

# **Individualized Interactive Accommodation and Fundamental Alteration Determinations**

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# 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

# The Interactive Process

## The Fundamental Alteration Process

From two directions: caselaw & best practices

# Course Structure <sup>(1)</sup>

- Two determination processes compared and contrasted
- “In the beginning” there was *Southeastern Community College v. Davis*
- Caselaw concerning the interactive accommodation determination process
- Caselaw concerning the fundamental alteration determination process a.k.a. the *Wynne v. Tufts* and *Guckenberger v. Boston University* processed
- Best practices and procedures



# Course Structure (2)

- The caselaw presentation will spend more time on interactive process than the fundamental alteration process
  - There is a lot of existing guidance on the fundamental alteration process, particularly from OCR
  - The components of the process have been well-detailed by the courts for a long time
  - The interactive process is much, much more likely to be required than is the fundamental alteration process, but is not as well defined, especially outside of employment arena
  - Less training on the pertinent higher ed. caselaw has been presented before by AHEAD or its affiliates; but fortunately, new caselaw is now helping to clarify this area of postsecondary student disability law

# I. Distinguishing Two Key Processes

# The Interactive Process

- ***The interactive process***, 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, DSS or other stakeholder), selecting the accommodations and arranging for their implementation
  - “Schools are obliged to carefully weigh whether requested accommodations are ‘feasible’ and ‘effective.’ ***Wong v. Regents of the Univ. of Cal.***, 192 F.3d 807, 818 (9th Cir. 1999).”
  - The communication element is a mutual responsibility
  - Good faith participation by either party may well be an element for a court to consider
  - This may be an on-going process, dynamic process, 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***

# A Concept Borrowed from Employment Law

- With regard to students, the interactive process is nowhere to be found in Section 504 or titles II and III of the ADA
- “In the employment context, we have noted that requesting and providing reasonable ADA accommodations must be an "interactive process" that includes ‘the input of the employee as well as the employer.’ [citation omitted] That's for good reason. The objective of the reasonable-accommodation requirement is to find a solution that works for both parties. ***The same is true in education.*** [emphasis added] ***Pickett v. Texas Tech Health Sciences Center***, No. 21-11087, 2022 U.S. App. LEXIS 16564, 5<sup>th</sup> Cir. (June 15, 2022)

# The Fundamental Alteration Review and Determination Process

- **The fundamental alteration/*Wynne v. Tufts/Guckenberger v. Boston University* process**, is for deciding whether an academic standard or rule is “essential” and whether a proposed accommodation would represent a fundamental alteration to that rule or standard, if the accommodation in question would implemented
  - Comes up less often but when authentically presented, likely will require more time and attention from the college/university
  - More faculty and administration involvement
  - Likely, less student involvement
  - Likely, not as dynamic or iterative a process with regard to student input
  - Generally, less DSS involvement
  - More about diligence, thoroughness, authenticity (not a pretext) than good faith

# Common to Both Processes <sup>(1)</sup>

- Deference is the “name of game” in postsecondary student disability law – doing either process (or both when necessary) correctly is likely to earn deference from OCR, DOJ, and the courts --- more so the **Wynne** process
- Neither, will not be credited if, in reality, a pretext, cover-up or excuse for discrimination
- Both are subject to imprecise conflation leading to reliance on the wrong process
- Both require recognizing when the process should be instituted
- Both will require consideration of how what resources are available, such as faculty time, to allocate to the processes required to resolve the matter
- Both should involve DSS, but more so the interactive process

## Common to Both Processes (2)

- Neither process is mentioned in the current Section 504 regs but they are mentioned in some ADA regulations
- Both 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

## II. “In the Beginning”

There was *Southeastern Community College v. Davis*



# Background

- 442 US 397 (1978)
- Ms. Davis was academically and professionally (LVN) qualified to enter the RN nursing program of Southeastern Community College
- During a preadmission interview, Southeastern discovered that Davis had a hearing impairment
- This being the very first 504 case before the Supreme Court, it was darn confused
  - Do you take into account the impact of the disability in determining qualification?
  - Does 504 require Southeastern to ignore what Ms. Davis cannot do due to her disability?
  - How is reasonable accommodation different from affirmative action?
- Later decisions were needed to clear up a lot of questions

# An Impressive Process by Southeastern

- Before making its decision whether Ms. Davis was qualified for admission it took multiple interactive steps:
  - It asked Ms. Davis to take an audiological exam to reveal the extent of her disability and the degree of her reliance of lip-reading
  - It consulted with a number of other nursing schools as to whether they had had a deaf nursing student and how they had accommodated the student
  - It twice contact the North Carolina, State Director of Nursing to determine if a deaf person would be licensed and whether the ability to participate in the surgical setting was “essential” [fundamental]
  - It convened the full faculty to obtain ideas and discuss how to accommodate Ms. Davis and whether to admit her
  - Following a faculty vote to not admit Ms. Davis, at her request, she was granted a second interview to hear her out
  - Following the interview a final decision was made and Ms. Davis sued in Federal court under Section 504

# In the Midst of this Confusion, Southeastern Prevailed, in Some Measure Due to its Processes

- Southeastern did not “shoot from the hip”
  - Extensive process
  - A diligent search for accommodations that might work
- Southeastern did not decline admission merely due to Davis having a disability
- What elements of the Southeastern curriculum that were essential, legitimate or fundamental, was not determined by a *Wynne* process, but it did use a diligent, non-pretextual, appropriate process
  - Looking at its existing curriculum
  - Looked at what graduates were authorized to do
  - Consultations with the State Board of Nursing

# III. Interactive Process Case Studies

*Chapman v. Meharry*

*Karam v. University of Arizona*

*Pickett v. Texas Tech Health Science Center*

*Segev v. Lynn University*

*OCR: Northern Arizona University*

*See also, Doe v. University of Kentucky (E.D. Ky. 2021); Kling v. University of Pittsburgh Medical Center (W.D. Penn 2021);* OCR Letter to Salt Lake Community College (2022) [presented later below]

# III.A.: The Rewards of a Good Interactive Process

# *Chapman v. Meharry Medical College*

A dynamic, affirmative, interactive process will earn deference for academic decision-making such as who is a QSD

# Background

- Angela CHAPMAN v. Meharry Medical College, Case No. 3:18-cv-00650, M.D. Tenn. (August 12, 2021)
- Plaintiff a former Meharry student with anxiety disorder, depression, adjustment disorder, Asperger's Disorder Syndrome and learning disabilities had a spotty academic record throughout her medical school career
- The College concluded that she was not a qualified student with a disability (QSD) when at the end of six years she had not finished her medical education or passed any of the MSLE step exams as required by the rules of the College
- Chapman unsuccessfully argued that, as a reasonable accommodation, she should have been given an extension of her time beyond the six-year maximum time under the rules of Meharry to earn her MD degree

# Summary Judgment for Meharry

- Following an employment discrimination analysis, Meharry was granted summary judgment on two grounds:
  - Meharry, in good faith, had engaged in an interactive process to consider the plaintiff's requests for accommodation and granted many, but not all, of them
  - Deferring to the academic judgment of Meharry the court agreed that it could conclude that Chapman was not otherwise qualified



# Why Meharry Prevailed <sup>(1)</sup>

- What Meharry had done right in its interactions
  - It had been flexible giving her the maximum time permissible under its own rules to pass Step 1 of the USMLE and reversing a decision to dismiss her
  - It had interactively accommodated her all along, such as extra time to prepare for the Step 1 exam
  - When she still wasn't doing well, it acquired more evaluative data and sought to learn more about the manifestations of her disabilities
    - Based on this data, it upped her accommodations including leaves of absence, a study plan, and additional mentorship services

# Why Meharry Prevailed (2)

- What the plaintiff did wrong
  - A consistently poor academic record
  - Did not bring pertinent data pertaining to her disabilities to the College's attention until late in the matter

# Is There a Right of the Student to be Present in the Interactive Process?

- Chapman's key claim was that she was not present in the meetings in which the faculty deliberated about her accommodation requests
  - A sign of bad faith?
  - "[N]othing requires employers to include the employee and/or the employee's physician in every discussion of possible accommodations or evaluations as part of engaging in the interactive process[,] and considering the record as a whole, the fact that Defendants did not include Plaintiff in discussions of his evaluation process alone is not enough to support a finding of bad faith in the interactive process."  
[citation omitted]

# Insights From the Chapman Decision About the Interactive Process

- The interactive process is very much about good faith and deference
  - Engaging in the interactive process is likely not a one-time event
  - Revisiting it, affirmatively taking steps to learn more about the impacts of the student's disability goes a long way to demonstrate good faith and the absence of a desire to see a student known to have a disability flunk out
  - This active and thorough use of the process earns institutions deference with regard to their academic decision making such as whether a student is qualified to remain in a professional training program
- Conversely, a student's bad faith may work against them

# An Even Bigger Point: The Interactive Duty is Not an Absolute One

- A failure to engage in the interactive process violates the ADA and Section 504 but, in the view of most courts, only if it would have produced an accommodation that would have worked
- Here, no such untried accommodation existed, as the court accepted that, in light of all Meharry did to support Chapman, she was not a QSD
- The court cites another decision as precedent for its conclusion: “Moreover, even if Defendants' refusal to include Plaintiff in the discussions during his evaluation could constitute bad faith in the interactive process, Plaintiff must still submit evidence that he can be reasonably accommodated. ‘The ADA . . . is not intended to punish employers for behaving callously if, in fact, no accommodation for the employee's disability could reasonably have been made.’”

# *Karam v. University of Arizona*

Evidence of careful analysis, flexibility, and precision  
during the interactive process

# Background

- No. CV-18-00455-TUC-RCC, D. Ariz. (Feb. 2, 2022)
- This complaint was brought by a successful third-year pharmacy student who claimed that she had been denied an allegedly authorized accommodation, extra time to write up patient evaluations and treatment plans (SOAP notes), in a class for which she got a B
- I wish the case had never been brought as, in granting summary judgment for the University, the court stated that if someone passes a class in which they were denied an accommodation, there is no claim as they have not been excluded from any program benefit on the basis of disability

# One More Way to Show Care in the Interactive Process: Critical Distinction Making

- This case might have been treated as a fundamental alteration case, but the DSS office made maximum use of the interactive process
  - It took on the responsibility of consulting with faculty about the requested accommodation and permitted the student to do the same
    - The court noticed that the student failed to show up
- Based on its discussions with the faculty, the DSS office took great care to distinguish two facially-similar circumstances:
  - Granting extra time to develop SOAP notes for an exam that simulated non-emergency medical circumstances (OSCE), as might happen in a clinic
  - Denying extra time when the exam simulated emergency circumstances (CSA) as might happen in an ER



# One More Way to Show Care in the Interactive Process: Finding Alternate Accommodations

- Even where extra time was denied, alternate accommodations were provided to Karam, which she used with success:
  - Completing the SOAP notes in a proctored, private space
  - Providing headphones or ear plugs to reduce distractions while completing the SOAP notes
  - Using assistive technology for completion of the SOAP notes
- Analogous to Southeastern Community College in *SE v. Davis*

# Once Again a Relationship between Process and Demonstrating Good Faith

- By distinguishing between the facially similar exams with regard to SOAP notes and providing alternatives, the school is demonstrating that:
  - it is being diligent in its analytical processes;
  - denies nothing just to maintain its authority; and,
  - denies nothing just to ensure that students with disabilities don't get to be pharmacists
    - The opposite is demonstrated by providing every possible alternative
- This could have been a fundamental alteration case, but the DSS office wanted to be proactive in problem solving and was, at the same time, open to student participation

# *Pickett v. Texas Tech Health Sciences Center*

The value of a clearly identified venue  
for engaging in the Interactive Process

# Long Story Short

- ***Pickett v. Texas Tech Health Sciences Center***, No. 21-11087, 2022 U.S. App. LEXIS 16564, 5<sup>th</sup> Cir. (June 15, 2022)
- A graduate nursing student who was managing ADHD enrolled in a Family Nurse Practitioner (FNP) program and a Doctor of Nursing Practice(DNP) program; two separate programs
- Pickett went to the DSS office and was authorized in writing to receive notetaking assistance, extra time on exams, and a low distraction testing site
- Pickett also wanted, but did not get, other accommodations including copies of Power Points and in the Nurse Practitioner program extra time to submit patient evaluation notes after review by her clinical supervisor
- Pickett claimed denial of accommodation and intentional discrimination
- Her denial of accommodations claims were allowed to proceed, in part, and were denied in part, her intentional discrimination claims were allowed to proceed

## Clear Procedures Advantage the Interactive/Accommodation Request Process

- With clear notice of procedures for requesting accommodations, student's denial of accommodation claims were allowed to proceed **but only** where she had requested the accommodations from the proper DSS office, for the program in question, and had received an authorizing letter of accommodation (LOA) for the particular program in which she wished to receive the accommodations
- The student's claim for extra time to complete evaluations was dismissed as the court held her responsible for not bringing her request nor her appeal of the faculty member's denial, to the DSS office
  - Extra time on exams approved for the other (FNP) program was not enough to support her claim

# Court's Rationale for Requiring It All to Go through the Proper The Interactive Process (1)

- “In the employment context, we have noted that requesting and providing reasonable ADA accommodations must be an "interactive process" that includes ‘the input of the employee as well as the employer.’ [citation omitted] That's for good reason. The objective of the reasonable-accommodation requirement is to find a solution that works for both parties. ***The same is true in education.*** [emphasis added]

# Court's Rationale for Requiring It All to Go through the DSS Office – The Interactive Process <sup>(2)</sup>

- “The [Science] Center cannot maintain an interactive accommodations process without centralizing accommodations requests. Schools are obliged to carefully weigh whether requested accommodations are "feasible" and "effective." *Wong v. Regents of the Univ. of Cal.*, 192 F.3d 807, 818 (9th Cir. 1999).”
- “That inquiry requires expertise that individual professors may not have. And defendants correctly point out that putting that burden on individual professors would create an ‘alternative, undocumented’ process, introducing disarray. Such a rule would undermine schools' ability to preserve interactivity in their handling of ADA requests.”

## III.B.: The High Cost of Failing to Implement an Effective Interactive Process



# *Segev v. Lynn University*

A warning: failure to engage  
in the interactive process may be a very costly matter

# Why This Case is Important <sup>(1)</sup>

- ***Segev v. Lynn University***, Case Number: 19-CV-81252, S.D. Fla., 2021 U.S. Dist. LEXIS 37731 (Magistrate Reinhart opinion February 26, 2021); opinion adopted by District Court Judge Cannon, 2021 U.S. Dist. LEXIS 94620; 2021 WL 1996437 (May 19, 2021)
- Segev's mother, in writing, had provided Lynn with his documentation and requested specific accommodations to his learning disabilities before he ever enrolled
- He had to wait 18 months before getting them, 6 months before he was dismissed
- Segev, alleging deliberate indifference, sued for a failure to accommodate
- Under Section 504, like Title IX, a showing of "deliberate indifference" by private plaintiffs is necessary to obtain compensatory damages (monetary damages beyond out-of-pocket expenses [tuition/room and board], expert and attorney fees)
- According to the Federal District Court Judge in Segev, Aileen M. Cannon, "Deliberate indifference is an exacting standard," and it "plainly requires more than gross negligence." "Indeed, the deliberate indifference standard requires that the alleged indifference essentially amount to a "deliberate choice."

# The Deliberate Indifference Claim May Proceed

- Segev’s claim for deliberate indifference damages, under Section 504, was permitted to proceed, where a University failed to give clear notice to students or faculty or reach a clear understanding among administrators as to how to commence or implement the interactive process that precedes accommodation
  - There was no reliable point for receiving documentation of disability or requests for accommodation
  - There was poor recordkeeping of such requests
  - There was poor and confused communication and almost no coordination between the office that determined accommodations and the office that provided supplementary services to students with learning disabilities
  - Not all faculty treated accommodation requests as more than voluntary
  - An individual, hired as the “compliance officer,” had not applied for the job and had no training

*Jones v. Marshal University  
Board of Governors*

# Background

- CA No. 3:20-0786 (S.D. W. Va. 2021)
- Shaynen Jones, with a strong community college academic record, was admitted to the Marshall University pre-nursing program
- Before enrolling Jones entered cooperatively into the interactive process by providing the University with full documentation of the fact that she was “totally deaf” and required interpreting services [compare to *Southeastern v. Davis*]
- Despite that fact, there were no services for her on the first day of class, they were provided in her classes thereafter on an unreliable intermittent basis, and sometimes skipped altogether

# An Interactive Process that Was Itself Inaccessible

- Marshall required a one-month advanced notice for all other services, including interpreter services for academic purposes outside of class, such as meeting with professors
- In fact, on the grounds that she had not requested the services a month in advance, all requests pertaining to non-classroom, academic activities were denied: such as use of the university's writing center, tutoring center, and bookstore; to assist her in meeting with her mentor in the EDGE program; and, to assist her at meetings with professors during office hours
- Jones was told interpreting was too expensive and she was berated for requesting it less than a month in advance
- An 11-day in advance request was denied and a two-month planner, listing all the times she would need service, also did not get her service

# Engaging in the Interactive Process Was of No Value

- Plaintiff/Jones was a qualified individual as she met all the academic and technical requirements requisite to admission and was in fact admitted by Marshall
- Jones gave timely notice that she is an individual with a disability and would need accommodations
- The accommodations requested by Jones were “necessary” and “reasonable”
- “[Marshall University] failed to provide the requested accommodations **or to otherwise engage in an interactive process to identify alternative ones**” [emphasis added]
- Jones alleges that even when she tried to “conform to the egregious four-weeks advance notice policy,” services --- all academically-related --- were denied
- Jones alleges that, “[she] was ‘forced to withdraw’ from the program.”

# Court Denies Marshall University's Motion to Dismiss

- A futile or highly burdensome interactive process can serve to illustrate that reasonable accommodations are being denied
- “These allegations are clearly sufficient to support a claim that [Ms. Jones] was excluded from, or denied access to, Marshall’s educational program .... Accepting the facts alleged in the Amended Complaint as true, the Court is satisfied that Plaintiff has stated a plausible claim of discrimination under both the ADA and Section 504 of the Rehabilitation Act.”



# III.C.: Insights from OCR Into the Interactive Process

Northern Arizona University

OCR Complaint No. 08-22-2063 (2022)

Salt Lake Community College

OCR Complaint No. 08-22-2021 (2022)

[discussed below under fundamental alteration]

# OCR letter to Northern Arizona University

OCR Complaint No. 08-22-2063 (2022)

# Background

- Student in a Doctoral Psychology Program who was requesting, in part, accommodations in both the academic setting and practicum(clinical) setting.
- A number of the student's requests were not approved but the student was offered two sets of alternative accommodations to choose from.
- Unhappy, the student initiated the school's formal grievance process.
- Grievance committee upheld the determination that the accommodations offered would be effective alternative approaches and the student could select which approach to take.
- The student filed a complaint with OCR alleging numerous violations.

# OCR's Articulation of the Interactive Duty <sup>(1)</sup>

“Section 504 envisions a meaningful and informed process with respect to the provision of modifications, e.g., through an interactive and collaborative process between a post-secondary institution and the student. Students are responsible for knowing these procedures and following them. Generally, upon receiving documentation of a disability and a request for academic adjustments, a postsecondary institution’s evaluation of a student’s request requires a fact- specific, case-by-case inquiry. This evaluation process should be interactive, with information exchanged between the student and the postsecondary institution to arrive at a conclusion about the academic adjustment requested.”

# OCR's Articulation of the Interactive Duty <sup>(2)</sup>

- “If the request for an academic adjustment is not initially granted, the student and the postsecondary institution should engage in an interactive process to determine what, if any, academic adjustment will be made, and the appropriate scope of the academic adjustment. *The interactive process may be brief, with a student requesting an academic adjustment and an institution granting it with minimal documentation requirements or it may be more protracted, with various exchanges between the student and the postsecondary institution about the nature of the academic adjustment.* “

# OCR's Analysis of the Allegations

- OCR concluded that there is insufficient evidence to establish that the University's conduct violated Section 504 or Title II
- "Review of the evidence reflects that the University engaged the Complainant in an interactive process to identify and implement appropriate accommodations for the practicum."
- "Students may disagree with accommodations and modified accommodations, but still have an obligation to continue the interactive process."

# III.D.: Interactive Process Implementation Guidance

# What Is the Purpose of the Interactive Process?

- An individualized assessment of barriers the student experiences in:
  - Academic environment
  - Physical environment
  - Virtual environment
  - Housing and Residence life
  - Support programs
  - Campus activities



# What the Interactive Process Helps to Identify

- If the proposed accommodation is necessary to ensure that any academic requirements or technical standards do not discriminate or have the effect of discriminating on the basis of the student's disability
- If the proposed accommodation is necessary to provide the student with a disability meaningful access or an equal opportunity to gain the same benefits as their non-disabled peers
- If the proposed accommodation is logically connected to the impacts of the student's disability and the barriers to access they experience in the academic and/or campus environment
- If the proposed accommodation is logically designed to address and remove the identified barrier to access
- If implemented, the proposed accommodation would be effective in removing the identified barrier to access

# Who Should be Involved in the Interactive Process? <sup>(1)</sup>

- “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.” [emphasis added]

*OCR “Letter to Simmons College” #01-16-2113*

# Who Should be Involved in the Interactive Process? <sup>(2)</sup>

- The Student:
  - Identifying barriers
  - Describing their experience
  - Requesting/identifying potential effective accommodations
  - Providing information which supports their eligibility and requests
  - Following up if issues or additional barriers arise

# Who Should be Involved in the Interactive Process? (3)

- The School:
  - Disability Resources-leading the process for the school
    - Familiarize itself with the student and their disability
    - Explore potential accommodations
    - Make decisions using professional judgment
  - Appropriate academic or program administrators
    - To resolve formal or informal complaints
    - Resolve student issues/concerns about the provision of approved accommodations
  - Faculty
    - If questions arise about the application of an accommodation in a class
    - To better understand course design and identify potential modifications/adjustments

# Why Do It?

- It is a best practice
- As mentioned earlier, it allows for a diligent and individualized assessment of:
  - Disability/Design related barriers experienced by the student
  - Essential course and program requirements
- It establishes an important collaboration which:
  - Identifies actual barriers to access
  - Identifies methods for removing those barriers

# Why Do it?

- In short it results in:
  - Positive outcomes and equitable access for students!
  - Enhanced design and opportunity in courses and programs.
  - When necessary, it supports institutional decision making and demonstrates clear and deliberative decision making when:
    - Justifying the approval of an accommodation to internal administrators.
    - Justifying the denial of a requested accommodation during an internal grievance proceeding, an external complaint investigation or potential legal action

# IV. The Fundamental Alteration Review and Determination Process

# IV.A: Regulatory Foundation



# The 504 Regulations Don't Use the Term "Fundamental Alteration"

- But the Section 504 regulations certainly reference the same concept and the OCR ED regulation below, is virtually identical to the HEW regulation that the Supreme Court relied up *S.E. Com. Col. v. Davis* 442 US 397 (1978)
- **"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 .... on the basis of [disability]. *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. ...."  
[Emphasis added]
  - An affirmative defense
  - What's not essential is not fundamental

# The Titles II and III Regulations Do Explicitly Use the Term Fundamental Alteration

- Conceptually the same
- 28 C.F.R. § 35.150 – Program Accessibility
- a) General. A public entity shall operate each service, program, or activity so that [it] .... is readily accessible to and usable by individuals with disabilities. This paragraph does not—  
.....
- (3) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity .... In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity ... has the burden of proving that compliance with §35.150(a) of this part would result in such alteration ....
- The Title II regulation at 28 C.F.R. § 35.164 Duties is virtually identical
- The Title III regulations similarly reference fundamental alteration in several provisions including 28 CFR § 36.302

# IV. B.: The Seminal Cases

***Wynne v. Tufts***

***Guckenberger v. Boston University***

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

- Respectively, 932 F.2d 19 (1<sup>st</sup> Cir. 1991); 976 F.2d 791 (1<sup>st</sup> 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 paid for and had a faculty member conduct a psychoeducational evaluation, Tufts and Wynne discover that Wynne has a learning disability which may explain his difficulties on multiple choice exams
- Sounds like a good interactive process, except Tufts denies Wynne's subsequent 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, courts defer to academic decision-making and that its choice of exam format is the essence of an academic decision-making
  - 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

## *Wynne v. Tufts University* [round I] (1)

- A three paragraph affidavit from the Dean to support summary judgement did not meet the expectations of the court as it was:
  - “Conclusory” (without support or detail)
  - There was 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 accommodation determination process was not ***interactive or individualized*** [my words]

# *Wynne v. Tufts University* [round 1] (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 the "***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 in favor of the school

# *Wynne v. Tufts University* [round II] <sup>(1)</sup>

- Second time before the court, Tufts shows that it carefully followed the order of the 4<sup>th</sup> Circuit and consequently 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 ironclad.*” [emphasis added]
    - NB: 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 through the ***Wynne v. Tufts*** decision-making process



## *Wynne v. Tufts University* [round 3]

- Wynne's one last chance to rebut Tufts would have been that though Tufts went through the process, it did so in bad faith; the process was a shame with an 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 were *not* a pretext (an excuse or shame) for discrimination:
    - There was no evidence of disability animus found by the court
    - Tufts did a lot to try to help Wynne
    - Wynne was given multiple second-chances before being taken to dismissal
    - Wynne didn't even identify his disability until he was in a dismissal process (to some degree a sequential issue)
  - Much like shown by the successful defenders of their interactive processes, above

# *Guckenberger v. Boston University II* (1)

- 8 F. Supp. 2d 82 (D. Mass. 1998)[BU II]
- BU II concerned discontinuation of course substitution for foreign languages by BU President, Jon Westling, who in BU I had been shown to be hostile to students with learning disabilities
- Like Tufts, BU sought summary judgement based on the highly academic nature of the decision to discontinue course substitutions for foreign languages
- Maybe because of everything that the court had learned earlier in ***Guckenberger I***, it sent BU back for a ***Wynne***-like process [also the same Circuit]
- The second time before the court on this issue, 976 F.2d 791 (1<sup>st</sup> 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 during ***Guckenberger I***, BU earned enough discretion to prevail

# How Boston University Did It Right

- Kept the discredited President, Jon Westling, Ph.D. out of the process
- It used a multi-disciplinary committee
- BU articulated the objective of a foreign language requirement
  - Identified alternatives to learning a foreign language
  - Articulated why alternatives would not meet the identified objective: “intimacy with another culture”
- Following a diligent search BU found new ways to teach foreign language
- BU presented the court with a win/win situation, committing to teach foreign language in multiple ways
  - An example of how accommodating students with disabilities can be an engine of innovation in the classroom
- The court concluded that, the contrary practices of the other Ivy League schools, granting substitutions, did not prove animus or pretext by BU

# Expanding the *Wynne* Doctrine to “Due Diligence”

- A number of courts have applied the *Wynne v. Tufts* process, or at least its standard of a conscientious due diligence process to a wide range of qualification-related questions, including in a series of complex health science cases as well as fundamental alteration questions
  - E.g., *Wong v. Regents of Univ. of Cal.* 192 F.3d 807 (9<sup>th</sup> Cir. 1999) [*Wong I – due diligence not demonstrated*]; compare, *Zukle v. Regents of Univ. of California*, 166 F.3d 1041 (9<sup>th</sup> 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]

# IV.C.: OCR Letter Case Studies

OCR letter to Salt Lake Community College (2022)

OCR letter to Chamberlin University School of Nursing (2022)

# Though it Never Cites to *Wynne* or *Guckenberger*, OCR Relies Heavily on their Process Requirements

- OCR letters to: Salt Lake Community College (2022); Chamberlin University School of Nursing, Kent State University (2022); Tulsa Community College (2011); Wright State University (2013); California State University, Dominguez Hills (2016); GateWay Community College (2017); University of North Carolina Greensboro (2017); Irvine Valley College (2017); Rio Salado College (2017); Central Washington University (2017); and Surry Community College (2017)

# Salt Lake Community College -- Background

- Salt Lake Community College (SLCC), OCR Complaint No. 08-22-2021 (2022)
- A letter full of excellent guidance!
- This letter is *both* about the interactive process and the how the College failed to take the steps necessary to secure its determination that what the student wanted were fundamental alterations
- Under Title IX and Section 504 the complainant wanted accommodations for her pregnancy-related sickness absences including being excused from published absence limits and penalties and an opportunity to make up missed work and assignments
- SLCC agreed to a limited number of excused absences but only with a grade penalty for both absences and late assignments
- Complainant was advised to take responsibility for being pregnant and that she should drop out

# Basis of OCR's Determination that the College Had Failed to Engage in the Interactive Process <sup>(1)</sup>

- Complainant reached out to the Title IX Coordinator and DSS Director but got no relief on the grounds that what she wanted was a unreasonable [a fundamental alteration]
- A failure by the College to gather the information necessary to understand the student's condition or what accommodations would be needed
- A hasty decision that what the complainant wanted would constitute a fundamental alteration without going through an essential requirement/educational justification process
- No oral and written notice to the complainant stating that her request had been denied or the basis for the decision



# Basis of OCR's Determination that the College Had Failed to Engage in the Interactive Process (2)

- Mischaracterization of what the student wanted so that her requests were more likely to appear as a request for a fundamental alterations
- A speculative rather than a careful rational review as to whether there were other accommodations by which she could successfully complete the course requirements
- No consideration of retroactive adjustments to compensate for past accommodations inappropriately not implemented
  - I've never seen this before but it makes good sense

# Important Fundamental Alteration Guidance <sup>(1)</sup>

- “In providing an academic adjustment, a postsecondary institution does not have to eliminate or lower essential requirements of its programs or activities or make modifications that would result in a fundamental alteration of its programs or activities or impose an undue burden on the institution. Academic requirements that the recipient can demonstrate are essential to the instruction being pursued by a student or to any directly related licensing requirement are not regarded as discriminatory.”
- “In reviewing an institution’s determination that a specific standard or requirement is an essential program requirement that cannot be modified, OCR considers whether that requirement is *educationally justifiable*.” *[emphasis added]*
  - [Another term or test for distinguishing “essential” or “fundamental” from what is “not fundamental”]
- “The requirement should be essential to the educational purpose or objective of a program or class.” [reformatted for presentation]

# Important Fundamental Alteration Guidance (2)

- “OCR considers among other factors, whether:
  - (1) the decisions regarding essential program requirements were 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
  - (2) whether the decision-makers considered 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.”
- “OCR affords considerable deference to academic decisions made by post-secondary institutions, including what is or is not an essential program requirement.” [reformatted for presentation]
- The OCR language quoted above is entirely consistent with the *Wynne* and *Guckenberger* court-ordered, fundamental alteration determination procedures, but even clearer.

# OCR letter to Chamberlin Univ. School of Nursing Background <sup>(1)</sup>

- OCR Docket # 04-21-2120 – like the Salt Lake case, this matter pertained both to the interactive and the fundamental alteration processes
- The complainant was a student in the Chamberlin University School of Nursing Bachelor of Science in Nursing Program
- Chamberlin is a private university with several locations; in this case apparently Georgia
- The Student had successfully progressed through the curriculum up to her capstone project which was a mix of didactic and clinical work
- The Student was an individual with Multiple Sclerosis an impairment that, with treatment, includes suppressed immunity

# OCR letter to Chamberlin Univ. School of Nursing Background <sup>(2)</sup>

- The complainant asked for two “academic adjustments” [accommodations]
  - A guarantee that she would not be assigned a patient with COVID
  - Remote didactic and clinical instruction while she was travelling to New York for treatment
- In order to address her first request, the Student was moved from an outside clinical placement to an on campus clinical program where there was the best opportunity for not being assigned a patient with COVID
  - But the University made a point of stating this was not an accommodation to which she was entitled as she had failed to apply for this placement on a timely basis

# OCR letter to Chamberlin Univ. School of Nursing Background <sup>(3)</sup>

- On the grounds that the second accommodation was “unreasonable” and no “appropriate” alternate placement was available, and that the State licensing body was no longer requiring on-line instruction to address COVID, the complainant was denied, in writing, the second accommodation
- According to the University, the Student was orally offered some alternatives including completing her degree at another Chamberlin campus that was still virtual
- *By delaying her treatment*, the Student completed her capstone on campus and graduated

# OCR Had Some Real Concerns

- Technically, this is a “302 letter,” meaning the matter was resolved voluntarily prior to OCR making a compliance determination
- But, OCR certainly implied that there were facts to support a violation
- What bothered OCR:
  - During COVID the student’s Chamberlin campus had provided didactic and clinical training on-line
  - Students who had taken the capstone course on-line were permitted to sit for the state licensing exam and had passed it
  - At least one other Chamberlin campus was still offering the capstone course on-line
  - The treatment of the Student’s accommodation requests had been cursory and when delivered in writing contained only the University’s conclusions

# OCR States Its Basic Analytical Approach

- “When determining whether a recipient provided academic adjustments in accordance with Section 504 OCR examines the following:
  - (1) whether the student provided adequate notice in accordance with required procedures of the need for academic adjustments;
  - (2) whether reasonable academic adjustments were provided; and
  - (3) whether the academic adjustments provided were of adequate quality and effectiveness.” [reformatted for presentation]



## Nearly quoting *Wynne and Guckenberger*, OCR Provides Deference to Academic Decision Making (1)

- “In keeping with the policy of deference to academic decision making .... OCR does not substitute its judgment for that of educational experts with respect to whether academic requirements are or are not essential .... OCR may, however, review the process that a postsecondary institution utilizes to determine whether an academic adjustment is an essential requirement.”
- “Under an appropriate process, when determining whether a requested academic adjustment or auxiliary aid would constitute a fundamental alteration ... relevant officials within the institution are generally required to engage in a reasoned deliberation that includes a diligent assessment of available options.” [quote continues onto next slide]

## Nearly quoting *Wynne and Guckenberger*, OCR Provides Deference to Academic Decision Making (2)

- “An appropriate process should include 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 after reasoned deliberation; and
  - 3) the decision makers reach a rationally justifiable conclusion that the available alternatives would result either in lowering of academic standards or requiring substantial program alternative.”  
[reformatted for presentation]

IV.D.: Fundamental Alteration  
Review and Determination Process  
Implementation Guidance

# What is the Purpose of the Fundamental Alteration Process?

- An individualized assessment of essential course and program requirements:
  - Learning outcomes
  - Assessments
  - Activities
  - Materials
  - Policies

# Why is this Process So Important to OCR and the Courts?

- “In keeping with the policy of deference to academic decision making, OCR gives significant deference to the professional judgments of faculty and other educational experts with respect to genuinely academic decisions. OCR does not substitute its judgment for that of educational experts with respect to whether academic requirements are or are not essential to participation in a recipients’ program or activity. OCR may, however, review the process that a postsecondary institution utilizes to determine whether an academic adjustment is an essential requirement. “

Letter to Chamberlin University School of Nursing #04-21-2120

- “An educational institution decides what requirements are essential for its program as long as each requirement has a rational relationship to the program of instruction and is not a pretext for discrimination. OCR does not substitute its judgment for the academic judgment of educators.”

Letter to Central Washington OCR Case No. 10162203

# Who Should be Involved in the Fundamental Alteration Process? <sup>(1)</sup>

- The Student:
  - Identifying barriers
  - Describing their experience
  - Requesting/identifying potential effective accommodations

# Who Should be Involved in the Fundamental Alteration Process? <sup>(2)</sup>

- The School:
  - Disability Resources
    - Familiarize itself with the student and their disability
    - Explore and identifying potential alternative accommodations
  - Faculty
    - If there is a concern that implementation of an accommodation will fundamentally alter an essential course element
    - To identify specific
      - Learning outcomes
      - Assessments
      - Activities
      - Materials
      - Policies

# Who Should be Involved in the Fundamental Alteration Process? <sup>(3)</sup>

- The School (con't.):
  - Appropriate academic or program administrators
    - If there is a concern that implementation of an accommodation will fundamentally alter an essential program element (academic, housing, student supports)
    - Explore/identify potential alternative accommodations, when necessary
    - When legitimate questions arise in which other school officials don't agree on the nature of a concern (ie. D.R. and a Faculty member)



# Why Do It? <sup>(1)</sup>

- It is a best practice
- As mentioned earlier, it allows for a diligent and individualized assessment of:
  - Disability/Design related barriers experienced by the student
  - Essential course and program requirements
- It establishes an important collaboration which:
  - Identifies what is essential in courses and programs
  - Identifies potential fundamental alterations
  - Identifies possible alternative approaches when a FA is established

# Why Do It? (2)

- In short it results in:
  - Positive outcomes and equitable access for students!
  - Enhanced design and opportunity in courses and programs.
  - When necessary, it supports institutional decision making and demonstrates clear and deliberative decision making when:
    - Justifying the denial of a requested accommodation during an internal grievance proceeding, an external complaint investigation or potential legal action