interactive process or did not participate in good faith
  • Constructive notice by the student of a need for an accommodation, will in most instances will not be a viable alternative argument. (Amir v. St. Louis Univ., 184 F.3d 1017, 1027 (8th Cir. 1999); Rosley v. Drake University, United States District Court, 342 F.Supp.3d 904, (S.D. Iowa, October 12, 2018)
  • Different rules may apply to students with intellectual disabilities. (Taylor v. Phoenixville Sch. Dist., 184 F.3d 296 (3rd Cir. 1999))

X.B.: Initial Responses Available to a College

• The student's proffered (proposed), denied or unimplemented accommodation is not necessary
  • The student is doing well academically but can't abide by our code of conduct
  • The student's disability is not the cause of his/her problem
  • He/she never came to class and never turned in any homework
  • He/she can't lift 20 lbs. because he/she is out of shape and weak
  • The student got every accommodation he/she requested; a very effective defense but even a history of doing a lot helps: “give what you can, withhold what you must”

X.C.: More than Just a Response: Affirmative Defenses

• For an affirmative defense the burden of proof is on the school
  • To argue that the student's proffered, denied, or unimplemented accommodation is “unreasonable” or “not reasonable” likely, the university would have to show that implementation of the accommodation would either result in:
    • A “fundamental alteration” Southern Community College v. Davis; U.S. Airways v. Barnett; Gati v. Western Kentucky University, et al., No. 3:14-CV-544-DIH-CHL, 2017 WL 4288749 (W.D. Ky. Sept. 27, 2017);
    • An undue burden
X.C.: Affirmative Defenses (2)

- An “undue burden”
  - Something that is “not feasible in the ordinary run of cases”
  - This defense might work *See Beazer v. NY Transit Authority, 440 U.S. 568 (1979)*
  - OCR suggests it will take the vagaries of COVID into account where creative alternatives are put into place *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](https://www2.ed.gov/about/offices/list/ocr/docs/20200512-qa-psi-covid-19.pdf)

- Too expensive
  - This defense, based on money and finances is very unlikely to work *Featherstone v. Pac. N.W. Univ. of Health Sciences*, D.C.E.D. Wash., No. 1:CV-14-3084-SMJ (2014)