

**CAUGHT BREAD-HANDED: EXPOSING  
LONG-TERM CARE FACILITIES' LEGAL  
NON-COMPLIANCE IN CARING FOR  
ELDERLY RESIDENTS WITH CELIAC  
DISEASE**

*Megan Benka*

*For too long, elderly individuals living with celiac disease have faced a growing challenge to find long-term care willing to accommodate their celiac disease. Many find themselves being rejected from admission into nursing homes because facilities refuse to provide a gluten-free diet, currently the only treatment for celiac disease. Even when an individual finds a nursing home willing to accommodate a gluten-free diet, the facility's adherence to a strict gluten-free diet may be lackluster.*

*Long-term care facilities may resist the idea that they are legally bound to accommodate residents with celiac disease and argue that even if they are legally bound, the cost of providing a gluten-free diet is prohibitively expensive.*

*This Note addresses the need for long-term care facilities to recognize their obligations under the law to accommodate a resident's gluten-free diet. It describes various legal obligations, two settlement agreements between the Department of Justice and universities, and a pertinent decision by the Fourth Circuit. Finally, this Note recommends that long-term care facilities fulfill their legal obligations by using the Department of Justice's settlement agreements as a guide to ensuring the inclusivity of their dining services.*

---

Megan Benka, Associate Editor 2023-2024; J.D. 2024, University of Illinois College of Law; B.A. 2020, International Relations and Russian Language, University of Rochester (New York). The author would like to thank her family and friends for their endless encouragement and support.

## I. Introduction

Curtiss Matlock found herself in a position familiar to many at one point in their lives—she needed to find a nursing home that would care for her elderly mother.<sup>1</sup> For six years, Ms. Matlock diligently cared for her mother with the help of private caregivers and hospice assistance.<sup>2</sup> However, at eighty-eight years old, Ms. Matlock's mother had lost her sight from glaucoma, suffered from diminished memory, and could no longer use her right hand.<sup>3</sup> Even so, Ms. Matlock continued, with the assistance of the other caregivers, to care for her mother in nearly every aspect of life: "bathing, dressing, administering medications, food preparation . . ." <sup>4</sup> As her funds depleted under the financial strain of providing private care, Ms. Matlock needed to find a nursing home that would provide her mother the care she required.<sup>5</sup>

Yet Ms. Matlock could not find this desperately-needed nursing home.<sup>6</sup> While she did find price-appropriate nursing homes that could provide the requisite medical and physical assistance,<sup>7</sup> repeated refusal or blatant dismissiveness to accommodate one of her mother's other medical conditions, celiac disease, stymied Ms. Matlock's search.<sup>8</sup> When a nursing home did not outright refuse to accept Ms. Matlock's mother because of her celiac disease, the treatment for which is to follow a strict gluten-free diet, Ms. Matlock later discovered the staff's resistance to providing safe gluten-free meals.<sup>9</sup> A member of the kitchen staff stated the following: "Oh, she doesn't need that diet. That's all made up."<sup>10</sup>

Ms. Matlock's experience is not an isolated one.<sup>11</sup> Her story, shared on a support page for individuals with celiac disease, garnered forty-two comments.<sup>12</sup> One commenter lamented, "I often hope that I'll

---

1. See Curtiss Ann Matlock, *Nursing Home Care—The Great Challenge for the Celiac*, CELIAC.COM (Mar. 30, 2016), <https://www.celiac.com/articles.html/nursing-home-care8212the-great-challenge-for-the-celiac-r3655>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *See id.*

6. *See id.*

7. *See id.*

8. *Id.*

9. *See id.*

10. *Id.*

11. *See* Comments to Matlock, *supra* note 1.

12. *See id.*

go suddenly than have to endure care under people who deny the existence of these problems.”<sup>13</sup> And on a different forum, run by an individual living with celiac disease, one commenter responded to a particular blog post by writing, “I raised . . . [gluten-free] dining as . . . one of my needs. I was told there was no way they could handle that. So if I have to go into a residential facility, am I going to be sick the rest of my life?”<sup>14</sup> Another sharp-eyed commenter wrote, “The courts have ruled that colleges must provide gluten-free food to students with celiac disease under rules established by the Americans with Disabilities Act. Surely the same rules would apply to nursing homes and assisted living facilities?”<sup>15</sup>

Unfortunately, the answer—broadly speaking—is unclear.<sup>16</sup> For elderly individuals living with celiac disease, nursing homes place these residents at risk of serious health consequences, the development of certain forms of cancer or other autoimmune disorders, if they refuse to accommodate the resident’s gluten-free diet.<sup>17</sup> This Note addresses the realities that many elderly individuals experience while living with celiac disease in nursing homes<sup>18</sup> that provide assistance with daily activities, like bathing, eating, and dressing, services considered to be “custodial care.”<sup>19</sup> After this Introduction, Part II provides background information about celiac disease and its prevalence amongst the elderly.<sup>20</sup> In addition, Part II describes pertinent federal and state regulations,<sup>21</sup> two settlement agreements between the Department of Justice

---

13. Guest Sandy, Comment to Matlock, *supra* note 1.

14. Nancy Kirk, Comment to Erica Dermer, *Gluten-Free Seniors—What Are We Going To Do?*, CELIAC & THE BEAST (June 21, 2018), <https://www.celiacandthebeast.com/2018/06/gluten-free-seniors-what-are-we-going-to-do/>.

15. Guest Wetfish, Comment to Matlock, *supra* note 1.

16. *See infra* Part II.

17. *See Assessing for Compliance with the Gluten-Free Diet*, CELIAC DISEASE FOUND. (Oct. 27, 2016), <https://celiac.org/about-the-foundation/featured-news/2016/10/assessing-compliance-gluten-free-diet/>; *see also Autoimmune Disorders*, CELIAC DISEASE FOUND., <https://celiac.org/about-celiac-disease/related-conditions/autoimmune-disorders/> (last visited Aug. 29, 2023).

18. Matlock, *supra* note 1.

19. *Custodial Care vs. Skilled Care*, CMS, <https://www.cms.gov/Medicare-Medicaid-Coordination/Fraud-Prevention/Medicaid-Integrity-Education/> (last visited Sept. 24, 2023).

20. *See infra* Part II.

21. *See* Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213; Rehabilitation Act of 1973, 29 U.S.C. 794; 42 U.S.C. § 18116; 42 C.F.R. §§ 483.10, 483.60 (2022); 775 ILL. COMP. STAT. ANN. 5/1-101 (West 1980); 210 ILL. COMP. STAT. ANN. 45/1-101 (West 1980); IOWA CODE ANN. § 216.1 (West 1993).

(DOJ) and universities,<sup>22</sup> and an applicable judicial decision by the Fourth Circuit.<sup>23</sup> Part III analyzes the obligation that nursing homes have under these federal and state regulations to provide quality care for residents with celiac disease.<sup>24</sup> Part III will also analyze the impact of the DOJ's Settlement Agreements<sup>25</sup> and the Fourth Circuit's watershed decision in *J.D. v. Colonial Williamsburg Foundation*.<sup>26</sup> Lastly, Part IV recommends how nursing homes, following the lead of universities, may care for elderly residents in compliance with their obligations under federal and state law.

## II. BACKGROUND OF CELIAC DISEASE AND RELEVANT DISABILITY STATUTES

### A. Celiac Disease

Affecting about one percent of genetically predisposed people worldwide, celiac disease is a chronic autoimmune disease that damages the small intestine.<sup>27</sup> Unfortunately, the exact cause of celiac disease is still unknown.<sup>28</sup> However, researchers postulate that stressful life events, like undergoing surgery or experiencing emotional trauma, might relate to its onset.<sup>29</sup> When individuals with celiac disease ingest gluten, a protein found in wheat, rye, and barley, their immune system is attacked, damaging tiny projections, or villi, that line the small

---

22. See Settlement Agreement, U.S. and Lesley U. (2012) (DJ 202-36-231) [hereinafter Lesley Settlement]; see also Settlement Agreement, U.S. and Rider U. (2019) (DJ 202-48-32) [hereinafter Rider Settlement].

23. *J.D. by Doherty v. Colonial Williamsburg Found.*, 925 F.3d 663, 668 (4th Cir. 2019).

24. See *infra* Part III.

25. See *infra* Part III.

26. *J.D. by Doherty*, 925 F.3d at 668.

27. See *Definition & Facts for Celiac Disease*, NAT'L INST. OF DIABETES & DIGESTIVE & KIDNEY DISEASE, <https://www.niddk.nih.gov/health-information/digestive-diseases/celiac-disease/definition-facts> (last visited Aug. 29, 2023) [hereinafter *Definition & Facts for Celiac Disease*]; see also Shadi Rashtak & Joseph A. Murray, *Celiac Disease in the Elderly*, 38(3) *GASTROENTEROLOGY CLINICS OF N. AM.* 433, 433–46 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3227015/> [hereinafter Rashtak & Murray].

28. *What Is Celiac vs. Non-Celiac Gluten Sensitivity*, CAROLINA ASTHMA & ALLERGY CTR. (Aug. 17, 2023), <https://www.carolinaasthma.com/celiac-vs-gluten-sensitivity/> [hereinafter *Celiac vs. Gluten Sensitivity*]; see also *Celiac Disease*, WEBMD, <https://www.webmd.com/digestive-disorders/celiac-disease/celiac-disease> (last visited Aug. 29, 2023) [hereinafter *Celiac Disease*].

29. *Celiac Disease*, *supra* note 28.

intestine and promote nutrient absorption.<sup>30</sup> Symptoms, while variable, commonly manifest as diarrhea, fatigue, weight loss, vomiting, and anemia.<sup>31</sup> The long-term effects of celiac disease can be severe, and include a higher risk of developing coronary artery disease and small bowel cancer; untreated celiac disease, meanwhile, can lead to other autoimmune disorders, including type 1 diabetes and multiple sclerosis.<sup>32</sup> Thus, the importance of receiving a proper diagnosis is vital.<sup>33</sup>

Traditionally, celiac disease is diagnosed through a blood test or by an endoscopy, a medical procedure where a doctor guides a tube with a camera into the upper portion of the gastrointestinal tract to obtain biopsies of the small intestine.<sup>34</sup>

Importantly, “despite awareness efforts, celiac disease is often confused with other gluten-related disorders . . . .”<sup>35</sup> However, celiac disease is not to be confused, or used interchangeably with, gluten sensitivity or a wheat allergy.<sup>36</sup> For those suffering from gluten sensitivity or a wheat allergy, symptoms may mimic those of celiac disease; however, neither gluten sensitivity nor wheat allergies are autoimmune diseases.<sup>37</sup> Moreover, for those who have a gluten sensitivity or a wheat allergy, their small intestine is not damaged if gluten is ingested.<sup>38</sup>

While drug therapies for treating celiac disease are in medical trials, currently, the only treatment for celiac disease remains a strict,

---

30. *What is Celiac Disease?*, CELIAC DISEASE FOUND., <https://celiac.org/about-celiac-disease/what-is-celiac-disease/> (last visited Aug. 29, 2023) [hereinafter *What is Celiac Disease?*].

31. *Celiac disease*, MAYO CLINIC (Aug. 10, 2021), <https://www.mayoclinic.org/diseases-conditions/celiac-disease/symptoms-causes/syc-20352220> [hereinafter *Celiac disease*, MAYO CLINIC].

32. *What is Celiac Disease?*, *supra* note 30.

33. *See generally What Are the Complications of Celiac Disease?*, WEBMD, <https://www.webmd.com/digestive-disorders/celiac-disease/celiac-disease-complications> (last visited Aug. 29, 2023) (describing the consequences of untreated celiac disease).

34. *See Diagnosis of Celiac Disease*, NAT'L INST. OF DIABETES & DIGESTIVE & KIDNEY DISEASES, <https://www.niddk.nih.gov/health-information/digestive-diseases/celiac-disease/diagnosis> (last visited Aug. 29, 2023).

35. Jamie Bartosch, *Two conditions that seem like celiac disease, but aren't*, UCHICAGOMED. (Jan. 17, 2020), <https://www.uchicagomedicine.org/forefront/gastrointestinal-articles/two-conditions-that-have-symptoms-like-celiac-disease-but-are-not>.

36. *See Definition & Facts for Celiac Disease*, *supra* note 27.

37. *Definition & Facts for Celiac Disease*, *supra* note 27; *see also Celiac vs. Gluten Sensitivity*, *supra* note 28.

38. *Definition & Facts for Celiac Disease*, *supra* note 27.

lifelong adherence to a gluten-free diet.<sup>39</sup> Common food items such as bread, pasta, baked goods, pastries, and beer naturally contain gluten.<sup>40</sup> Absent a marker clearly designating a product as gluten-free, however, an individual with celiac disease must pay attention to other products that seem unlikely to contain gluten but do, by verifying the product's ingredient label.<sup>41</sup> "Hidden gluten," as it is called, is found in a variety of different products, including meat substitutes, salad dressings, milkshakes, and even condiments, like soy sauce and teriyaki sauce.<sup>42</sup> Notably, gluten is not exclusively found in food products and may also be found in medications, vitamins, supplements, and cosmetic products.<sup>43</sup>

## B. Celiac Disease Amongst the Elderly

Initially believed to be a childhood disease, epidemiologic studies now suggest that many individuals develop celiac disease after the age of 50.<sup>44</sup> Within the past several years, celiac disease research has expanded to include examining the incidence and prevalence of celiac disease amongst the elderly, trending away from research historically focused on children and young adults.<sup>45</sup> One study, for example, reported significant changes in the incidence of celiac disease amongst the elderly in a particular county in Minnesota.<sup>46</sup> In this study, the incidence rates of celiac disease amongst those 65 and older increased from 0.0% in 1950-1959 to 15.1% in 2000-2006, reflecting, perhaps, an increased

---

39. See *Drugs for Celiac Disease May Be on the Horizon*, COLUM. U. IRVING MED. CTR. (May 12, 2022), <https://www.cuimc.columbia.edu/news/drugs-celiac-disease-may-be-horizon> [hereinafter *Drugs for Celiac Disease*]; *What is Celiac Disease?*, *supra* note 30.

40. *Sources of Gluten*, CELIAC DISEASE FOUND, <https://celiac.org/gluten-free-living/what-is-gluten/sources-of-gluten/> (last visited Aug. 29, 2023) [hereinafter *Sources of Gluten*].

41. *Id.*

42. See *38 Foods Where Gluten May be "Hidden,"* GLUTEN INTOLLERANCE GROUP (Aug. 2021), <https://gluten.org/2021/03/23/43-foods-where-gluten-may-be-hidden/>; see also *Sources of Gluten*, *supra* note 40.

43. See *Drugs for Celiac Disease*, *supra* note 39. See *Sources of Gluten*, CELIAC DISEASE FOUND., *supra* note 40.

44. See Rashtak & Murray, *supra* note 27.

45. See Rashtak & Murray, *supra* note 27; P. Collin, A. Vilppula, L. Luostarinen, G. K. T. Holmes & K. Kaukinen, *Review Article: Coeliac Disease in Later Life Must Not Be Missed*, 47 ALIMENTARY PHARMACOLOGY & THERAPEUTICS, 563, 563-72 (2018) [hereinafter Collin et al.].

46. See Rashtak & Murray, *supra* note 27.

awareness of the clinical presentation of celiac disease in the elderly.<sup>47</sup> Another study by researchers in Finland and the United Kingdom reported that roughly 25% of celiac disease diagnoses were made amongst those 60 and above.<sup>48</sup>

Research shows that celiac disease is not uncommon in the elderly,<sup>49</sup> and yet, receiving a proper diagnosis is a challenge.<sup>50</sup> Many of the symptoms associated with celiac disease, including diarrhea, weight loss, and fatigue, may be dismissed by a patient's physician as a natural part of the aging process or suggested to be the result of a different medical condition, like irritable bowel syndrome.<sup>51</sup> In some cases, overlooking celiac disease as a viable diagnosis in elderly patients has the unfortunate potential to result in an extraordinarily delayed diagnosis.<sup>52</sup> In one survey, where patients were incorrectly diagnosed with irritable bowel syndrome, and later received a proper diagnosis of celiac disease, the average diagnostic delay was 17 years.<sup>53</sup>

A gluten-free diet typically requires an entirely different approach to thinking about food.<sup>54</sup> This shift is even more pronounced for elderly individuals who receive a diagnosis later in life.<sup>55</sup> However, following a gluten-free diet improves the quality of life for those suffering from celiac disease, even when an elderly patient is asymptomatic.<sup>56</sup> Anecdotal<sup>57</sup> and empirical evidence<sup>58</sup> supports this conclusion. For example, Ms. Matlock recounts her mother returning to an active lifestyle that had been disrupted by the symptoms of celiac disease after her

---

47. See Rashtak & Murray, *supra* note 27.

48. See Collin et al., *supra* note 45.

49. See Rashtak & Murray, *supra* note 27; see also Collin et al., *supra* note 45.

50. See Rashtak & Murray, *supra* note 27.

51. See Rashtak & Murray, *supra* note 27; see Collin et al., *supra* note 45.

52. See Rashtak & Murray, *supra* note 27.

53. See Rashtak & Murray, *supra* note 27.

54. Nancy Lapid, *7 Tips to Cope with Starting a Gluten-Free Diet*, VERYWELL FIT (July 16, 2021), <https://www.verywellfit.com/the-gluten-free-diet-learning-to-cope-563178>.

55. See *For Many Seniors, Gluten-Free is Not "Just a Fad,"* SENIOR PLAN. SERVS., <https://seniorplanningservices.com/2016/04/19/many-seniors-gluten-free-not-just-fad/> (last visited Aug. 29, 2023).

56. See Collin et al., *supra* note 45.

57. See Matlock, *supra* note 1.

58. See Anitta Vilppula, Katri Kaukinen, Liisa Luostarinen, Ilkka Krekelä, Heikki Patrikainen, Raisa Valve, Markku Luostarinen, Kaija Laurila, Markku Mäki & Pekka Collin, *Clinical Benefit of Gluten-Free Diet in Screen-Detected Older Celiac Disease Patients*, 11:136 BMC GASTROENTEROLOGY (2011).

diagnosis, including taking up painting and interacting with neighbors.<sup>59</sup> Moreover, in a study of 122 participants, individuals with celiac disease demonstrated an improved quality of life and showed increases in body mass index after following a gluten-free diet for one or more years.<sup>60</sup>

### C. Legal Obligations

There are myriad federal and state regulations that could impact the treatment of nursing home patients with celiac disease. This Section briefly outlines the pertinent federal and state regulations.<sup>61</sup> Analysis of the application of these laws will follow in Part III.<sup>62</sup>

#### 1. FEDERAL REGULATIONS

##### a. Section 504 of the Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973 states that “[n]o otherwise qualified individual with a disability . . . shall, solely by reasons of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>63</sup> Section 504 defines “disability” to mean an individual with a physical or mental impairment which substantially limits one or more major life activities.<sup>64</sup>

Section 504’s nondiscrimination requirements apply to employers and organizations that receive any federal financial assistance; consequently, long-term care facilities, like nursing homes providing custodial care, are legally bound by Section 504’s requirements if they accept Medicare or Medicaid.<sup>65</sup> As such, covered nursing home facilities

---

59. See Matlock, *supra* note 1.

60. Rok Seon Choung, Abhinav Lamba, Eric V. Marietta, Jacalyn A. See, Joseph J. Larson, Katherine S. King, Carol T. Van Dyke, Alberto Rubio-Tapia & Joseph A. Murray, *Effect of a Gluten-free Diet on Quality of Life in Patients with Nonclassical Versus Classical Presentations of Celiac Disease*, 54(7) J. OF CLINICAL GASTROENTEROLOGY 620–625 (2020).

61. See *infra* Sections II.C.1-2.

62. See *infra* Part III.

63. 29 U.S.C. § 794(a).

64. *Your Rights Under Section 504 of the Rehabilitation Act*, U.S. DEP’T OF HEALTH AND HUM. SERVS.: OFF. FOR CIV. RTS. (revised June 2006), <https://www.hhs.gov/sites/default/files/ocr/civilrights/resources/factsheets/504.pdf> [hereinafter *Your Rights Under Section 504*].

65. *Id.*



cannot deny individuals the opportunity to “participate in or benefit from federally funded programs, services, or other benefits.”<sup>66</sup>

**b. Section 1557 of the Patient Protection and Affordable Care Act (ACA)**

Section 1557 of the Patient Protection and Affordable Care Act (ACA) prohibits “discrimination on the basis of . . . disability . . . in covered health programs or activities.”<sup>67</sup> All health programs and activities that receive federal financial assistance must comply with this regulation.<sup>68</sup> Nursing homes are considered a “covered entity” under the ACA.<sup>69</sup> Pursuant to the ACA, a covered entity “may not deny an individual . . . [a] service on the basis of his or her disability” where an individual otherwise meets the eligibility requirements.<sup>70</sup> As an example, the Department of Health and Human Services states that a nursing home may not deny admission to an individual because of their HIV status, which is a recognized disability under federal civil rights laws.<sup>71</sup>

**c. Americans with Disabilities Act (ADA)**

Enacted in 1990, the ADA prohibits discrimination against people with disabilities “in the areas of employment, state and local government services, public accommodations, transportation, and telecommunications.”<sup>72</sup> In effect, the ADA is an “equal opportunity” law for people with disabilities.<sup>73</sup> An individual must have a disability to be protected under the ADA, defined by the statute to mean a “physical

---

66. *Id.*

67. 42 U.S.C. § 18116.

68. *Section 1557 of the Affordable Care Act*, UTAH DEP’T OF HUM. SERVS., <https://dspd.utah.gov/wp-content/uploads/2017/06/Section-1557-MCAC-Information-Sheet-1.pdf> (last visited Aug. 29, 2023).

69. *Id.*

70. *Section 1557: Frequently Asked Questions*, U.S. DEP’T OF HEALTH AND HUM. SERVS., <https://www.hhs.gov/civil-rights/for-individuals/section-1557/1557faqs/index.html> (last visited Aug. 29, 2023) [hereinafter *Section 1557: Frequently Asked Questions*].

71. *Id.*

72. *Your Rights Under the Americans with Disabilities Act*, U.S. DEP’T OF HEALTH AND HUM. SERVS., <https://www.hhs.gov/sites/default/files/ocr/civilrights/resources/factsheets/ada.pdf> (last visited Aug. 29, 2023).

73. *Introduction to the Americans with Disabilities Act*, ADA.GOV, U.S. DEP’T OF JUST. CIV. RTS. DIV., [https://www.ada.gov/ada\\_intro.htm](https://www.ada.gov/ada_intro.htm) (last visited Aug. 29, 2023) [hereinafter *Introduction to the ADA*].

or mental impairment that substantially limits one or more major life activities of an individual.”<sup>74</sup> While the term “substantially limits” is meant to be interpreted broadly,<sup>75</sup> not every condition meets this standard.<sup>76</sup> The term, “major life activities,” meanwhile, includes activities that are performed every day, such as eating, sleeping, walking, seeing, and hearing.<sup>77</sup>

A covered entity discriminates on the basis of disability when it fails to make “reasonable modifications” to its policies, practices, and procedures, unless the entity can demonstrate that these modifications would impair the essential nature of their provided service.<sup>78</sup> What constitutes a fundamental alteration is not clearly delineated by statute and, therefore, mandates a fact-specific inquiry into the context of each situation.<sup>79</sup> An example provided by the DOJ is illustrative.<sup>80</sup> In accommodating an individual with celiac disease, a restaurant may be obligated to remove or replace ingredients in a meal to comply with the customer’s gluten-free diet if customers are generally free to ask for special requests to their meals.<sup>81</sup> However, the DOJ notes that a restaurant would not be obligated to change their menu to incorporate gluten-free offerings.<sup>82</sup>

The ADA is divided into five different sections, with each section listing requirements for distinct organizations.<sup>83</sup> Title I speaks directly to employers,<sup>84</sup> Title II to state and local governments,<sup>85</sup> Title III to

---

74. 42 U.S.C. § 12102(1)(A).

75. See *Introduction to the ADA*, *supra* note 73.

76. See *Introduction to the ADA*, *supra* note 73.

77. See *Introduction to the ADA*, *supra* note 73.

78. 42 U.S.C. § 12182(b)(2)(A)(ii); see also *Reaching Out to Customers with Disabilities: Lesson One: Policies, Practices, and Procedures*, ADA.GOV, <https://www.ada.gov/reachingout/lesson12.htm> (last visited Aug. 29, 2023) [hereinafter *Reaching Out to Customers with Disabilities*].

79. Sara J. Rosenbaum, Joel B. Teitelbaum, D. Richard Mauery & Alexandra M. Stewart, *Reasonable Modification or Fundamental Alteration? Recent Developments in ADA Caselaw and Implications for Behavioral Health Policy*, 21 HEALTH POL’Y AND MGMT. ISSUE BRIEFS 1 (Feb. 2003).

80. Questions and Answers About the Lesley University Agreement and Potential Implications for Individuals with Food Allergies, U.S. DEP’T OF JUST., CIV. RTS. DIV., (Jan. 2013), [https://www.ada.gov/q&a\\_lesley\\_university.htm](https://www.ada.gov/q&a_lesley_university.htm). [hereinafter *Lesley University Questions and Answers*].

81. *Id.*

82. *Id.*

83. *Introduction to the ADA*, *supra* note 73.

84. 42 U.S.C. § 12182(a).

85. *Id.*

“places of public accommodation,”<sup>86</sup> and Title IV to telecommunications.<sup>87</sup> Title V, meanwhile, delineates how the ADA may be implemented.<sup>88</sup> Of particular interest for purposes of this Note is Title III, which prohibits discrimination on the basis of disability in the “full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation . . . .”<sup>89</sup> Under Title III, “social service center establishments” are expressly declared places of public accommodation.<sup>90</sup> Because of the myriad of social services provided by nursing homes, including medical care, assistance with daily living activities, and the provision of meals, these long-term care facilities fall within the meaning of a social service center establishment.<sup>91</sup>

**d. 42 C.F.R. § 483.60: Food and Nutrition Services**

Under 42 C.F.R. § 483.60, nursing home facilities participating in Medicaid must meet specific requirements that establish a standard quality of care to be provided within their facilities.<sup>92</sup> As it pertains to food and nutrition services, nursing homes must ensure that each resident is provided a “nourishing, palatable, well-balanced diet that meets his or her . . . special dietary needs.”<sup>93</sup> 42 C.F.R. § 483.60 also requires that participating nursing home facilities employ a sufficient number of staff with the requisite training and skills to carry out the functions of food and nutrition service,<sup>94</sup> including a qualified dietician or other clinically qualified individual.<sup>95</sup>

---

86. *Id.*

87. *Introduction to the ADA, supra* note 73.

88. *Id.*

89. 42 U.S.C. § 12182(a).

90. 42 U.S.C. § 12181(7)(K).

91. *See* U.S. DEP’T OF JUST., AMERICANS WITH DISABILITIES ACT: TITLE III TECHNICAL ASSISTANCE MANUAL 1994 SUPPLEMENT (1994) [hereinafter ADA MANUAL 1994 SUPPLEMENT].

92. *Federal Nursing Home Regulations and State Law*, NURSING HOME ALERT, <http://www.nursinghomealert.com/federal-nursing-home-regulations-and-state-laws> (last visited Aug. 29, 2023) [hereinafter NURSING HOME ALERT].

93. 42 C.F.R. § 483.60 (2022).

94. *Id.* at § 483.60(a).

95. *Id.* at § 483.60(a)(1).

## 2. STATE REGULATIONS

States are free to enact their own discrimination laws to complement federal regulations.<sup>96</sup> While states may implement their own non-discrimination laws that are equal to or more protective than their federal counterparts,<sup>97</sup> these laws may not conflict with federal nondiscrimination regulations.<sup>98</sup>

Across the United States, many state nondiscrimination laws mirror the ADA's definition of disability.<sup>99</sup> As a result, this Note will provide only a few examples of ADA-similar language<sup>100</sup> before turning to focus on statutes with a broader definition of disability than the federal regulations discussed in the preceding paragraphs.<sup>101</sup>

### a. State Human and Civil Rights Acts

To recall, at the federal level, both the ADA and Section 504 define a person with a disability as someone with a "physical or mental impairment that substantially limits one or more major life activities."<sup>102</sup> Some states utilize this definition in their own legislation.<sup>103</sup> For example, Section 4112.01 of Ohio's Code defines disability as a "physical or mental impairment that substantially limits one or more major life activities."<sup>104</sup> The statute then expressly includes in its definition those activities that constitute a major life activity — "including the function of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."<sup>105</sup> Chapter 413.08 of the Florida Statutes also defines disability exactly the same as its federal

---

96. See *Federal, State, and Local Laws: Conflicts or Complements?*, 16 ADA IN FOCUS 3 (2012).

97. See *e.g.*, CAL. CIV. CODE § 51(b) (West 2023); S.C. CODE ANN. § 1-13-20 (2023); COLO. REV. STAT. ANN. § 24-34-601(2)(a) (West 2023); N.J. STAT. ANN. § 10:5-12(f)(1) (West 2023); 775 ILL. COMP. STAT. ANN. 5/1-102(A) (West 2023).

98. See *generally Preemption*, NAT'L ASS'N OF ATT'YS GEN., <https://www.naag.org/issues/supreme-court/preemption/> (last visited Aug. 29, 2023) (explaining the principle of preemption when a federal law overrules a state law).

99. 42 U.S.C. § 12102(1)(A).

100. See *infra* Section II(C)(2)(a).

101. See *infra* Section II(C)(2)(a); see also Andy Marso, *Some Notable State Variations from the ADA*, ACCESSIBILITY.COM (May 22, 2020), <https://www.accessibility.com/blog/some-notable-state-variations-from-the-ada>.

102. 42 U.S.C. § 12102(1)(A); See *Your Rights Under Section 504*, *supra* note 64.

103. See OHIO REV. CODE ANN. § 4112.01(13) (West 2023).

104. *Id.*

105. *Id.*

counterparts,<sup>106</sup> as do Montana,<sup>107</sup> Missouri,<sup>108</sup> Kentucky,<sup>109</sup> and Kansas.<sup>110</sup> Under Iowa's Civil Rights Act, disability is defined as "the physical or mental condition of a person which constitutes a substantial disability."<sup>111</sup> Like the ADA, it is a discriminatory practice to "refuse or deny any person because of . . . disability the accommodations, advantages, facilities [or] services [thereof] . . ."<sup>112</sup> Colorado similarly defines disability to have the same meaning set forth in the ADA and Section 504.<sup>113</sup>

However, other states define disability much more broadly than federal regulations.<sup>114</sup> For example, the Illinois Human Rights Act (IHRA) does not define "disability" by looking at whether an individual's disability substantially limits a major life activity.<sup>115</sup> The IHRA expands the definition of discrimination based on disability to include unlawful discrimination against an individual because of their association with a person with a disability, a provision lacking in the ADA.<sup>116</sup> Moreover, California's Fair Employment and Housing Act (FEHA) defines disability as "some limitation that makes achievement of a major life activity difficult."<sup>117</sup> This differs from the ADA's view that a disability must "substantially limit" a major life activity.<sup>118</sup> Connecticut, meanwhile, separates its definition of disability into physical disability, mental disability, and learning disability.<sup>119</sup> Illustrating the breadth of Connecticut's definition, "physically disabled" is construed to mean having a "chronic physical handicap, infirmity impairment, whether

---

106. FLA. STAT. ANN. § 413.08(1)(b) (West 2023).

107. MONT. CODE ANN. § 49-2-101(19)(a)(i) (West 2023).

108. MO. REV. STAT. § 213.010(5) (West 2023).

109. KY. REV. STAT. ANN. § 344.010(4) (West 2023).

110. KAN. STAT. ANN. § 44-1002(j) (West 2023).

111. IOWA CODE ANN. § 216.2(5) (West 2023).

112. IOWA CODE ANN. § 216.7(1)(a) (West 2023).

113. COLO. REV. STAT. ANN. § 24-34-301(7) (West 2023).

114. ILL. ADMIN. CODE tit. 56 § 2500.20(a) (2023); Illinois Human Rights Act, 775 ILL. COMP. STAT. ANN. 5/1-103(I)(2) (West 2023); Fair Employment and Housing Act, CAL. GOV'T CODE § 12900 (West 2023) (quoting *Jackson v. Kaplan Higher Educ., LLC*, 106 F.Supp.3d 1118(E.D. Cal. 2015)); CONN. GEN. STAT. ANN. § 46a-51 (West 2023); N.Y. EXEC. LAW § 292 (McKinney 2023).

115. Illinois Human Rights Act, 775 ILL. COMP. STAT. ANN. 5/1-103(I)(2) (West 2023).

116. *Id.*

117. Fair Employment and Housing Act, CAL. GOV'T CODE § 12900 (West 2023).

118. 42 U.S.C. § 12102(1)(A).

119. CONN. GEN. STAT. ANN. § 46a-51 (West 2023).

congenital or resulting from injury, organic processes or illness.”<sup>120</sup> In New York State, the New York State Human Rights Law defines disability as “a physical, mental or medical impairment . . . which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques . . . .”<sup>121</sup> Per the Division of Human Rights, the definition of disability has been broadly construed to protect more individuals than the ADA does.<sup>122</sup>

This Note will not analyze the obligations imposed on long-term care facilities in states that utilize the same definition of “disability” as under the ADA and Section 504. Rather, to explore the impact that heightened regulations have on long-term care facilities, this Note will analyze obligations in a state with a broader definition of “disability.”

New York State has long championed the protection of human rights.<sup>123</sup> In fact, in 1945, New York became the first state to enact a Human Rights Law, prohibiting discrimination on the basis of race, color, creed, and national origin.<sup>124</sup> Recent achievements by the Division of Human Rights further illustrate New York State’s position as a trailblazer for human rights.<sup>125</sup> In the 2019-2020 fiscal period, nine “expansions and provisions” were added to the Human Rights Law and there was an 18.4% increase in monetary compensation to complainants.<sup>126</sup> As of April 16, 2022, the Division of Human Rights announced specific steps to “enhance transparency in the agency’s processes and improve New Yorkers’ understanding of their rights . . . .”<sup>127</sup> For these reasons, this Note will use the New York State Human Rights Law’s definition

---

120. *Id.*

121. N.Y. EXEC. LAW § 292 (McKinney 2023).

122. See *Disability Rights: The Americans with Disabilities Act and the Human Rights Law*, N.Y. ST.: DIV. OF HUM. RTS., <https://dhr.ny.gov/ada> (last visited Aug. 29, 2023) [hereinafter *Disability Rights*].

123. See generally *75<sup>th</sup> Anniversary*, N.Y. ST.: DIV. OF HUM. RTS., <https://dhr.ny.gov/75th-anniversary> (last visited Aug. 29, 2023) (listing accomplishments by the Division of Human Rights in New York State).

124. See *id.*

125. See generally *Recent Notable Achievements*, N.Y. ST.: DIV. OF HUM. RTS., <https://dhr.ny.gov/system/files/documents/2022/04/nysdhr-75th-achievements.pdf> (last visited Aug. 29, 2023) (listing accomplishments by the Division of Human Rights in New York State).

126. See *id.*

127. See *New York State Division of Human Rights Announces Actions to Enhance Transparency*, N.Y. ST.: DIV. OF HUM. RTS. (Apr. 16, 2022), <https://dhr.ny.gov/news/new-york-state-division-human-rights-announces-actions-enhance-transparency>.

of disability to analyze obligations imposed on long-term care facilities, including nursing homes.<sup>128</sup>

**b. State Nursing Home Regulations**

In addition to implementing broader protections against nondiscrimination, states may also enact more protective nursing home regulations.<sup>129</sup> First, this Section will provide an overview of governmental regulation of nursing homes.<sup>130</sup> Then, this Section will briefly outline the requirements that nursing facilities participating in Medicaid must comply with under federal law, as set forth in 42 C.F.R. 483, Subpart B.<sup>131</sup> Lastly, this Section will provide a sampling of nursing home regulations, as they relate to nutritional services, from across the United States.<sup>132</sup>

**i. *Wearing Two Hats: State Governments as Enforcers of Federal and State Nursing Home Regulations.***

The role of federal and state governments in regulating nursing homes has undergone a dramatic transformation.<sup>133</sup> Historically, federal and state governments did not exercise meaningful control over the long-term care industry.<sup>134</sup> In fact, it was not until 1950, when Congress amended the Social Security Act, that participating states were required to enact licensing standards for nursing homes.<sup>135</sup> Further, it was not until 1987, when Congress passed the Nursing Home Reform Act,<sup>136</sup> that the federal government set forth guidelines “for all aspects of a nursing home’s functioning.”<sup>137</sup> The Nursing Home Reform Act

---

128. N.Y. EXEC. LAW § 292(21) (McKinney 2023).

129. See NURSING HOME ALERT, *supra* note 92.

130. See *infra* Section II(C)(2)(b)(1).

131. See *infra* Section II(C)(2)(b)(2); *Nursing Homes*, CMS.GOV, <https://www.cms.gov/medicare/provider-enrollment-and-certification/certificationandcompliance/nhs> (last visited Aug. 29, 2023) [hereinafter *Nursing Homes*, CMS].

132. See *infra* Section II(C)(2)(b)(3).

133. See Robert J. Fogg, *Historical Overview of Federal and State Nursing Home Regulations*, NURSING HOME REGULS. MANUAL § 110 (Feb. 2009) [hereinafter Fogg].

134. *Id.*

135. *Id.*

136. *Id.*

137. See *Nursing Home Regulations*, NURSING HOME ABUSE GUIDE, <https://nursinghomeabuseguide.com/legal-action/nursing-home-regulations/> (last visited Aug. 29, 2023).

protects residents' rights to participate in their own care and to complain without fear of reprisal, in addition to other rights that promote their quality of life.<sup>138</sup> The increased involvement by federal and state governments in actively regulating nursing homes was, and continues to be, vital to ensure that nursing homes do not revert to providing "shockingly deficient care."<sup>139</sup>

In the United States, state governments also play an important role in regulating nursing homes.<sup>140</sup> They are responsible for certifying whether a nursing home facility is in compliance with federal regulations and certification rules.<sup>141</sup> To make this determination, state agencies conduct inspections of nursing homes, evaluating its equipment,<sup>142</sup> staff,<sup>143</sup> policies,<sup>144</sup> procedures,<sup>145</sup> and finances.<sup>146</sup> States also recommend enforcement actions against those facilities not complying with federal requirements.<sup>147</sup> Facilities that fail to comply with federal regulations may face serious consequences, ranging from "fines to probation to closure."<sup>148</sup>

In addition to abiding by federal regulations, nursing homes must satisfy state-specific standards.<sup>149</sup> These standards must comply with those required under federal law, at the minimum.<sup>150</sup> Thus, in addition to their work enforcing federal regulations, state agencies, both public

---

138. See *Residents' Rights*, THE NAT'L LONG-TERM CARE OMBUDSMAN RES. CTR., <https://ltombudsman.org/issues/residents-rights> (last visited Aug. 29, 2023).

139. See Fogg, *supra* note 133 (stating the Institute of Medicine's finding from their report, "Improving the Quality of Care in Nursing Homes").

140. See *Who Regulates Nursing Homes?*, ILL. DEP'T OF PUB. HEALTH, <https://dph.illinois.gov/topics-services/health-care-regulation/nursing-homes/regulation.html> (last visited Aug. 29, 2023) [hereinafter *Who Regulates Nursing Homes?*].

141. See *Nursing Homes*, CMS, *supra* note 131; see also *Who Regulates Nursing Homes?*, *supra* note 140 (describing how the Illinois Department of Health, under a cooperative agreement with the U.S. Department of Health and Human Services' Centers for Medicare and Medicaid Services, ensures that entities accepting Medicare and Medicaid are in compliance with applicable federal regulations).

142. See *Who Regulates Nursing Homes?*, *supra* note 140.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. See *Nursing Homes*, CMS, *supra* note 131.

148. See David C. Grabowski, *Strengthening Nursing Home Policy for the Post-pandemic World: How Can We Improve Residents' Health Outcomes and Experiences?*, THE COMMONWEALTH FUND (Aug. 20, 2020), <https://www.commonwealthfund.org/publications/issue-briefs/2020/aug/strengthening-nursing-home-policy-post-pandemic-world>.

149. See NURSING HOME ALERT, *supra* note 92.

150. See NURSING HOME ALERT, *supra* note 92.



and private,<sup>151</sup> are responsible for licensing,<sup>152</sup> regulating,<sup>153</sup> and inspecting<sup>154</sup> nursing homes within their state.

*ii. 42 C.F.R. 483, Subpart B: Federal Regulation and Certification Rules*

To be reimbursed under Medicaid, participating nursing facilities must comply with several requirements.<sup>155</sup> Requirements touch on issues including, but not limited to, respecting resident rights to a “dignified existence,”<sup>156</sup> the right to “reside and receive services in the facility with reasonable accommodation of resident needs . . . ,”<sup>157</sup> and ensuring that each resident is provided with a diet that meets his or her “daily nutritional and special dietary needs.”<sup>158</sup>

*iii. State Nursing Home Regulations: A Sample from Across the United States*

A brief overview of nursing home regulations across the United States highlights the diversity in standards that may be imposed at the state level.<sup>159</sup> Wisconsin, for example, mirrors federal requirements that facilities provide each resident with a diet that meets their nutritional and dietary needs.<sup>160</sup> As it relates to menus, the facility shall “make reasonable adjustments to accommodate each resident’s preferences, habits, customs, appetite, and physical condition.”<sup>161</sup> In Illinois, the Illinois Nursing Home Care Act sets standards to regulate the diet of each resident based, in part, on recommendations which may be made by the physicians attending the resident.<sup>162</sup> Ohio requires that each nursing

---

151. *Who Regulates Nursing Homes?*, *supra* note 140.

152. *Who Regulates Nursing Homes?*, *supra* note 140.

153. *Who Regulates Nursing Homes?*, *supra* note 140.

154. *Who Regulates Nursing Homes?*, *supra* note 140.

155. 42 C.F.R. § 483.10(a).

156. *Id.*

157. *Id.* at § 483.10(e)(3).

158. 42 C.F.R. § 483.60.

159. See WIS. ADMIN. CODE DHS § 132.63 (2023); 210 ILL. COMP. STAT. ANN. 45/3-202 (West 2023); OHIO ADMIN. CODE 3701-17-18 (2023); CAL. CODE REGS. tit. 22 § 72335 (2023); CAL. CODE REGS. tit. 22 § 72339 (2023); 22 VA. ADMIN. CODE § 40-73-580 (2023).

160. WIS. ADMIN. CODE § 132.63 (2023).

161. *Id.*

162. 210 ILL. COMP. STAT. 45/3-202(4) (West 2003).

home have a “kitchen and other food service facilities which are adequate for preparing and serving food for all residents.”<sup>163</sup> Moreover, for residents receiving a therapeutic diet, a dietician is required to “evaluate the home’s compliance in the provision of the diet.”<sup>164</sup> Nursing homes must also arrange for staff to be trained in the preparation of “foods for all diets.”<sup>165</sup> In addition, each nursing home must maintain a sufficient food supply for all residents at all times.<sup>166</sup>

California requires that a “current profile card” be created for each patient, indicating “diet order, likes, dislikes, allergies to foods, diagnosis and instructions or guidelines to be followed in the preparation and serving of food to the patient.”<sup>167</sup> Therapeutic diets, meal plans incorporated as part of the treatment of a medical condition,<sup>168</sup> must be provided for each patient as prescribed and served under the supervision of a dietician.<sup>169</sup> In Virginia, facilities must develop and implement a policy to monitor each resident for changes in physical or mental status related to their nutrition.<sup>170</sup> As soon as a facility suspects that a resident might be suffering from a nutritional deficiency, the facility is required to implement an intervention.<sup>171</sup> This may include alerting a physician of a resident’s drastic weight loss and abiding by the physician’s instructions on how to treat the resident.<sup>172</sup> Facilities must also comply with any needs identified by the resident’s individualized service plan upon their admission,<sup>173</sup> as well as those needs prescribed by a healthcare professional.<sup>174</sup>

Because of the varying stringency of regulations at the state level,<sup>175</sup> this Note will examine obligations imposed on long-term care facilities in a state with more rigorous standards than federal regulations require. For example, Virginia’s regulations require that long-term care facilities take proactive measures in caring for their

---

163. OHIO ADMIN. CODE 3701-17-18 (2023).

164. *Id.*

165. *Id.*

166. *Id.*

167. CAL. CODE REGS. tit. 22 § 72335 (2023).

168. See Karina Chou, *Therapeutic Diets in the Elderly*, THE GERIATRIC DIETITIAN (Jan. 15, 2021), <https://thegeriatricdietitian.com/therapeutic-diets/>.

169. CAL. CODE REGS. tit. 22 § 72339 (2023).

170. 22 VA. ADMIN. CODE § 40-73-580 (2023).

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. See *infra* Section II(C)(2)(b)(3).

residents.<sup>176</sup> Long-term care facilities, for instance, must have policies in place that enable them to determine whether a resident is suffering from a nutritional deficiency.<sup>177</sup> Once this occurs, the facility has an affirmative obligation to implement an intervention.<sup>178</sup> The impact that proactive requirements might have in detecting celiac disease in the first place is of particular interest, as is the impact of these requirements on continuing care for residents already living with celiac disease.<sup>179</sup> For these reasons, this Note will utilize Virginia's<sup>180</sup> nursing home regulations to examine obligations imposed on long-term care facilities.

#### D. PERTINENT ADMINISTRATIVE AND JUDICIAL DECISIONS

Implementation of these federal and state protections against non-discrimination and nursing home regulations has been lackluster,<sup>181</sup> as evidenced by Ms. Matlock's disheartening quest to find a nursing home to care for her mother.<sup>182</sup> One of the most interesting areas of judicial action has occurred through a series of Settlement Agreements<sup>183</sup> reached by the DOJ with two universities, Lesley University and Rider University, under the ADA. These Settlement Agreements form the basis of this Note's suggestion regarding how long-term care facilities, such as nursing homes, may care for residents with celiac disease in compliance with federal and state law.<sup>184</sup>

##### 1. DOJ SETTLEMENTS: UNIVERSITIES REQUIRED TO MAKE REASONABLE MODIFICATIONS IN THEIR DINING SERVICES FOR STUDENTS WITH CELIAC DISEASE

###### a. Lesley University

Lesley University is a private university located in Cambridge, Massachusetts with total student enrollment hovering around 8,000.<sup>185</sup> Around 2009, the DOJ received a complaint, alleging that Lesley

---

175. 22 VA. ADMIN. CODE § 40-73-580 (2023).

177. *Id.*

178. *Id.*

179. *See* 22 VA. ADMIN. CODE § 40-73-580 (2023).

180. 22 VA. ADMIN. CODE § 40-73-580 (2023).

181. *See* Matlock, *supra* note 1.

182. *Id.*

183. *See* Lesley Settlement, *supra* note 22; *see also* Rider Settlement, *supra* note 22.

184. *See infra* Part IV.

185. Lesley Settlement, *supra* note 22.

violated Title III of the ADA.<sup>186</sup> Specifically, the complaint alleged that Lesley failed to make reasonable modifications that would have allowed students with celiac disease or food allergies to “fully and equally [enjoy] the privileges, advantages, and accommodations” of the school’s meal plan system.<sup>187</sup> At the time, Lesley required all students living on campus to pay for its meal service plan, even if students were unable to consume the prepared food because of celiac disease or food allergies.<sup>188</sup>

Title III of the ADA defines public accommodation to include a “undergraduate [or] postgraduate private school.”<sup>189</sup> As a public accommodation, Lesley was bound to comply with Title III’s nondiscrimination requirements mandating reasonable modifications in “policies, practices, or procedures, when the modifications are necessary to afford goods, services . . . privileges . . . or accommodations to individuals with disabilities,” unless these modifications would have fundamentally altered the nature of the goods and services provided by Lesley.<sup>190</sup>

On its face, the DOJ’s settlement agreement with Lesley did not classify celiac disease as a disability under the ADA.<sup>191</sup> Instead, the settlement states that “[f]ood allergies may constitute a disability under the ADA.”<sup>192</sup> In doing so, the settlement agreement incorrectly grouped celiac disease with food allergies.<sup>193</sup> As noted above, celiac disease is not a food allergy but an autoimmune disease.<sup>194</sup>

In a subsequent document clarifying the settlement agreement between the Department and Lesley University, the DOJ classified the autoimmune response to certain foods, characteristic of celiac disease, as constituting a “significant or severe response . . . .”<sup>195</sup> While the DOJ again mistakenly conflated celiac disease with food allergies,<sup>196</sup> the DOJ explicitly included individuals with celiac disease as living with a

---

186. *Id.*

187. *Id.*

188. Lesley University Questions and Answers, *supra* note 80.

189. 42 U.S.C. § 12181(7)(J).

190. See Lesley Settlement, *supra* note 22.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Definition & Facts for Celiac Disease*, *supra* note 27.

195. See Lesley University Questions and Answers, *supra* note 80.

196. See *id.* (“Some individuals with food allergies have a disability as defined by the ADA—particularly those with more significant or severe response to certain foods. This would include individuals with celiac disease and others who have autoimmune responses to certain foods . . .”).

disability under the ADA<sup>197</sup> – Title III, therefore, bound Lesley to make reasonable modifications to their university meal plans and food services to accommodate students with celiac disease.<sup>198</sup>

Lesley voluntarily entered into the settlement agreement with the DOJ, acknowledging their obligation to make reasonable modifications to the school's dining services and meal plan for students with celiac disease.<sup>199</sup> Some changes to the school's dining services were minor, like posting notices concerning food allergies in each of its five dining halls or potentially exempting students from the mandatory meal plan.<sup>200</sup> Other changes to the school's dining services were more extensive.<sup>201</sup> For example, to reduce the risk of cross-contamination from meals containing gluten, dining hall staff would prepare meals in designated areas free from specific allergens.<sup>202</sup> Moreover, Lesley agreed to create a designated area for students to store and prepare food themselves, allowing access to this area only to those students with celiac disease or food allergies.<sup>203</sup> This designated area includes, among other items, cabinet space for non-perishable items, separate appliances, including a microwave and toaster, and cleaning supplies.<sup>204</sup>

In addition to these changes, Lesley agreed to implement tailored educational programs to train food service managers and dining hall staff on how to comply with the modifications stated in its settlement agreement with the DOJ.<sup>205</sup> For example, food service managers are required to attend a food handling and food service management class.<sup>206</sup> Upon completion of the class, individuals are then required to provide evidence of their successful participation to the DOJ.<sup>207</sup> Food service staff, meanwhile, are required to attend educational training twice per year, at a minimum, to learn about celiac disease, cross-contamination, and the proper handling and preparation of food.<sup>208</sup>

---

197. *Id.*

198. *See* Lesley Settlement, *supra* note 22.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

**b. Rider University**

In July 2016, the DOJ received another complaint alleging that a different private university violated Title III of the ADA.<sup>209</sup> Like the complaint lodged against Lesley,<sup>210</sup> this complaint alleged that Rider University violated Title III of the ADA because the university failed to make reasonable modifications to its food service and meal plan system to accommodate students with celiac disease or food allergies.<sup>211</sup> As a private nonprofit university, Rider fell within the meaning of a public accommodation under the ADA and, therefore, was subject to Title III's nondiscrimination policies.<sup>212</sup>

After performing an investigation into Rider's policies and practices relating to students with food allergies, the DOJ determined that Rider violated Title III of the ADA.<sup>213</sup> In particular, the DOJ found that Rider failed to comply with its obligations under the ADA by not "readily offer[ing] exemptions" from its meals plans for those students who could not participate because of a food-related disability or food allergy.<sup>214</sup> The DOJ further determined that Rider's failure to provide "adequate information" on their website for students with food-related disabilities or food allergies trying to obtain reasonable modifications to the university's food services plan rendered Rider non-compliant with its obligations under the ADA.<sup>215</sup>

While Rider disputed the DOJ's finding that its policies and procedures violated the ADA, the university ultimately agreed to enter into a settlement agreement to avoid litigation and having to admit liability.<sup>216</sup> To comply with its obligations under the ADA, Rider agreed to enact several changes to their dining services and website.<sup>217</sup>

Regarding its dining services, Rider agreed to post notices concerning food allergies in each of its dining halls,<sup>218</sup> a change that Lesley also implemented in their settlement agreement with the DOJ.<sup>219</sup>

---

209. See Rider Settlement, *supra* note 22.

210. See Lesley Settlement, *supra* note 22.

211. See Rider Settlement, *supra* note 22.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. See Lesley Settlement, *supra* note 22.

Moreover, Rider agreed to provide meals that were nutritionally comparable to meals offered to students without food-related disabilities or food allergies, as well as to take all reasonable steps to prevent students' meals from being inadvertently cross-contaminated with food containing the prohibited allergen.<sup>220</sup> A more extensive modification included an agreement to establish a dedicated "Allergen Awareness Food Preparation Area."<sup>221</sup> This dedicated area includes a chef who prepares food only for students with celiac disease or food allergies and a separate kitchen, stocked with separate utensils and other food-preparation items, to be exclusively used in preparing allergen-friendly food.<sup>222</sup>

Rider also agreed to update their "Dining & Meal Plans" webpage to include a link to a "Housing/Dining Accommodation Request Form."<sup>223</sup> Students requesting an accommodation are required to fill out this form,<sup>224</sup> which asks for the student's biographical information and information related to their disability.<sup>225</sup> The student's physician or a disability evaluator then certifies that the student has a disability as defined under the ADA and is seeking dining accommodations due to a medical condition.<sup>226</sup>

## 2. ADJUDICATIVE DECISIONS

The Settlement Agreements clarified that colleges and universities owe particular obligations to students with celiac disease under the ADA.<sup>227</sup> In non-university settings, however, the DOJ's underlying stance in its Settlement Agreements remains in flux across the United States.<sup>228</sup> But, there is precedent within the courts that celiac disease

---

220. See Rider Settlement, *supra* note 22.

221. *Id.*

222. *Id.*

223. *Id.*

224. See *Housing/Dining Accommodation Request for Students with Disabilities or Severe Medical Problems*, RIDER U., [https://www.rider.edu/sites/default/files/2022-01/SASS\\_HousingDiningRequestForm.pdf](https://www.rider.edu/sites/default/files/2022-01/SASS_HousingDiningRequestForm.pdf) (last visited Aug. 29, 2023).

225. *Id.*

226. *Id.*

227. See Lesley Settlement, *supra* note 22; see also Rider Settlement, *supra* note 22.

228. See *Phillips v. P.F. Chang's China Bistro, Inc.*, No. 5:15-cv-00344-RMW, 2015 WL 4694049, at \*4 (N.D. Cal. Aug. 6, 2015) (citing *Land v. Baptist Med. Ctr.*, 164 F.3d 423, 425 (8th Cir. 1999)) (describing how other courts have held that food allergies may not constitute a disability because an individual living with a food allergy can avoid any potential harm by abstaining from ingesting the allergen); see also *Fraser v. Goodale*, 342 F.3d 1032, 1041–42 (9th Cir. 2003) (holding that eating is a major life activity, with the qualification that not all those on a diet may bring a claim of disability).

could be considered a disability under the ADA.<sup>229</sup> This was the conclusion made by the U.S. Court of Appeals for the Fourth Circuit in the succeeding case.

**a. J.D. by Doherty v. Colonial Williamsburg Foundation:  
A Watershed Case for People Living with Celiac Disease**

J.D. was an 11-year-old boy who suffered from celiac disease or non-celiac gluten sensitivity.<sup>230</sup> On a school trip to Colonial Williamsburg, J.D.'s school scheduled lunch at Shields Tavern (Shields), a restaurant curating a customer experience reminiscent of 18th-century Colonial Williamsburg.<sup>231</sup> Because of J.D.'s celiac or non-celiac sensitivity, J.D.'s father informed J.D.'s school that his son would not be eating food prepared by the scheduled restaurant but would instead eat a personally prepared meal.<sup>232</sup> Upon arriving at Shields, J.D.'s father unpacked the prepared meal for himself and his son.<sup>233</sup> However, because of the restaurant's policy against bringing in outside food, restaurant staff escorted J.D. and his father to an outside dining area.<sup>234</sup> Here, J.D. and his father ate lunch while the rest of J.D.'s classmates enjoyed their meal inside.<sup>235</sup>

J.D. filed suit against the Colonial Williamsburg Foundation, alleging that Shield's actions violated Section 504, Title III of the ADA, and the Virginians with Disabilities Act.<sup>236</sup> Colonial Williamsburg asserted that J.D.'s condition was not a disability under the ADA because J.D. had the option of avoiding food that contained gluten and, therefore, J.D.'s condition did not "substantially limit" a major life activity.<sup>237</sup> The U.S. Court of Appeals for the Fourth Circuit found Colonial Williamsburg's argument unpersuasive, noting that the 2008 Amendments (the "Amendments") to the ADA were enacted to broaden the "scope of protection to be available under the ADA."<sup>238</sup> Moreover, the Court

---

229. J.D. by Doherty v. Colonial Williamsburg Found., 925 F.3d 663, 670 (4th Cir. 2019).

230. *Id.* at 667.

231. *Id.* at 668.

232. *Id.*

233. *Id.*

234. *Id.* at 668–69.

235. *Id.*

236. *Id.* at 669.

237. *Id.* at 670.

238. *Id.*



noted that the Amendments made textually explicit that the “substantially limits”<sup>239</sup> inquiry considers a condition in its “unmitigated state,” “without regard to the ameliorative effects of mitigating measures.”<sup>240</sup>

As to whether Shields discriminated against J.D. on the basis of his disability, the Court engaged in a three-part inquiry.<sup>241</sup> First, the Court examined whether J.D.’s requested modification, bringing home-cooked food into Shields, was “necessary.”<sup>242</sup> As to this prong, the Court noted that other courts have used a “like experience” standard.<sup>243</sup> Under this standard, public accommodations must consider how non-disabled guests use their facilities and “then must take necessary and reasonable steps to provide disabled guests with a ‘like experience.’”<sup>244</sup>

Second, the Court examined whether the requested modifications were “reasonable.”<sup>245</sup> Here, the Court reiterated that, under the ADA, covered entities are not obligated to make all possible accommodations that would ensure individuals with disabilities are provided equal access.<sup>246</sup> Rather, covered entities need only make those accommodations that are reasonable.<sup>247</sup>

Third, the Court examined whether the requested modification would “fundamentally alter the nature” of the restaurant.<sup>248</sup> As to this prong, the Court considered whether allowing J.D. to bring in outside food modified an essential aspect of Shield’s purpose: providing patrons with a curated old-world dining experience.<sup>249</sup> The Court acknowledged that allowing outside food might alter Shield’s purpose because food service was the essential part of Shield’s business.<sup>250</sup> Yet the Court simultaneously acknowledged that allowing outside food to accommodate an individual with celiac disease or a food allergy might not inhibit the opportunity for patrons to enjoy the experience crafted

---

239. *Id.*

240. *Id.*

241. *Id.* at 671.

242. *Id.* at 672–74.

243. *Id.* at 672.

244. *Id.*

245. *Id.* at 674.

246. *Id.*

247. *Id.*

248. *Id.* at 676.

249. *Id.*

250. *Id.*

by Shields.<sup>251</sup> On each prong, the Court concluded there existed a genuine dispute of material fact to be left for a jury to decide.<sup>252</sup>

Thus, the Court's in-depth analysis suggested that in non-university settings, health-related dietary restrictions, like those resulting from celiac disease or gluten sensitivity, may constitute a disability under the ADA.<sup>253</sup>

### III. Analysis

This Section examines the federal and state regulations<sup>254</sup> that long-term care facilities must comply with in caring for residents with celiac disease. While some long-term facilities may argue that they are exempt from following these regulations,<sup>255</sup> precedent within the U.S. Court of Appeals for the Fourth Circuit<sup>256</sup> and two separate DOJ settlements<sup>257</sup> suggest a different conclusion. What immediately follows is a brief description of the challenges that many nursing homes within the United States face and an ongoing commitment to improving nursing home care, reignited in the wake of COVID-19.<sup>258</sup> This Section then examines federal regulations, state regulations, and adjudicative decisions, comparing what is required under these regulations with the actual care provided by long-term care facilities.

As of July 2022, the number of residents living in nursing home facilities hovered around 1.16 million, a decrease of 13% from the 1.33 million people living in nursing homes in July 2019.<sup>259</sup> Despite this decline, nursing homes remain crucial in providing long-term care for those living with physical or mental disabilities or other behavioral disorders.<sup>260</sup> In fact, leaders within the long-term care industry project that

---

251. *Id.*

252. *Id.* at 674–76.

253. *Id.* at 670.

254. See sources cited *supra* note 21.

255. See Matlock, *supra* note 1.

256. *J.D.*, 925 F.3d at 668.

257. See Lesley Settlement, *supra* note 22; see also Rider Settlement, *supra* note 22.

258. See Deborah Gastfreund Schuss, *COVID-19's Deadly Lesson: Time to Revamp Long-Term Care*, HEALTH AFFAIRS, <https://www.healthaffairs.org/doi/10.1377/forefront.20201110.707118/> (Nov. 17, 2020) (describing systemic issues within the long-term care industry, including understaffing and infection control).

259. Priya Chidambaram, *A Look at Nursing Facility Characteristics Through July 2022*, KFF (Aug. 24, 2022), <https://www.kff.org/medicaid/issue-brief/a-look-at-nursing-facility-characteristics-through-july-2022/>.

260. *Nursing Homes*, HEALTHINAGING.ORG, <https://www.healthinaging.org/age-friendly-healthcare-you/care-settings/nursing-homes> (last visited Jan. 5, 2022).

occupancy levels will go up from pre-pandemic levels in upcoming years because of population growth among those 75 and older.<sup>261</sup>

The COVID-19 pandemic highlighted cracks within the long-term care industry,<sup>262</sup> “exposing deep flaws in the way we care for our country’s most vulnerable people.”<sup>263</sup> With these shortcomings brought to light,<sup>264</sup> the moment has come to commit to improving the quality of care provided in nursing home facilities, especially when occupancy levels are projected to increase.<sup>265</sup> It seems that a renewed commitment to improving the long-term care industry has begun, with the Biden administration announcing actions to improve safety and quality of care within nursing homes.<sup>266</sup> It is consistent with this stated goal that long-term care facilities must determine whether they comply with, or have fallen short of, legal obligations<sup>267</sup> owed to residents with celiac disease.

## A. Duty to Comply: Federal and State Regulations

### 1. FEDERAL REGULATIONS

#### a. Section 504 of the Rehabilitation Act of 1973:

As outlined in Section II above, Section 504 protects individuals from discrimination on the basis of disability in any program or activity that receives federal financial assistance.<sup>268</sup> Both Medicare and

---

261. See Paul Bergeron, *Long Term Care Industry Outlook for 2023*, PROVIDER (Jan. 4, 2023), <https://www.providermagazine.com/Articles/Pages/Long-Term-Care-Industry-Outlook-for-2023.aspx>.

262. See Schuss, *supra* note 259.

263. See Schuss, *supra* note 259.

264. Christine E. Bishop & Howard B. Degenholtz, *Evidence Base for the Future of Nursing Homes: Special Issue*, 6 INNOVATION IN AGING 1, 1–4 (2022).

265. See Bergeron, *supra* note 262.

266. See FACT SHEET: *Protecting Seniors by Improving Safety and Quality of Care in the Nation’s Nursing Homes*, WHITE HOUSE (Feb. 28, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/28/fact-sheet-protecting-seniors-and-people-with-disabilities-by-improving-safety-and-quality-of-care-in-the-nations-nursing-homes/>; see also *Biden Administration Issues Bold and Comprehensive Nursing Home Reform Agenda*, CTR. FOR MEDICARE ADVOC. (Mar. 3, 2022), <https://medicareadvocacy.org/bidens-bold-2022-nursing-home-reform-agenda/>.

267. See sources cited *supra* note 21.

268. See *Section 504: Frequently Asked Questions*, U.S. DEP’T. OF HOUS. AND URB. DEV., [https://www.hud.gov/program\\_offices/fair\\_housing\\_equal\\_opp/disabilities/sect504faq](https://www.hud.gov/program_offices/fair_housing_equal_opp/disabilities/sect504faq) (last visited Aug. 29, 2023) [hereinafter *Section 504: Frequently Asked Questions*].

Medicaid are federally funded programs, overseen by the Centers for Medicare and Medicaid Services.<sup>269</sup> Medicare is a federal health insurance program that covers short-term stays in skilled-nursing facilities; its coverage, however, does not extend to long-term care facilities providing custodial services, which are the focus of this Note.<sup>270</sup> Medicaid, on the other hand, is a federal and state program that provides health coverage for low-income individuals and covers long-term care.<sup>271</sup> Given the cost of long-term care, the role of Medicaid in nursing home care is extensive.<sup>272</sup>

Long-term care facilities provide a range of services, including nursing care, 24-hour supervision, and meal services.<sup>273</sup> Meal services in particular are a “mainstay of life” in long-term care facilities.<sup>274</sup> More than simply the way in which residents meet their nutritional needs, mealtimes foster social connections amongst residents.<sup>275</sup> Studies show that these social connections are vital to ensuring a quality living experience for residents living in long-term care facilities.<sup>276</sup> For example, residents with low social engagement during meals have been found to have a lower average body weight.<sup>277</sup> Unintentional weight loss can greatly impact a resident’s quality of life, given its association with

---

269. See Ashley Hunstberry-Lett, *Medicaid or Medicare: Who Pays for Nursing Home Fees?*, AGINGCARE, <https://www.agingcare.com/articles/nursing-home-costs-covered-by-medicare-medicaid-167077.htm> (last visited Aug. 29, 2023).

270. *Id.*

271. *Id.*

272. See *Medicaid’s Role in Nursing Home Care*, KFF (June 20, 2017), <https://www.kff.org/infographic/medicaids-role-in-nursing-home-care/> (stating that Medicaid is the primary payer for long-term care, and that Medicaid covers six in ten nursing home residents).

273. See *Residential Facilities, Assisted Living, and Nursing Homes*, NAT’L INST. ON AGING, <https://www.nia.nih.gov/health/residential-facilities-assisted-living-and-nursing-homes> (last visited Aug. 29, 2023) [hereinafter *Residential Facilities, Assisted Living, and Nursing Homes*].

274. Ross Watkins, Victoria A. Goodwin, Rebecca A. Abbott, Abi Hall & Mark Tarrant, *Exploring Resident’s Experiences of Mealtimes in Care Homes: A Qualitative Interview Study*, BMC GERIATRICS, 2017, at 1.

275. *Id.* at 2.

276. Rory Coughlan & Linda Ward, *Experiences of Recently Relocated Residents of a Long-Term Care Facility in Ontario: Assessing Quality Qualitatively*, 44 INT’L J. OF NURSING STUD. 47, 47–57 (2007).

277. Anne Marie Beck & Lars Ovesen, *Influence of Social Engagement and Dining Location on Nutritional Intake and Body Mass Index of Old Nursing Home Residents*, 22 J. OF NUTRITION FOR THE ELDERLY, 1, 7 tbl. 2 (2003).

“increases in hospitalizations, morbidity, and mortality.”<sup>278</sup> On the other hand, residents who eat with others in the dining room have been shown to have improved food intake and body weight.<sup>279</sup>

By refusing to provide a gluten-free diet to residents living with celiac disease, long-term facilities prevent these residents from receiving both the nutritional and social benefits of mealtimes.<sup>280</sup> Residents are prevented from enjoying meals prepared by their facility and forging social connections with other residents during mealtimes, which likely exacerbates the feelings of isolation and loneliness felt by older adults in long-term care facilities.<sup>281</sup>

Despite this, nursing home facilities may argue that the cost of providing a gluten-free diet<sup>282</sup> fundamentally alters their ability to provide other services. However, providing meal service is an integral aspect of care in long-term care facilities, as opposed to an incidental activity.<sup>283</sup> As such, it would likely be difficult for long-term care facilities to argue that accommodating residents with celiac disease would fundamentally alter the nature of the services provided.<sup>284</sup>

---

278. Sandra F. Simmons, Emmett Keeler, Xiaohui Zhuo, Kelly A. Hickey, Huiwen Sato & John F. Schnelle, *Prevention of Unintentional Weight Loss in Nursing Home Residents: A Controlled Trial of Feeding Assistance*, 56 J. AM. GERIATRICS SOC’y 1466, 1466 (2008).

279. Kristel A. N. D. Nijs, Cees de Graaf, Els Siebelink, Ybel H. Blauw, Vincent Vanneste, Frans J. Kok & Wija A. van Staveren, *Effect of Family-Style Meals on Energy Intake and Risk of Malnutrition in Dutch Nursing Home Residents: A Randomized Controlled Trial*, 61 J. OF GERONTOLOGY 935, 935 (2006).

280. See Watkins et al., *supra* note 274 at 1.

281. Jorunn Drageset, *The Importance of Activities of Daily Living and Social Contact for Loneliness: a Survey Among Residents in Extended Care Facilities*, 18 SCANDINAVIAN J. OF CARING SCI. 65, 68 (2004).

282. See Kristen Fischer, *How to Shop for Gluten-Free Foods on a Budget*, GOODRX HEALTH (Apr. 20, 2022), <https://www.goodrx.com/well-being/diet-nutrition/gluten-free-diet-plan>.

283. See *Residential Facilities, Assisted Living, and Nursing Homes*, *supra* note 273.

284. See Frank C. Morris, Jr., *Act Now Advisory: DOJ Serves Notice: Celiac Disease and Severe Allergies Now Classified as Disabilities Under the ADA*, EPSTEIN BECKER GREEN (Jan. 24, 2013), <https://www.ebglaw.com/insights/act-now-advisory-doj-serves-notice-celiac-disease-and-severe-allergies-now-classified-as-disabilities-under-the-ada-far-reaching-implications-for-virtually-every-facility-serving-food/> [hereinafter Morris].

### b. Section 1557 of the Patient Protection and Affordable Care Act

Under Section 1557 of the Patient Protection and Affordable Care Act, covered entities may not deny an individual the opportunity to “participate in or benefit from . . . a benefit [or] service on the basis of his disability when the individual meets all of the essential eligibility requirements for the health program or activity.”<sup>285</sup>

It is critical, then, that an individual meets all of the “essential eligibility requirements” for the health program or activity in the first place. Regarding admission into nursing homes, eligibility requirements vary by state.<sup>286</sup> The following documents, however, are typical for nursing home admission: a physician’s order for admission into the nursing home,<sup>287</sup> a physician’s order for medications and treatment,<sup>288</sup> medical history and physical examination,<sup>289</sup> a state-required form certifying that the individual meets state nursing home requirements,<sup>290</sup> and other basic information about the prospective resident.<sup>291</sup>

Long-term care facilities participating in Medicaid are bound by Section 1557 of the ACA.<sup>292</sup> These facilities, therefore, may face discrimination challenges on the basis of disability when a resident with celiac disease is denied the opportunity to benefit from a service provided by the facility—a meal service tailored to meet their nutritional needs—when the facility’s admission requirements are otherwise met.<sup>293</sup>

### c. Americans with Disabilities Act

While the ADA itself does not explicitly state that celiac disease is a disability, the disease, by its very nature, greatly influences an individual’s lifestyle: even the slightest amount of gluten ingested can

285. See *Section 1557: Frequently Asked Questions*, *supra* note 70.

286. See Merritt Whitley, *Nursing Home Requirements for Seniors*, A PLACE FOR MOM (Aug. 30, 2023), <https://www.aplaceformom.com/caregiver-resources/articles/nursing-home-checklist>.

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*; see also *How Does a Nursing Home Admissions Process Work?*, BENEDICTINE (Feb. 11, 2022), <https://www.benedictineliving.org/blog/how-does-a-nursing-home-admissions-process-work/> [hereinafter BENEDICTINE].

292. See *Section 1557: Frequently Asked Questions*, *supra* note 70.

293. See generally BENEDICTINE, *supra* note 299 (describing how nursing home admissions process work).

cause permanent damage to one's small intestine.<sup>294</sup> Consumption of gluten, moreover, interferes with the absorption of nutrients, including iron, vitamin D, and zinc, which may cause nutritional deficiencies.<sup>295</sup> Still yet, studies have linked gluten-sensitive enteropathy with sleep disturbances.<sup>296</sup> Perhaps most importantly, the DOJ has classified celiac disease as a disability under the ADA.<sup>297</sup>

In determining whether a covered entity has failed to make reasonable modifications, the DOJ provides an example.<sup>298</sup> The example states that a restaurant may be obligated to remove or replace certain gluten-containing ingredients if other customers may ask for special requests to accommodate their diet.<sup>299</sup> However, the example also states that a restaurant would not be obligated to add gluten-free offerings to their menu.<sup>300</sup> With this example in mind, long-term care facilities may argue that there exists no affirmative obligation to create and then incorporate gluten-free offerings into their menus.<sup>301</sup> Rather, if other residents may ask for certain ingredients to be removed from their meals, then residents with celiac disease may also ask for gluten-containing ingredients to be removed from their meals.

However, this analogy is imperfect. While both long-term care facilities<sup>302</sup> and restaurants<sup>303</sup> are considered public accommodations under Title III of the ADA, they are distinguishable from one another.<sup>304</sup> For example, long-term care facilities are considered "social service

---

294. See *Dietary Changes for Celiac Disease*, JOHNS HOPKINS MED., <https://www.hopkinsmedicine.org/health/conditions-and-diseases/celiac-disease/dietary-changes-for-celiac-disease> (last visited Aug. 29, 2023).

295. See *Common Nutrient Deficiencies in People with Newly Diagnosed/Untreated Celiac Disease*, BETH ISR. DEACONESS MED. CTR., <https://www.bidmc.org/centers-and-departments/digestive-disease-center/services-and-programs/celiac-center/celiacnow/nutrition-and-the-gluten-free-diet/nutritional-considerations-on-the-gluten-free-diet/common-nutritional-deficiencies-in-people-with-celiac-disease> (last visited Aug. 29, 2023).

296. See F. Zingone, M. Siniscalchi, P. Capone, R. Tortora, P. Andreozzi, E. Capone & C. Ciacci, *The Quality of Sleep in Patients with Coeliac Disease*, 32 ALIMENTARY PHARMACOLOGY AND THERAPEUTICS 1031, 1031–36 (2010); Ipek Suzer Gamli & Merzem Keceli Basaran, *The Effect of a Gluten-Free Diet on Sleep Disturbances in Children with Celiac Disease*, 14 NATURE & SCI. OF SLEEP 449, 449–56 (2022).

297. See Lesley University Questions and Answers, *supra* note 80.

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. ADA Manual 1994 Supplement, *supra* note 91.

303. *Id.*

304. *Id.*

center establishments” because they provide medical care and meal services, as well as assist facility residents with everyday tasks.<sup>305</sup> Moreover, as it relates to the provision of meals, long-term care facilities are bound by 42 C.F.R. 483.60, which states that each of the facility’s residents “must receive and the facility must provide at least three meals daily.”<sup>306</sup> Restaurants, on the other hand, typically serve the general public instead of a defined group of individuals.<sup>307</sup>

Public accommodations that serve food to the public are not mandated to provide gluten-free food.<sup>308</sup> In contrast, the Settlement Agreements heretofore discussed required both Lesley and Rider to make reasonable modifications to their meal service plans to accommodate students with celiac disease.<sup>309</sup> What motivated the DOJ to require that these schools make such modifications? Responding to frequently asked questions regarding their settlement with Lesley, the DOJ highlighted key characteristics of the claim against Lesley that influenced their finding that Lesley must make reasonable modifications to the university’s meal plan.<sup>310</sup> First, the issue at hand involved a mandatory meal plan.<sup>311</sup> Second, the mandatory meal plan was for a defined group of students: those students living on campus.<sup>312</sup> Therefore, the DOJ found that the university had differing obligations than those of a restaurant in providing gluten-free food.<sup>313</sup>

Like Lesley, long-term care facilities are tasked with implementing and providing a dining program, which includes meals and snacks.<sup>314</sup> Providing meal service is one condition that participating long-term care facilities must meet in order to receive payment for services rendered under Medicaid.<sup>315</sup> Just as Lesley’s meal plan was mandatory for those students living on campus, dining services within long-term care facilities are mandatory for a defined group of individuals: those residents living in the facility.<sup>316</sup> Rooted in the same logic

---

305. *Id.*

306. 42 C.F.R. 483.60(f)(1) (2023).

307. *See* Lesley University Questions and Answers, *supra* note 80.

308. *Id.*

309. *See* Lesley Settlement, *supra* note 22; *see also* Rider Settlement, *supra* note 22.

310. *See* Lesley University Questions and Answers, *supra* note 80.

311. *Id.*

312. *Id.*

313. *Id.*

314. 42 C.F.R. §483.24(b)(4) (2023).

315. 42 C.F.R. § 483.60 (2023).

316. *See id.*



that will make arguing against their obligations under Section 504 difficult, facilities likely face an uphill battle in persuading a court that providing gluten-free offerings will fundamentally alter the nature of their services.<sup>317</sup>

*i. DOJ Settlements Provide a Model for How to Address ADA/Title III Violations in Public Accommodations*

Both Lesley and Rider failed to provide students with celiac disease the same opportunities to access and safely consume food as other students; students with celiac disease “couldn’t safely eat in the dining halls due to cross contact”<sup>318</sup> and “they couldn’t take advantage of campus services, such as ordering food online . . . because the lack of safe options.”<sup>319</sup> Yet, these students were mandated to participate in the dining program offered by each university.<sup>320</sup> While the Settlement Agreements were solely between the DOJ, Lesley, and Rider, they nonetheless symbolized a victory for celiac access in the university setting.<sup>321</sup>

In finding that Lesley<sup>322</sup> and Rider<sup>323</sup> violated Title III of the ADA, the DOJ’s decision put colleges and universities across the United States on notice, encouraging institutions<sup>324</sup> to assess whether their dining services were in line with obligations imposed upon them under the ADA.<sup>325</sup> Practically speaking, the Settlement Agreements<sup>326</sup> informed other universities about the preventative steps that could be

---

317. See Morris, *supra* note 290.

318. Tina Rodriguez, *Food Allergies as Disabilities: What the Lesley University Settlement Means for Schools*, SAGE DINING SERVS. (Dec. 14, 2014), <https://www.sagedining.com/intranet/apps/messages/wp-content/uploads/2015/10/Food-Allergies-As-Disabilities.pdf>.2

319. *Id.*

320. See *id.*

321. See Gina Clowes, *Lesley U. Decision: A Victory for Allergy, Celiac Access*, ALLERGIC LIVING (Apr. 10, 2013), <https://www.allergicliving.com/2013/04/10/lesley-u-decision-a-victory-for-allergy-celiac-access/>.

322. See Jennifer Iscol, *Lesley University Settlement*, CELIAC CMTY. FOUND. OF N. CAL. (Aug. 28, 2013), <https://celiaccommunity.org/2013/lesley-university-settlement>.

323. See Rider Settlement, *supra* note 22.

324. See Iscol, *supra* note 322; see also Allie Grasgreen, *Dining Disabilities*, INSIDE HIGHER ED (Jan. 1, 2013), <https://www.insidehighered.com/news/2013/01/02/lesley-settlement-flags-food-allergies-and-campus-dining>.

325. See Iscol, *supra* note 322.

326. See Lesley Settlement, *supra* note 22; see also Rider Settlement, *supra* note 22.

implemented to ensure the inclusivity of dining services and successful accommodation of students with celiac disease or food allergies.<sup>327</sup>

The Settlement Agreements detail the exact measures taken by each school to resolve the discriminatory impact of their dining services.<sup>328</sup> Among other modifications, Lesley, for example, agreed to create a designated area in their dining halls solely for these students, which would include space for non-perishable items and separate appliances.<sup>329</sup> For Rider, modifications included, but were not limited to, providing meals that were nutritionally comparable to those meals offered to students without food-related disabilities or food allergies, as well as taking reasonable steps to prevent students' meals from being inadvertently cross-contaminated with food containing the prohibited allergen.<sup>330</sup> Other colleges and universities across the United States have since modified their dining services in a similar fashion.<sup>331</sup> Just one example—the University of Rochester offers a dedicated gluten-free pantry, which contains pre-packaged gluten-free snacks and meals, toasters, microwaves, and other kitchen utensils.<sup>332</sup> Gluten-free options are also available in both dining centers located on campus.<sup>333</sup>

The DOJ's Settlement Agreements strongly signaled to colleges and universities that the DOJ was not afraid to enforce these entities' federal obligations to accommodate students with celiac disease.<sup>334</sup> Like colleges and universities, nursing homes, as long-term care facilities, are also public accommodations<sup>335</sup> regulated by Title III of the ADA.<sup>336</sup>

---

327. See Iscol, *supra* note 322.

328. See Lesley Settlement, *supra* note 22; see also Rider Settlement, *supra* note 22.

329. See Lesley Settlement, *supra* note 22.

330. See Rider Settlement, *supra* note 22.

331. See *Nutrition and Dietary Considerations*, U. ILL. URBANA-CHAMPAIGN: STUDENT AFFS. U. HOUS., <https://housing.illinois.edu/dine/nutrition/dietary-considerations> (last visited Aug. 29, 2023); see also *On Campus Resources*, U. ROCHESTER, <https://dining.rochester.edu/health-wellness/on-campus-resources/> (last visited Aug. 29, 2023) [hereinafter *On Campus Resources*, ROCHESTER]; see also *Gluten Free Dining Options*, BOS. U. DINING SERVS., <https://www.bu.edu/dining/nutrition/gluten-free/> (last visited Aug. 29, 2023).

332. See *Operations*, U. ROCHESTER, <https://dining.rochester.edu/dining-faqs/> (last visited Aug. 29, 2023) [hereinafter *Dining FAQs*, U. ROCHESTER].

333. *Id.*

334. See Iscol, *supra* note 322; see also Grasgreen, *supra* note 324.

335. See 42 U.S.C. § 12181(7)(K).

336. ADA MANUAL 1994 SUPPLEMENT, *supra* note 91.

Rather than going against the grain, long-term care facilities should pay heed to the DOJ's Settlement Agreements<sup>337</sup> in making accommodations to their meal services for residents with celiac disease.

**d. 42 U.S.C. § 483.60: Food and Nutrition Services**

To receive payment for services rendered under Medicaid programs, nursing homes, as long-term care facilities are required to meet a series of conditions collectively referred to as "conditions of participation."<sup>338</sup> The conditions of participation mandate that each resident of a participating nursing home facility receives the care and service that creates "the highest practicable physical, mental, and psychosocial well-being."<sup>339</sup> To that end, covered facilities must ensure that each residents' daily nutritional needs are met, which necessitates taking into consideration a resident's special dietary needs.<sup>340</sup> Not only must each resident receive food that accommodates their "allergies, intolerances, and preferences,"<sup>341</sup> but the food must be pleasant to eat.<sup>342</sup>

Facing a resident's dietary restrictions head-on is a bedrock principle illustrated elsewhere in the standards set forth by the Centers for Medicare and Medicaid Services.<sup>343</sup> For example, one section of the statute delineates what must be included in the "baseline care plan" for each resident.<sup>344</sup> The plan must include information necessary to care for each resident's health, including any dietary orders.<sup>345</sup> Long-term care facilities must also ensure that a resident is offered a therapeutic diet if a health care provider, or, in specific circumstances, a registered

---

337. See Iscol, *supra* note 322; see also Lesley Settlement, *supra* note 22; Rider Settlement, *supra* note 22.

338. 42 C.F.R. § 483.480 (2023).

339. 42 C.F.R. § 483.24 (2023).

340. 42 C.F.R. § 483.60 (2023).

341. 42 C.F.R. § 483.60(d)(4) (2023).

342. 42 C.F.R. § 483.60(d)(2) (2023); see generally Jillian D'Onfro, *Nursing Home Food is Getting Better. But the Journey is Far from Over*, COUNTER (Nov. 27, 2017, 12:59 PM), <https://thecounter.org/nursing-home-food-federal-regulations/> (describing the common belief that nursing home food is "mush, overcooked and pallid, or boring TV dinner-like spreads that look and taste exactly the same for every resident.").

343. 42 C.F.R. § 483.21 (2023).

344. *Id.*

345. *Id.*

or licensed dietitian,<sup>346</sup> finds that such a diet is necessary for a resident's nutritional problem.<sup>347</sup>

Failing to accommodate a resident's need for a gluten-free diet flies in the face of obligations imposed on long-term care facilities by conditions of participation.<sup>348</sup> The refusal to serve gluten-free meals to residents with celiac disease, for which a gluten-free diet is the only therapy,<sup>349</sup> directly contradicts the mandate that facilities ensure residents receive a level of care in line with "professional standards of practice."<sup>350</sup> Without a gluten-free diet, a resident is caught between a rock and a hard place.<sup>351</sup> On the one hand, a resident may decide to eat gluten-containing meals provided by the facility, triggering an immune response in the resident's small intestine,<sup>352</sup> damaging its lining<sup>353</sup> and preventing it from absorbing nutrients.<sup>354</sup> Despite the complications associated with consuming gluten,<sup>355</sup> a resident may decide to consume gluten-containing meals because of a near-complete dependence on the long-term care facility to provide for their nourishment.<sup>356</sup> On the other hand, eschewing gluten-containing meals will lead to malnutrition, "accelerating frailty"<sup>357</sup> in the resident.

### 3. STATE REGULATIONS

#### a. New York State Human Rights Law (NYSHRL)

The NYSHRL protects individuals from discrimination on the basis of disability in public accommodations.<sup>358</sup> As noted above, the NYSHRL defines disability to mean "a physical, mental or medical

---

346. 42 C.F.R. § 483.60 (2022).

347. 42 C.F.R. § 483.25(g)(3) (2022).

348. See generally 42 C.F.R. § 483 (2022) (detailing requirements for long term care facilities).

349. See *Celiac Disease*, *supra* note 28.

350. 42 C.F.R. § 483.25 (2023).

351. See *Celiac Disease*, MAYO CLINIC, *supra* note 31.

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.*

356. See Rachel Milte, Julie Ratcliffe, Gang Chen, Michelle Miller & Maria Crotty, *Taste, Choice and Timing: Investigating Resident and Carer Preferences for Meals in Aged Care Homes*, 20 NURSING & HEALTH SCI. 116, 116–24 (2018).

357. Tammy Hanel, *Causes of Appetite Loss in Seniors*, HEBREW SENIOR LIFE (Apr. 4, 2022), <https://www.hebrewseniorlife.org/blog/causes-appetite-loss-seniors>.

358. See *Disability Rights*, *supra* note 122.

impairment . . . which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques . . . .”<sup>359</sup> The Division of Human Rights, the entity charged with enforcing the NYSHRL,<sup>360</sup> broadly construes what constitutes a disability to provide more protection than that provided under the ADA.<sup>361</sup> That “there are no qualifiers as to the severity of the disability” or to the impairment of life activities illustrates the NYSHRL’s departure from the qualified definition of disability<sup>362</sup> under federal law.<sup>363</sup> The NYSHRL follows Title III of the ADA, covering “all places of public accommodation.”<sup>364</sup>

The NYSHRL mandates that public accommodations provide equal access and enjoyment of services for individuals with a disability by making reasonable modifications to their policies, practices, and procedures.<sup>365</sup> However, public accommodations are not required to undergo such modifications when doing so would fundamentally alter the nature of the business.<sup>366</sup>

Under the NYSHRL’s broad interpretation of what constitutes a disability,<sup>367</sup> it will be even more difficult for long-term care facilities to argue that a resident with celiac disease does not suffer from a disability.<sup>368</sup> The NYSHRL defines disability “solely in terms of impairment . . . which includes an impairment of any system of the body.”<sup>369</sup> For people with celiac disease, the consumption of gluten damages the small intestine<sup>370</sup> and interferes with the body’s ability to absorb

---

359. N.Y. EXEC. LAW § 292(21) (McKinney 2023).

360. See *Disability Rights*, *supra* note 122.

361. See *Disability Rights*, *supra* note 122.

362. See 42 U.S.C. § 12102(1)(A); see also *Disability Rights*, *supra* note 122.

363. See 42 U.S.C. §§ 12102, 18116; see also *Your Rights Under Section 504*, *supra* note 64.

364. See Karen S. Westervelt, *Reminder to Facilities of Their Obligation to Provide Accessible Services to People with Disabilities*, N.Y. ST.: DEP’T OF HEALTH (July 31, 2013), [https://www.health.ny.gov/professionals/hospital\\_administrator/letters/2013/2013-07-31\\_provide\\_accessible\\_services\\_to\\_persons\\_with\\_disabilities.htm](https://www.health.ny.gov/professionals/hospital_administrator/letters/2013/2013-07-31_provide_accessible_services_to_persons_with_disabilities.htm).

365. See *Rights of People with Disabilities in Places of Public Accommodation*, N.Y. ST.: DIV. OF HUM. RTS., [https://dhr.ny.gov/system/files/documents/2022/05/disabilities\\_ppa.pdf](https://dhr.ny.gov/system/files/documents/2022/05/disabilities_ppa.pdf) (last visited Aug. 29, 2023).

366. *Id.*

367. See *Disability Rights*, *supra* note 122.

368. *Morris*, *supra* note 290.

369. See *Krause v. Lancer & Loader Grp., LLC*, 965 N.Y.S.2d 312, 321–22 (N.Y. Sup. Ct. 2013).

370. See *Celiac Disease*, JOHNS HOPKINS MED., <https://www.hopkinsmedicine.org/health/conditions-and-diseases/celiac-disease> (last visited Aug. 29, 2023).

nutrients.<sup>371</sup> Certainly, celiac disease falls within the NYSHRL's broad definition of disability.<sup>372</sup>

**b. Virginia Administrative Code § 40-73-580: Food Service and Nutrition**

Long-term care facilities in Virginia must subscribe to requirements relating to general food service and nutrition.<sup>373</sup> Several requirements impose proactive obligations onto the facility to monitor their residents' health.<sup>374</sup> For special diets, in particular, the facility must prepare food in a way that complies with the resident's diet, as ordered by the resident's physician.<sup>375</sup> Moreover, every six months, at a minimum, a dietician or nutritionist reviews the physician's order for the special diet and the facility's preparation and delivery of the special diet.<sup>376</sup>

In Virginia, therefore, long-term care facilities may not refuse to provide gluten-free meals for residents with celiac disease.<sup>377</sup> So long as a resident receives an order from their physician or other provider stating the need for a gluten-free diet, a long-term care facility must prepare and serve the resident with food that complies with the ordered diet.<sup>378</sup> Recall that the only treatment for celiac disease is a lifelong adherence to a gluten-free diet.<sup>379</sup> Here, then, facilities may not substitute their judgment as to the legitimacy of celiac disease or the need of a particular resident to only consume gluten-free products.<sup>380</sup> Importantly, facilities must also prepare and deliver the gluten-free diet in a manner that is satisfactory to a dietician or nutritionist for each resident, irrespective of the facility's own determination of their competence in administering a resident's gluten-free diet.

But long-term facilities are required to do more<sup>381</sup> than provide a gluten-free diet as ordered by the resident's physician or other

---

371. *Id.*

372. See *Disability Rights*, *supra* note 122.

373. 22 VA. ADMIN. CODE §§ 40-73-580(B)(1)(b), (E)–(F) (2023).

374. See sources cited *supra* note 380.

375. 22 VA. ADMIN. CODE § 40-73-610(D) (2023).

376. 22 VA. ADMIN. CODE § 40-73-620 (2023).

377. See 22 VA. ADMIN. CODE § 40-73-610(D) (2023).

378. *Id.*

379. See *Drugs for Celiac Disease*, *supra* note 39.

380. See Matlock, *supra* note 1; see also Erica Dermer, *Gluten-Free Seniors—What Are We Going To Do?*, CELIAC & THE BEAST (June 21, 2018), <https://www.celiacandthebeast.com/2018/06/gluten-free-seniors-what-are-we-going-to-do/>.

381. See 22 VA. ADMIN. CODE §§ 40-73-580, 40-73-620 (2023).

provider.<sup>382</sup> Indeed, the wide-ranging obligations<sup>383</sup> that long-term care facilities owe to their residents begin to apply upon each resident's admission into the facility<sup>384</sup>—a blindingly obvious concept, yet often overlooked. Facilities must closely monitor their residents for any physical or mental decline related to their nutritional needs and implement interventions as soon as a problem is suspected.<sup>385</sup>

In closely monitoring for signs of nutritional deficiencies, a facility's obligations are not dependent on when a resident receives a celiac disease diagnosis.<sup>386</sup> Every resident who is admitted into a nursing home facility, whether or not they have celiac disease, is subject to close monitoring for any change in mental or physical status,<sup>387</sup> including significant weight loss.<sup>388</sup> Upon receipt of a diagnosis of celiac disease, and after implementing a gluten-free diet, a facility's obligation to closely monitor their resident does not cease.<sup>389</sup> Strictly providing gluten-free meals, therefore, is not commensurate with finding that a facility has fulfilled its obligations in caring for a resident living with celiac disease.<sup>390</sup>

## **B. Obligation to Accommodate Residents with Celiac Disease: Impact of Judicial Decisions**

### **1. J.D. BY DOHERTY V. COLONIAL WILLIAMSBURG FOUNDATION:**

The Settlement Agreements<sup>391</sup> clarified that colleges and universities owe obligations to students with celiac disease under the ADA.<sup>392</sup> Can the same be said about public accommodations in non-university contexts?

---

382. See 22 VA. ADMIN. CODE § 40-73-610(D) (2023).

383. See 22 VA. ADMIN. CODE §§ 40-73-580, 40-73-620 (2023).

384. See 22 VA. ADMIN. CODE § 40-73-580(E)(2) (2023).

385. See 22 VA. ADMIN. CODE § 40-73-580(E)-(F) (2023).

386. See *id.*

387. *Id.*

388. *Id.*

389. *Id.*

390. *Id.*

391. See Lesley Settlement, *supra* note 22; see also Rider Settlement, *supra* note 22.

392. See Lesley Settlement, *supra* note 22; see also Rider Settlement, *supra* note 22.

As noted in Part II, whether celiac disease is a disability under the ADA remains uncertain.<sup>393</sup> The District Court for the Northern District of California, for example, noted that other courts have held that food allergies may not constitute a disability because an individual living with a food allergy can avoid any potential harm by abstaining from ingesting the particular allergen.<sup>394</sup> Despite incorrectly characterizing celiac disease as a food allergy,<sup>395</sup> the court's analysis illustrates the apprehension felt by courts in classifying celiac disease as a disability.<sup>396</sup> In fact, the court noted that they could not find any cases specifically discussing whether celiac disease constitutes a disability under the ADA.<sup>397</sup>

Likewise, the U.S. Court of Appeals for the Ninth Circuit engaged in a lengthy analysis to determine whether the plaintiff's dietary restrictions constituted a disability under the ADA.<sup>398</sup> There, the court noted that the plaintiff's demanding dietary restrictions, a result of her diabetes, "substantially limited" the major life activity of eating.<sup>399</sup> The court qualified their holding, that eating is a major life activity, with the following statement: "[W]e do not thereby invite all those on a diet to bring claims of disability. Not every impediment to the copious and tasty diets our waistlines . . . cannot endure is a substantial limitation of the major life activity of eating."<sup>400</sup> The court highlighted several facts that were determinative in their analysis, including that the plaintiff must pay close attention to the foods that she eats and that she "cannot put a morsel of food into her mouth without carefully assessing whether it will tip her blood sugars out of balance."<sup>401</sup>

---

393. See *infra* Part II; Jefferson Adams, *Gluten in Soup at Grand Canyon's El Tovar Hotel Injured L.A. Man, Lawsuit Claims*, CELIAC.COM (Apr. 23, 2019), <https://www.celiac.com/articles.html/gluten-in-soup-at-grand-canyons-el-tovar-hotel-injured-la-man-lawsuit-claims-r4782/>; Gene Johnson, *Man Sues Washington Jail over Lack of Gluten-free Food*, AP (Nov. 16, 2020, 12:14 PM), <https://apnews.com/article/celiac-disease-lawsuits-washington-vancouver-tacoma-3c817efffae4b07ddd16c26f183980bc>.

394. See *Phillips v. P.F. Chang's China Bistro, Inc.*, No. 5:15-cv-00344-RMW, 2015 WL 4694049, at \*4 (N.D. Cal. Aug. 6, 2015) (citing decisions in *Land v. Baptist Med. Ctr.*, 164 F.3d 423, 424–25 (8th Cir. 1999) and *Slade v. Hershey Co.*, No. 1:09CV00541, 2011 WL 3159164, at \*4 (M.D. Pa. July 26, 2011).

395. *Definition & Facts for Celiac Disease*, *supra* note 27.

396. See *Phillips*, 2015 WL 4695049 at \*4.

397. See *id.*

398. See *Fraser v. Goodale*, 342 F.3d 1032, 1037–45 (9th Cir. 2003).

399. *Id.* at 1042.

400. *Id.* at 1041.

401. *Id.*



However, the U.S. Court of Appeals for the Fourth Circuit concluded that dietary restrictions, specifically celiac disease, could be a disability under the ADA.<sup>402</sup> There, the court employed a three-pronged analysis<sup>403</sup> in concluding that there existed a genuine dispute of material fact to be left for a jury to decide whether Shields, the restaurant, discriminated against the plaintiff on the basis of disability.<sup>404</sup>

The first prong examined whether J.D.'s requested modification was "necessary."<sup>405</sup> The second prong examined whether such modification was "reasonable."<sup>406</sup> Under the last prong, the Court examined whether the requested modification would "fundamentally alter"<sup>407</sup> the nature of Shields. While the court employed this framework to analyze the actions of a themed restaurant in Colonial Williamsburg, much can be gained from utilizing this framework to analyze actions of long-term facilities that do not provide gluten-free meals for residents with celiac disease.<sup>408</sup>

As to the first prong, is providing gluten-free meals "necessary"<sup>409</sup> for people living with celiac disease in long-term care facilities? The U.S. Court of Appeals for the Fourth Circuit emphasized that courts use a "like experience" standard to determine whether a requested modification is necessary.<sup>410</sup> This has come to mean that public accommodations must examine how their facilities are used by individuals without disabilities and then must take "necessary and reasonable steps to provide disabled guests with a 'like experience.'"<sup>411</sup> Long-term care facilities provide residents with meals, which they may safely consume, and facilitate opportunities for residents to socialize with others during mealtimes.<sup>412</sup> By failing to provide gluten-free meals, nursing homes strip residents with celiac disease of the full and equal enjoyment of

---

402. See *J.D. by Doherty v. Colonial Williamsburg Found.*, 925 F.3d 663, 670–76 (4th Cir. 2019).

403. *Id.* at 671.

404. *Id.* at 675.

405. *Id.* at 672–74.

406. *Id.* at 674–75.

407. *Id.* at 676–77.

408. See *id.* at 671–76.

409. *Id.* at 672.

410. *Id.*

411. *Id.*

412. See generally *Watkins et al.*, *supra* note 274 (discussing the importance of social interactions at communal mealtimes in long-term care facilities).

their facility's meal services.<sup>413</sup> While failing to provide gluten-free meals does not preclude a resident from partaking in the social aspect of mealtimes, that a resident might have to continuously explain to others why they cannot consume gluten may accelerate feelings of anxiety, exclusion, and isolation.<sup>414</sup> Poignantly, because it is "easier to forgo the experience and avoid the awkward social struggle,"<sup>415</sup> those with celiac disease "end up missing out on 'more than just the gluten.'"<sup>416</sup>

The second prong—that is, whether the modification is reasonable,<sup>417</sup> depends on the individual circumstances and the capabilities of each respective long-term care facility.<sup>418</sup> Surely, what is reasonable for one facility may not be reasonable for another. In *J.D.*, as described above, the plaintiff sought to eat a homemade gluten-free meal in the restaurant.<sup>419</sup> While not dispositive, the court mentioned that the restaurant's approving a similar accommodation "spoke directly to the reasonableness" of the plaintiff's request.<sup>420</sup> Accordingly, if long-term care facilities accommodate specific food allergies, including tree nuts, peanuts, and seafood, or other restrictive diets, their capacity to do so speaks to the reasonableness of accommodating a gluten-free diet.<sup>421</sup>

Providing gluten-free meals will impose some costs on long-term care facilities.<sup>422</sup> According to a 2019 study, gluten-free food can cost up to 183% more than non-gluten-containing food.<sup>423</sup> In addition, to prevent cross-contamination, long-term care facilities must also take steps to dedicate specific utensils and equipment to prepare gluten-free

---

413. See *id.*; see also Rebecca Pytell, *Missing Out On More Than Just The Gluten*, STRENGTH & SUNSHINE (July 23, 2017), <https://strengthandsunshine.com/missing-just-gluten-celiac-social-isolation/>.

414. See Watkins et al., *supra* note 274; see also Pytell, *supra* note 413.

415. See Pytell, *supra* note 413.

416. *Id.*

417. *J.D. by Doherty v. Colonial Williamsburg Found.*, 925 F.3d 663, 667 (4th Cir. 2019).

418. *Id.* at 675.

419. *Id.* at 666.

420. *Id.* at 674.

421. See *id.* at 674–675.

422. See Elizabeth Ecker, *CCRC Sees Opportunity in Gluten-Free Dining*, SENIORS HOUS. NEWS (May 23, 2013), <https://seniorhousingnews.com/2013/05/23/gluten-free-dining-presents-new-value-in-senior-living/>.

423. See Christina Heiser, *Here's Why Gluten-Free Food Is So Expensive*, ASWEAT-LIFE (Sept. 15, 2021), <https://asweatlife.com/2021/09/why-is-gluten-free-food-so-expensive/>.

meals.<sup>424</sup> However, incurring costs is not unique to accommodating a gluten-free diet.<sup>425</sup> Food allergy management necessarily entails costs, whether monetary or relating to the value of one's time.<sup>426</sup> For example, policies and procedures need to be created to reduce the risk of exposure to allergens, and great care taken in the buying, preparing, and serving of food to residents.<sup>427</sup>

The last prong of this framework entails examining whether a requested modification would "fundamentally alter the nature" of the goods and services.<sup>428</sup> If so, failure to make a reasonable modification will not constitute discrimination under the ADA.<sup>429</sup> A fundamental alteration is a "modification to 'an essential aspect'" of the public accommodation.<sup>430</sup> For long-term care facilities, the provision of meal services is certainly an essential aspect of their multi-faceted operation.<sup>431</sup> Does providing gluten-free meals alter the nature of this service?

If this were taken to be true, accommodating common food allergies might also be found to fundamentally alter the nature of a long-term care facility's services.<sup>432</sup> And yet, long-term care facilities across the United States have taken proactive measures to fulfill the diverse nutritional needs and preferences of their residents.<sup>433</sup> American House Sarasota,<sup>434</sup> a senior living community in Sarasota, Florida, utilizes a spreadsheet to track all their residents' dietary needs, as well as cards with residents' photos on them to make sure that each resident receives

---

424. See Barbara Bianchi, *5 Essential Steps to Prevent Gluten Cross Contamination in Your Kitchen*, GLUTEN FREE HOMESTEAD (June 17, 2022), <https://glutenfreehomestead.com/2015/05/5-essential-steps-to-prevent-gluten-cross-contamination-in-your-kitchen/>.

425. See *Allergy Safe Adult Care Facilities*, HEALTHLINKBC (Mar. 1, 2019), <https://www.healthlinkbc.ca/healthlinkbc-files/allergy-safe-adult-care-facilities>.

426. See Bianchi, *supra* note 424.

427. See Bianchi, *supra* note 424.

428. See *J.D. by Doherty v. Colonial Williamsburg Found.*, 925 F.3d 663, 676 (4th Cir. 2019).

429. *Id.* (citing *Montalvo v. Radcliffe*, 167 F.3d 873, 877 (4th Cir. 1999)).

430. *Id.* (citing *Halpern v. Wake Forest U. Health Scis.*, 669 F.3d 454, 464 (4th Cir. 2012)).

431. See *Residential Facilities, Assisted Living, and Nursing Homes*, *supra* note 273.

432. *Colonial Williamsburg Found.*, 925 F.3d at 676.

433. See Stacey Burke, *Special Diets and Feeding Assistance in Senior Living*, A PLACE FOR MOM (July 13, 2021), <https://www.aplaceformom.com/caregiver-resources/articles/special-diets>; see also Katie Fanuko, *How One Senior-Living FSD Addresses Allergies*, FOODSERVICE DIRECTOR (May 26, 2015), <https://www.foodservice-director.com/menu/how-one-senior-living-fsd-addresses-allergies>.

434. See AM. HOUSE SARASOTA, <https://www.americanhouse.com/sarasota> (last visited Aug. 29, 2023) [hereinafter SARASOTA].

the correct meal.<sup>435</sup> The Village at St. Edward<sup>436</sup> in Fairlawn, Ohio, similarly utilizes a spreadsheet that lists all dietary possibilities and has an “always-available menu” that residents can look over to substitute a particular food item.<sup>437</sup>

#### IV. Policy Recommendations

As noted at the outset, diagnosing an elderly individual with celiac disease is not without its challenges—in fact, the diagnosis may be overlooked or delayed by years.<sup>438</sup> Once this initial barrier is surpassed, unfortunately, the needs of those living with celiac disease in long-term care facilities may still be neglected or trivialized by staff and other residents.<sup>439</sup> Horror stories about the treatment of gluten-free residents by their long-term care facilities are countless.<sup>440</sup> And for many elderly individuals, or their family members trying to find a safe facility for them, these stories only exacerbate pre-existing feelings of stress, anxiety,<sup>441</sup> and isolation.<sup>442</sup>

What, then, is the answer? One individual suggests the following: “Perhaps we should start our own Celiac City where gluten is not to be found for miles around. Gluten free restaurants, grocery stores, bed and breakfasts, retirement homes, amusement part, etc. and no worries!”<sup>443</sup> Individuals with celiac disease should not feel that they must resort to creating their own “Celiac City”<sup>444</sup> to ensure a safe environment to live out their later years. Rather, nursing homes, as long-term care facilities, have an obligation under federal and state law<sup>445</sup> to accommodate the gluten-free diet that celiac disease requires.

---

435. See Burke, *supra* note 433.

436. See VILL. OF ST. EDWARD, <https://vsecommunities.org/> (last visited Aug. 29, 2023) [hereinafter ST. EDWARD].

437. See Fanuko, *supra* note 433.

438. See Rashtak & Murray, *supra* note 27; see also Collin et al., *supra* note 45, at 563.

439. Matlock, *supra* note 1.

440. See Matlock, *supra* note 1; see also Dermer, *supra* note 380.

441. See Matlock, *supra* note 1; see also Pytell, *supra* note 413.

442. See Pytell, *supra* note 413.

443. knitty kitty, Comment to *Independent Livings and Assisted Livings*, CELIAC.COM (Dec. 6, 2022), <https://www.celiac.com/forums/topic/157639-independent-livings-and-assisted-livings/#comment-1105018>.

444. *Id.*

445. See sources cited *supra* Section II(C).

**A. Learning from “Lesley” and “Rider”: How Nursing Homes Can Satisfy their Obligations to Accommodate Residents with Celiac Disease**

This Note recommends that long-term care facilities satisfy their obligations to residents with celiac disease by referencing the Settlement Agreements<sup>446</sup> as a guide to ensure the inclusivity of their dining services. Specifically, this Note recommends two actions. First, long-term care facilities should implement an educational program to train the kitchen staff, as well as staff members at large, on the fundamentals of celiac disease.<sup>447</sup> Second, long-term care facilities must take all reasonable precautions to minimize potential cross-contamination by using separate utensils and other food-preparation items and prioritizing changing foodservice gloves.<sup>448</sup>

The first recommendation—implementing an educational training program, is critical. Simply put, “education is the difference between a ‘gluten-friendly’ meal and a safe gluten-free meal.”<sup>449</sup> In caring for those with celiac disease, this is a fundamental distinction.<sup>450</sup> Facilities should seek programs designed to provide kitchen staff, and other staff members, with best practices for serving gluten-free food.<sup>451</sup> Training programs should leave staff members with the confidence and understanding to answer the following questions:

- What is celiac disease?
- What is gluten?
- What food items contain gluten?
- How can one check that ingredients are gluten-free?
- What is cross-contamination?
- How can one prevent cross-contamination?
- How can staff members communicate with residents about their gluten-free process?

---

446. See Lesley Settlement, *supra* note 22; see also Rider Settlement, *supra* note 22.

447. See Lesley Settlement, *supra* note 22, at § 7(b); see also Rider Settlement, *supra* note 22, at § 7.

448. See Lesley Settlement, *supra* note 22, at § 4(d)(iv); see also Rider Settlement, *supra* note 22, at § 4(b).

449. GREAT Gluten-Free Kitchens, BEYOND CELIAC, <https://www.beyondceliac.org/gluten-free-diet/dining-tips/great-gluten-free-foodservice-training/meet-our-kitchens/> (last visited Aug. 29, 2023) [hereinafter GREAT Gluten-Free Kitchens].

450. Definition & Facts for Celiac Disease, *supra* note 27.

451. See, e.g., sources cited *infra* notes 462–65 and accompanying text.

- Why is it important to have a process in place to protect residents with celiac disease?<sup>452</sup>

GF-Smart,<sup>453</sup> GREAT Gluten-Free Foodservice Training,<sup>454</sup> Gluten and Allergy Free Passport,<sup>455</sup> and the Gluten Intolerance Group's Gluten-Free Food Service<sup>456</sup> are all programs designed to provide staff with the knowledge and tools to provide safe gluten-free meals. Like Lesley,<sup>457</sup> facilities should require training to be completed annually, at a minimum, to remain informed about the latest updates or information relating to celiac disease care. By partaking in these training programs, staff will feel well-prepared to field questions from their gluten-free residents, providing residents with the assurance that they are being safely cared for.<sup>458</sup>

The second recommendation—that long-term care facilities take all reasonable precautions to minimize potential cross-contamination—may appear daunting.<sup>459</sup> After all, even small amounts of gluten inadvertently ingested can trigger an autoimmune response.<sup>460</sup> However, there are several concrete steps that long-term care facilities can take to reduce cross-contamination. As demonstrated by Lesley<sup>461</sup> and Rider,<sup>462</sup> long-term care facilities should designate separate appliances, including a microwave, toaster, and cutting boards, as well as separate

452. *Gluten-Free Food Program*, NAT'L CELIAC ASS'N, <https://nationalceliac.org/gluten-free-food-program/> (last visited Aug. 29, 2023).

453. See e.g. *Professional Training for Gluten-Free Food Safety*, GLUTEN-FREE FOOD PROGRAM, <https://glutenfreefoodprogram.com/gf-training/> (last visited Aug. 29, 2023).

454. See e.g. *GREAT Gluten-Free Foodservice Training*, BEYOND CELIAC, <https://www.beyondceliac.org/gluten-free-diet/dining-tips/great-gluten-free-foodservice-training/> (last visited Aug. 29, 2023).

455. See e.g. *Food Service Training*, GLUTEN FREE & ALLERGY FREE PASSPORT, <https://glutenfreepassport.com/pages/food-service-training-menuinfo-fare-kim-koeller> (last visited Aug. 29, 2023).

456. See e.g. *Looking Out for the Gluten-Free Consumer*, GLUTEN-FREE FOOD SERV., <https://gffs.org/> (last visited Aug. 29, 2023).

457. See Lesley Settlement, *supra* note 22.

458. See generally Bryan Reynolds, *What You Need to Know about Caring for a Celiac Parent*, EPISCOPAL RET. SERVS. (Sept. 17, 2015), <https://blog.episcopalretirement.com/354arjorie-p-lee-blog/what-you-need-to-know-about-caring-for-a-celiac-parent> (explaining the importance of being knowledgeable about celiac disease and providing emotional support to people living with celiac disease).

459. See Lesley Settlement, *supra* note 22, at § 4(d)(iv); see also Rider Settlement, *supra* note 22, at § 4(b).

460. See *Cross-Contact*, BEYOND CELIAC, <https://www.beyondceliac.org/gluten-free-diet/cross-contact/> (last visited Aug. 29, 2023) [hereinafter *Cross-Contact*].

461. See Lesley Settlement, *supra* note 22.

462. See Rider Settlement, *supra* note 22.

kitchen utensils, pots, pans, and fryers to be used exclusively for the preparation of gluten-free food.<sup>463</sup> Moreover, to prevent staff from mistakenly using dedicated gluten-free equipment to prepare gluten-containing meals, gluten-free equipment and ingredients should also be stored in separate locations.<sup>464</sup> Given the variety of gluten-containing meals that kitchen staff make, it is also essential that these individuals put on new, clean foodservice gloves before preparing gluten-free food.<sup>465</sup> Simply placing the gloves in an accessible spot in the kitchen can help achieve this<sup>466</sup> without drastically slowing down food preparation.

While a long-term care facility may face up-front costs<sup>467</sup> in bringing their facilities into compliance with the appropriate gluten-free standards, offering gluten-free options may differentiate one facility from the next.<sup>468</sup> Where prospective residents are seeking a facility to accommodate their celiac disease, a facility with the capabilities to provide safe gluten-free food may have a decisive edge. Moreover, owing to an increased interest in the gluten-free food space<sup>469</sup> and growing prevalence of gluten intolerance and celiac disease,<sup>470</sup> demand for gluten-free products is surging.<sup>471</sup> In fact, the global gluten-free food market exceeded \$4.3 billion dollars in 2021<sup>472</sup> and is projected to exceed

---

463. See *Cross-Contact*, *supra* note 460.

464. See Shane Schaibly, *Six Tips for Establishing a Safe and Effective Gluten-Free Kitchen*, FOODSAFETY MAG. (Apr. 3, 2013), <https://www.food-safety.com/articles/4438-six-tips-for-establishing-a-safe-and-effective-gluten-free-kitchen>.

465. *Id.*

466. *Id.*

467. See Ecker, *supra* note 434.

468. See Lindsey Yeakle, *Offering Gluten-Free Options Can be a Differentiator for Senior Living Communities*, MCKNIGHTS SENIOR LIVING (Jan. 2, 2019), <https://www.mcknightsseniorliving.com/home/columns/guest-columns/offering-gluten-free-options-can-be-a-differentiator-for-senior-living-communities/> [hereinafter Yeakle, *Gluten-Free Options Can be a Differentiator*]; see also Lindsey Yeakle, *The Benefits of Adding Gluten-Free Dining Options at Your Community*, MCKNIGHTS SENIOR LIVING (Mar. 22, 2021), <https://www.mcknightsseniorliving.com/home/columns/guest-columns/the-benefits-of-adding-gluten-free-dining-options-at-your-community/> [hereinafter Yeakle, *Benefits of Adding Gluten-Free Dining Options*].

469. See Yeakle, *Gluten-Free Options Can be a Differentiator*, *supra* note 468.

470. See *Global Gluten Free Product Market Size to Grow USD 6.2 Billion by 2030*, GLOBENEWSWIRE (Oct. 5, 2022, 7:00 AM), <https://www.globenewswire.com/en/news-release/2022/10/05/2528525/0/en/Global-Gluten-Free-Product-Market-Size-to-grow-USD-6-2-Billion-by-2030-CAGR-of-7-7.html>.

471. See *id.*

472. See *id.*

\$6.2 billion dollars by 2030.<sup>473</sup> Grandview Terrace,<sup>474</sup> a continuing care retirement community in Arizona, is just one example of a senior housing community that made accommodations to meet this demand. After becoming certified under the GREAT Gluten-Free Foodservice training program, the community began to see “returns on the investment” in the form of current residents and prospective residents taking interest in the facility’s offerings.<sup>475</sup>

## V. Conclusion

As public accommodations,<sup>476</sup> nursing homes have a legal mandate to abide by nondiscrimination laws and make reasonable modifications to their dining meal services to accommodate a resident’s gluten-free diet. Facilities must take seriously their obligations to accommodate the needs of residents with celiac disease, or else face severe consequences under federal and state law.<sup>477</sup>

To satisfy their legal obligations, long-term care facilities have a plethora of tools in their arsenal. Long-term care facilities may utilize the Settlement Agreements<sup>478</sup> as a guidebook of exactly the types of changes they may enact. Undergoing educational training programs and implementing procedures to minimize cross-contamination, however, are crucial. Not only will these actions bring comfort and relief to current residents, prospective residents, and family members,<sup>479</sup> but offering gluten-free meals may allow long-term care facilities to stand apart from their competitors.<sup>480</sup>

---

473. *See id.*

474. *See Grandview Terrace—Dining*, SUN HEALTH CMTYS., <https://www.sunhealthcommunities.org/community/grandview-terrace/dining> (last visited Aug. 29, 2023).

475. Ecker, *supra* note 434.

476. *See* 42 U.S.C.A. § 12181(7)(K) (West); *see also ADA Manual 1994 Supplement*, *supra* note 91.

477. *See ADA Public Accommodations*, FISHER PHILLIPS, [https://www.fisherphillips.com/a/web/eJuz7urcC9UdoDqS3N5mK3/2jtwdt/FP\\_ADA%2520Public%2520Accommodations.pdf](https://www.fisherphillips.com/a/web/eJuz7urcC9UdoDqS3N5mK3/2jtwdt/FP_ADA%2520Public%2520Accommodations.pdf) (last visited Aug. 29, 2023); *see also Lesley Settlement*, *supra* note 22; *Rider Settlement*, *supra* note 22; *Who Regulates Nursing Homes?*, *supra* note 140.

478. *See Lesley Settlement*, *supra* note 22; *see also Rider Settlement*, *supra* note 22.

479. *See generally Reynolds*, *supra* note 467 (explaining the importance of being knowledgeable about celiac disease and providing emotional support to people living with celiac disease).

480. *See Yeakle, Gluten-Free Options Can be a Differentiator*, *supra* note 468; *see also Yeakle, Benefits of Adding Gluten-Free Dining Options*, *supra* note 468.



Food assumes a powerful role in our lives—it is inexorably tied together with being human.<sup>481</sup> When, for some, the time comes to enter a long-term care facility, food should assume a no less powerful role because a medical condition mandates a particular diet. For many elderly residents living with celiac disease, treatment by long-term care facilities has done just that. For too long, some long-term care facilities have denied residents access to gluten-free meals, dismissing the legitimacy of celiac disease as a medical condition and the necessity of a gluten-free diet. The story of Ms. Matlock’s mother,<sup>482</sup> and many like her,<sup>483</sup> illustrate this devastating reality. The law is clear—long-term care facilities may no longer loaf around when caring for residents with celiac disease.

---

481. See generally John Caruso, *Why Food & Celebration are Inexorably Tied Together*, CATERING BY MICHAELS: CATERING CHICAGO BLOG (Oct. 2, 2019), <https://www.cateringbymichaels.com/why-food-celebration-are-inexorably-tied-together/> (describing the societal significance of food); *The Role of Food in Human Culture*, GLOB. GASTROS, <https://globalgastros.com/food-culture/role-of-food-in-human-culture> (last visited Aug. 29, 2023) (describing the human relationship with food).

482. Matlock, *supra* note 1.

483. See *id.*; see also Dermer, *supra* note 380.

