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A collaborative program between the
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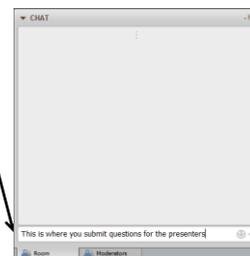
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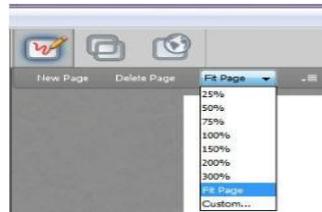
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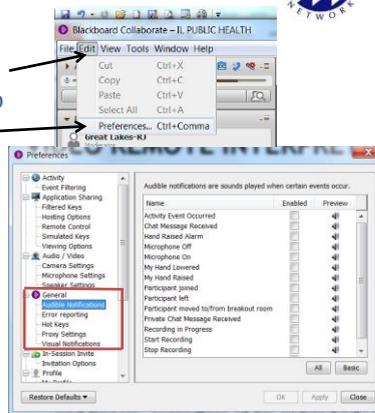
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ADA & Higher Education

Presented by Equip for Equality

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Valuable assistance provided by:

Allen Thomas, Pro Bono Attorney

May 18, 2016



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Outline of Today's Webinar

- Background: ADA & Rehabilitation Act
- Admissions Process
- Academic Adjustments
 - ❖ Process, Academic Deference and Fundamental Alteration
 - ❖ Auxiliary Aids & Services
 - Accessible Course Materials & Websites
 - ❖ Modifications to Nonessential Requirements
 - ❖ Modifications to Policies, Practices and Procedures
 - ❖ Undue Burden
- Architectural Access & Housing
- Dismissals
- Questions

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Background: ADA & Rehabilitation Act



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Which Laws Apply?

- **Title II of the ADA:** Public colleges that are operated by a state or local gov't, or are an instrumentality of a state or local gov't
- **Title III of the ADA:** Private colleges/universities/places of education are places of public accommodation
- **Section 504 of the Rehabilitation Act:** Places of education that receive federal funds
- **You Be The Judge:** Which law applies?
 - ❖ University of Illinois
 - ❖ Northwestern University
 - ❖ Brigham Young University

42 U.S.C. §§ 12131–12134 (Title II); 42 U.S.C. §§ 12181–12189 (Title III)
29 U.S.C. § 794 (Section 504)



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Exception for Certain Religious Schools

- Title III: Exception for “religious organizations or entities controlled by religious organizations, including places of worship.”
- Rehab Act: No religious exception
- Practical effect: Vast majority of higher education entities covered

White v. Denver Seminary **157 F. Supp. 2d 1171 (D. Colo. 2001)**

- Graduate student with ADHD, OCD and Tourettes Syndrome treated differently than non-disabled students and then dismissed
- **Issue:** Is Seminary exempt from Title III?
- **Test:** Whether a church/other religious org operates school
- **Court:** Exempt from Title III b/c controlled by a religious organization
 - ❖ Not relevant that Seminary is an institution of higher learning

Exemption as a Religious Organization

Caveat #1: Must actually be controlled by religious organization

Sloan v. Community Christian Day School **2015 WL 10437824 (M.D. Tenn. Dec. 11, 2015)**

- Distinguished *White* and other cases applying exemption
- Here, mission and learning is focused on God and religion
- But, owners are not ordained in any religion and there is no evidence that school is owned, affiliated with or financially supported by any recognized religious group

Caveat #2: Don't forget about Rehab Act

OCR Letter to Western Seminary – Portland Campus **OCR No. 1013235 (April 25, 2014)**

- Discussing investigation of Seminary under 504

Differences Between Title II, Title III and Section 504

Requirements are substantially similar - some differences:

- Regulations by different federal agencies (DOJ v DOE)
- Enforcement efforts by different federal agencies (DOJ v DOE/OCR) with some overlap
- Availability of compensatory damages
 - Rehab Act = Yes
 - Title III = No
 - Title II = Not completely settled (permitted but concerns with sovereign immunity)
- Causation standard
 - Rehab Act = “solely by reason of disability”
 - ADA = “by reason of such disability”



Admissions

Highlights of Certain Admissions Requirements

- Generally, no discrimination on basis of disability
- Cannot ask applicant whether s/he has a disability (Rehab Act)
 - ❖ Exception: May ask for voluntary disclosure to correct past discrimination
 - If so, must make clear that the information is solely for correcting past discrimination, will be kept confidential, refusal to answer will have no adverse impact
- Cannot limit the number of people with disabilities accepted (Rehab Act)
- No eligibility requirements that screen out those with disabilities OR tend to screen out, unless requirement is necessary

34 C.F.R. § 104.42; 28 C.F.R. § 35.130 (b)(8) 42 U.S.C. § 12182

Denying Admissions Based on Concerns of Direct Threat

Direct threat = high standard

- Risk must be immediate and real, provable by scientific facts and current knowledge, not based on stereotypes, or generalizations
- Threat to others (vs. Title I which includes “threat to self”)

DOJ Agreement: Univ. of Medicine & Dentistry of NJ

- Two individuals with Hepatitis B were accepted to medical school
- Disclosed Hepatitis B status and acceptance was revoked
- University argued it engaged in direct threat analysis
 - ❖ Convened HBV Committee, considered viral loads, infectivity
 - ❖ Believed—wrongfully—that students were required to perform “exposure-prone invasive procedures”
 - ❖ Offered 1-year deferral in hopes that viral loads would decrease

Denying Admissions Based on Concerns of Direct Threat

- DOJ investigated and concluded the University violated ADA
 - ❖ Current CDC guidance = no reported case of transmission from healthcare worker to patient and updated recommendations
 - ❖ Students not required to perform exposure-prone invasive procedures
- **Settlement (select terms):**
 - ❖ University updated disability policy re HBV based on CDC's recommendations
 - ❖ Permit applicants to enroll in school
 - ❖ Provide \$75,000 in tuition credits and compensation (total)
 - ❖ ADA training to employees

www.ada.gov/umdnj_sa.htm

Direct Threat and Admissions Materials

DOJ Agreement: Compass Career Management

- Vocational school conditionally accepted applicant to LPN program
- Learned applicant had HIV and issued letter discouraging college
- School then said that class was full and didn't admit student
- **Consent decree (select terms)**
 - ❖ Implement policy to stop discriminating against persons with HIV
 - ❖ Stop requiring disclosure of HIV status
 - ❖ Remove references to "good health" and "free of communicable diseases" on written materials and other questions on application
 - ❖ Train administrators/instructors on ADA
 - ❖ Pay \$30,000 to individual and \$5,000 to U.S.

www.ada.gov/compass_career_mgmt/compass_cd.html

Lowering Admissions Standards

Gent v. Radford University

976 F. Supp. 391 (W.D. Va. 1997)

- Applicant alleged he was denied admission to a graduate program in social work because of his disability
- University required a 2.7 GPA for admission; applicant had a 2.26
- Applicant argued that school should consider practical experience
- **Court:** Found for University
 - ❖ No allegation that college admitted others with lower GPAs
 - ❖ No allegation that GPA had disparate impact

Note: Courts generally give “significant discretion” to schools in “establishing its admission standards.” *Mallett v. Marquette Univ.*, 65 F.3d 170 (7th Cir. 1995)

Best practice: Conduct individualized inquiry, *Ganden v. Nat’l Collegiate Athletic Ass’n*, 1996 WL 680000 (N.D. Ill. Nov. 21, 1996)

Update re Flagging Scores of Test Takers with Disabilities

What is flagging?

- Annotating scores of test-takers who receive accommodations
- Recent LSAC case - LSAC’s practice:
 - ❖ Advised law schools that flagged scores “should be interpreted with great sensitivity and flexibility”
 - ❖ Advised law schools to “carefully evaluate LSAT scores earned under accommodated or nonstandard conditions”

Is flagging legal?

***Doe v. Nat’l Bd. Med. Exam’rs*, 199 F.3d 146 (3d Cir. 1999)**

- Third Circuit: Reversed grant of preliminary injunction
- “We do not view the annotation on Doe’s score ... as itself constituting a denial of access”

Update re Flagging Scores of Test Takers with Disabilities

Breimhorst v. Educational Testing Service 2000 WL 34510621 (N.D. Cal. 2000)

- **Court:** Denied motion for judgment on the pleadings – challenge to flagging is a viable claim
- **After case:** ETS agreed to stop flagging on tests, including GMAT
- **Others followed:** College Board (SAT, PSAT and AP) and the ACT

Dept. of Fair Employment and Housing v. LSAC Inc. 2012 WL 4119827 (N.D. Cal. Sept. 18, 2012)

- Denied LSAC's motion to dismiss, citing *Breimhorst*
- LSAC has the burden of proving it best ensured that the test equally measured abilities of disabled and non-disabled test-takers
- **Note:** LSAC agreed to stop flagging in consent decree with DOJ

Auxiliary Aids and Services for Admissions

Remember ADA and Rehab Act applies to all aspects of the admission process—from recruitment to tours to interviews

Wolff v. Beauty Basics, Inc. 887 F. Supp. 2d 74 (D.D.C. 2012)

- Applicant for cosmetology school requested an interpreter for school's mandatory tour for applicants
- Request denied and applicant brought a friend to interpret
- Applicant also asked for interpreter for class, which was also denied due to the "great expenses it would require."
- **Court:** Applicant's case can move forward
 - ❖ "Undisputed" that when she requested interpreters she required, the request was declined



Reasonable Accommodations and Academic Adjustments



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Academic Adjustments

- Failure to provide an academic adjustment may be discrimination
- Defenses, generally: fundamental alteration and undue burden
- Typically fall within three categories:
 - ❖ Provision of auxiliary aids and services
 - ❖ Modifications to nonessential academic requirements
 - ❖ Reasonable changes to policies, procedures, or practices
- Typical process
 - ❖ Student with a disability makes a request
 - ❖ Engage in interactive process - best practices:
 - Procedures create a uniform, structured system
 - Process/criteria used to evaluate request is published
 - Staff are trained to respond appropriately to student requests

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Process/Policy Guidance from Recent OCR Agreement

University of Notre Dame

OCR Resolution Agreement (05-13-2495 June 30, 2014)

- Agreed to revise written policies to identify (at minimum):
 - ❖ Title/contact info of individual responsible for facilitating requests
 - ❖ Steps required of student to initiate **interactive process**
 - ❖ Steps required of University in process – including timeframes
 - ❖ Assignment of specific facilitator to ensure the interactive process is completed and that necessary adjustments/aids are provided
 - ❖ Circumstances when an instructor will be involved in exploring necessary auxiliary aids and other services
 - ❖ Steps a student should take if auxiliary aids are not provided as required or are ineffective
- Note: Good example to use as a starting point for revising policies

Interplay Between Process, Academic Deference and Defenses

- Federal laws do not require college or university to modify academic requirements that are essential to the curriculum or that fundamentally alter the program
- Colleges and universities sometimes receive deference from courts
- Before deferring to academic decisions, courts examine the process
 - ❖ Courts seek to ensure that the process required a close consideration of the academic requirement or policy and that it was individualized to the student, not just a rote judgment or a decision based on stereotypes

42 U.S.C.A. § 12182(b)(1)(B) (2016); 34 C.F.R. § 104.44 (2015)
Zukle v. Regents of Univ. of California, 166 F.3d 1041, 1047 (9th Cir. 1999) (citing *Regents of the Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985), for the proposition that educational institutions are due deference with respect to academic standards)

Important Case About Deference / Process (& Modified Testing)

Wynne v. Tufts University School of Medicine

932 F.2d 19 (1st Cir. 1991)

- Med school student failed 8/15 courses his 1st year – OK to repeat
- Diagnosed with Dyslexia – difficulty with multiple choice questions
- Retook first year classes with various accommodations
- Requested an alternative to written multiple choice exams – denied
- Continued to fail Biochemistry – dismissed from school
- **Ct:** Reversed & set forth deliberative process required for deference
 - ❖ Real obligation to seek suitable accommodation and submit a factual record that it “conscientiously carried out this statutory obligation.”
 - ❖ Includes: Consider alternative means, feasibility, cost and effect on academic program

Important Case About Deference / Process (& Modified Testing)

Wynne v. Tufts University School of Medicine

976 F.2d 791 (1st Cir. 1992)

- Back to 1st Circuit; this time, court accepted Tufts’ explanation
- Tufts explained in “considerable detail” the consideration of alternative means and came to a “rationally justified conclusion”:
 - ❖ Detailed thought-process about methods of testing proficiency in biochemistry and why it was best done with multiple choice
- Cited steps Tufts did take: Suggested defer his biochem exam; arranged for testing; permitted repeat of first-year curriculum; provided access to tutoring, taped lectures, etc; permitted untimed exams; allowed him to retake pharmacology and biochemistry exams

See also Wong v. Regents of Univ. of California, 192 F.3d 807, 818 (9th Cir. 1999) (“We defer to the institution’s academic decisions only after we determine that the school ‘has fulfilled this obligation [of making an individualized determination].’”)

Recent Case About Deference / Process: Fundamental Alteration (& Reader)

Palmer College of Chiropractic v. Davenport Civil Rights Comm'n 850 N.W.2d 326 (Iowa 2014)

- Blind student at chiropractic school asked for reader & some modifications for how he would perform exams
- School rejected all and offered no alternatives – said would have to stop when students begin radiology and other diagnostic coursework
- **Iowa Supreme Court:** Found for student (affirmed Commission)
- **Deference:**
 - ❖ Institutions cannot rely on “accepted academic norms” as reasonable alternatives may involve new approaches or devices
 - ❖ School made a “strict, generalized invocation of [the school’s] technical standard” that fell “far short . . . of the conscientious, interactive, student-specific inquiry required by the case law.”

Recent Case About Deference / Process: Fundamental Alteration (& Reader)

- Deference is not warranted based on failure to investigate:
 - ❖ How student might use a reader on a specific task
 - ❖ How other former blind students had performed specific tasks
 - ❖ Reports of successful students at other schools and practitioners
 - ❖ Reports of technologies used successfully elsewhere
 - ❖ Experience with individuals teaching the student
- No fundamental alteration (no deference; affirmed commission)
 - ❖ No req’s for sight/radiographic images w/ state licensing boards
 - ❖ Gives waivers at other campus without accreditation problems
 - ❖ 2+ blind students previously graduated and are successful
 - ❖ 20% of practitioners practice w/o radiographs in their office
 - ❖ Numerous medical schools are admitting blind students

Process: Burden is on the University to Prove Defense (& Leave / exam deadline)

Dean v. Univ. at Buffalo Sch. of Med. and Biomedical Sciences 804 F.3d 178 (2d Cir. 2015)

- Medical student with depression and anxiety requested time off to adjust to new medications (and potentially prepare for exam)
- University gave the student some, but not all of the requested, time
- **2nd Cir:** Found for student (reversed/remanded summary judgment)
 - ❖ Student established reasonableness of leave request: Students ordinarily afforded 6-8 weeks of study time before each attempt
 - ❖ University's burden: No evidence whether University evaluated fundamental alteration or undue burden – no deference
 - ❖ “To do otherwise, might allow academic decisions to disguise truly discriminatory requirements.”

Process: Reasonable Time to Consider Request (& Retaking Test)

Schneider v. Shah 507 F. App'x 132 (3d Cir. 2012)

- Student in paralegal program failed two classes
- Disclosed disabilities and requested that her grade be changed in one class to account for disability-related absences and to retake test in another class with accommodations (extended time, distraction free-testing, preferential seating, breaks between class sessions)
- Student (and attorney-father) discussed accommodations for 22 days – then filed a lawsuit arguing delay showed no interactive process
- School provided accommodations and she graduated 5 months later
- **Court:** Found for University (affirmed dismissal of case)
 - ❖ 22 days was not an unreasonable amount of time in this case

Academic Adjustments

Academic adjustments generally fall within three categories (not always clearly within one):

- Provision of auxiliary aids and services
- Modifications to nonessential academic requirements
- Reasonable changes to policies, procedures, and practices

Auxiliary aids/services

- Colleges/universities shall take steps necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services (absent a fundamental alteration or undue burden)

- Hot legal issue: Emergence of “meaningful access” standard

34 C.F.R. § 104.44(d)(1); 28 C.F.R. § 36.303(a)

Auxiliary Aids & Services: Meaningful Access

Argenyi v. Creighton University

703 F.3d 441 (8th Cir. 2013)

- For medical school, student requested: CART for lectures; cued speech interpreter for labs; FM system for small groups
- Creighton provided some accommodations, but not all
- Student borrowed \$100,000+ to fund his own accommodations
- Creighton refused to allow student to use an interpreter in his clinical courses, even if he paid for the interpreter himself
- Without CART and interpreters, student was
 - ❖ Unable to follow class lectures and dialogue
 - ❖ Unable to communicate with patients in clinical setting
 - ❖ Experienced debilitating headaches and extreme fatigue

Meaningful Access: *Argenyi* Case

Eighth Circuit: Found for student (reversed/remanded MSJ)

- Creighton required to provide necessary auxiliary aids and services
- District court misinterpreted “necessary” to require a showing that individual was “effectively excluded” to warrant protection
- Instead, adopted “**meaningful access**” standard
- Not required to produce identical result/achievement, but must afford equal opportunity to gain the same benefit

Jury trial in August 2013: Jury found for student

- University discriminated in violation of the ADA and the Rehab Act
- Auxiliary aids would not have caused an undue burden
- No intentional discrimination (no \$\$ for student)

Judge: Creighton must accommodate student in his final two years

www.disabilityrightsnebraska.org/what_we_do/michael_argenyi_case.html

Accessible Course and Online Materials Private Settlement Agreement

Significant legal developments in last few years about providing auxiliary aids/services to make online materials (and websites) accessible

Settlement: Disability Rights Advocates & Berkley University

- Adopted various policies to ensure equal access to written materials that are part of a university education to students with disabilities
- Quick turnaround when requesting course materials in alternate formats: 10 business days for conversions from textbooks and 17 business days in conversions from course readers
- New library print conversion system so that students can request that a specific library book or journal be converted in an accessible digital format in a timely basis: 5 business days

Settlement agreement: <http://dralegal.org/wp-content/uploads/files/casefiles/settlement-ucb.pdf>

Fact sheet: http://dralegal.org/wp-content/uploads/files/casefiles/factsheet_ucb.pdf

Accessible Course and Online Materials OCR Agreement

OCR and South Carolina Technical College System Compliance Review (No. 11-11-6002 Mar. 8, 2013)

- Cited barriers to accessibility in colleges' websites:
 - ❖ Examples: No PDF tagging, alternative text for graphics, identification on column headers, specified reading order, tags on critical information such as watermarks and headings
 - ❖ Videos lacked proper labeling, keyboard control, or captioning
- Resolution Agreement:
 - ❖ Ensure websites of all colleges within the system are accessible,
 - ❖ Develop resource guide to provide info about web accessibility requirements standards with links to reference materials
 - ❖ Review and monitor the colleges' websites for compliance

Accessible Course and Online Materials DOJ Agreement

DOJ Settlement Agreement: Louisiana Tech University

- University's online learning platform was inaccessible - student had no accessible materials for nearly one month into quarter - withdrew
- Additional problems in subsequent courses
- **Settlement (select terms):**
 - ❖ Revised policy, including requirement to use learning technology, web pages and course content that comply with WCAG 2.0 Level AA
 - ❖ Ensure University-recognized modifications are implemented
 - ❖ Make web pages and materials created since 2010 accessible
 - ❖ Train instructors and administrators about the ADA
 - ❖ Pay \$23,543 in damages to the student

www.ada.gov/louisiana-tech.htm

Accessible Course and Online Materials DOJ Agreement

DOJ Settlement Agreement: EdX, Inc.

- EdX contracts with over 60 institutions of higher learning
- Provides massive open online courses, and operates a website, mobile application and a Platform
- **Settlement (select terms):**
 - ❖ Compliance with WCAG 2.0 within 18 months
 - ❖ Requires content providers to certify that provided courses meet certain requirements
 - ❖ Retain a website accessibility consultant
 - ❖ Designate a website accessibility coordinator

www.ada.gov/edx_sa.htm

Accessible Course and Online Materials Private Litigation

NAD v. Harvard University, 15-cv-30023 (D. Mass. Feb. 12, 2015)
NAD v. Mass. Inst. of Tech., 15-cv-30024 (D. Mass. Feb. 12, 2015)

- NAD: ADA violation for students & public b/c universities have no closed captioning for online materials provided free to the public, including recordings of speeches and educational materials
- Universities: Title III doesn't apply to the accessibility of online content & captioning is a fundamental alteration of content
- **DOJ Statement of Interest:** Disagreed with Universities
 - ❖ Title III applies to online content offered to the public; colleges must provide meaningful access
- **Status:** Magistrate recommended denying MTD; parties' briefing decision

www.ada.gov/briefs/harvard_soi.pdf; www.ada.gov/briefs/mit_soi.pdf

Additional Cases, Settlements and Resources

- Consent Decree: Lanzilotti, Cossaboon and the Nat'l Federation of the Blind and Atlantic Cape Community College (2015)
 - ❖ https://nfb.org/images/nfb/documents/pdf/accc_consent_decree.pdf
- OCR Resolution Agreement with the University of Montana
 - ❖ www.umt.edu/accessibility/docs/AgreementResolution_March_7_2014.pdf
- OCR / DOJ Joint "Dear Colleague" Letter: Electronic Book Readers (June 29, 2010)
 - ❖ www2.ed.gov/about/offices/list/ocr/letters/colleague-20100629.html
- DOJ: Statement Regarding Rulemaking on Accessibility of Web Information of Services of State and Local Government Entities (April 29, 2016)
 - ❖ http://www.ada.gov/regs2016/sanprm_statement.html

Tutoring: Personal Service?

- Generally, no requirement to provide devices/services of a personal nature. **34 C.F.R. § 104.44(d)**. Has been interpreted to include tutors
- **Caveat:** If tutoring services are provided to others, such services must be offered and accessible to students with disabilities

Sellers v. Univ. of Rio Grande **838 F. Supp. 2d 677 (S.D. Ohio 2012)**

- Student with ADHD, anxiety and depression requested tutors
- University: Not required to provide tutoring services
- **Court:** Found for student (granted TRO)
 - ❖ Where a university offers tutoring to its students, it must also offer tutoring to students with disabilities
 - ❖ Cited OCR opinions and guidance

Modifications to Academic Requirements: Is The Requirement Essential or Nonessential?

- Modifications may include: extended time, length of time to complete degree requirement, substitution of specific courses, adaption of manner in which courses are conducted **34 C.F.R. § 104.44(a)**
- Colleges use deliberative process to determine whether a particular academic requirement is essential
- Example of requirements found to be **essential** include:
 - ❖ Pass a licensing exam before continuing school
 - *Powell v. Nat'l Bd. of Med. Exam'rs*, 364 F.3d 79, 85 (2d Cir.), *opinion corrected*, 511 F.3d 238 (2d Cir. 2004)
 - ❖ Medical clerkship rotations, clinical hours, and the rigorous schedule required of medical students
 - *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1049–51 (9th Cir. 1999)

Is The Requirement Essential or Nonessential?

- Example of requirements found to be **essential** include:
 - ❖ Repeat coursework due to poor grades
 - *McGuinness v. Univ. of N.M. Sch. Of Med.*, 170 F.3d 974 (10th Cir. 1998)
 - ❖ Retake exam rather than attend summer program
 - *Kaltenberger v. Ohio Coll. of Podiatric Med.*, 16 F.3d 432 (6th Cir. 1998)
 - ❖ Take test in multiple choice format
 - *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791 (1st Cir. 1992).
 - ❖ Foreign language
 - *Guckenberger v. Boston University*, 8 F.Supp.2d 82 (D. Mass. 1998)

Is The Requirement Essential or Nonessential?

- Example of requirements found to **possibly be nonessential** include:
 - ❖ Modify testing requirements to permit sighted assistant to communicate visual information enabling student to analyze it and make diagnosis
 - *Palmer College of Chiropractic v. Davenport Civil Rights Comm'n*, 850 N.W.2d 326 (Iowa 2014)
 - ❖ Deadline for medical student to sit for Step 1 exam (implicitly)
 - *Dean v. Univ. at Buffalo Sch. of Med. and Biomedical Sciences*, 804 F.3d 178 (2d Cir. 2015)
 - ❖ Retake examination
 - *Peters v. University of Cincinnati College of Medicine*, 2012 WL 3878601 (S.D. Ohio Sept. 6, 2012)

Is The Requirement Essential or Nonessential?

- Example of requirements found to **possibly be nonessential** include:
 - ❖ Substitute class for one w/o strict attendance req (denied MTD)
 - *Hershman v. Muhlenberg College*, 17 F.Supp.3d 454 (E.D. Penn. 2014)
 - ❖ Permission to make up in-class or group work (denied MSJ)
 - *Grabin v. Marymount Manhattan College*, 2014 WL 2592416 (S.D.N.Y. June 10, 2014)
 - ❖ Double time for student w/ visual disability taking placement test
 - *OCR Letter to Cabrini College (PA)*, 30 NDLR 26, Case No. 03-04-2076 (OCR Region IV 2004)

Modifications to Policies, Practices, Procedures

- May be required to make reasonable changes to any other policy, procedure, or practice [34 C.F.R. § 104.44\(b\)](#)
- Examples: Modifications to: Rules prohibiting tape recording in class; No-pets policy; Attendance policies; etc.

DOJ Settlement: Southern Illinois University

- Law student with chronic fatigue syndrome alleged that SIU failed to modify its attendance policy to accommodate his disability
- **DOJ concluded:** SIU had an inconsistently applied attendance policy, and that it would have been a reasonable modification to modify its attendance policy for the student.

- **Settlement agreement:** SIU to adopt/implement ADA policy

www.ada.gov/southern_illinois_sa.html

Defense: Undue Burden

While courts rarely address concerns about costs in an academic setting, appears to be a difficult argument given overall resources

Argenyi v. Creighton University

- Appellate court decision did not address cost
- Jury concluded: No undue burden

***Innes v. Board of Regents of the Univ. System of Maryland* 121 F. Supp. 3d 504 (D. Md. 2015)**

- Sports fans who are deaf or hard of hearing requested accommodations (captioning during events) and on the website
- **Court:** Even if the purchase and installation of the captioning boards cost a total of \$3.75 million, that does not establish undue burden as a matter of law



Architectural Access & Housing



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Architectural Access

- Full and equal enjoyment of educational opportunities requires physical access to all facilities, including classroom, dorms, dining halls, student unions, etc. - few cases about architectural access

Covington v. McNeese State University 996 So. 2d 667 (La. App. 3 Cir. 2008)

- Student who used a wheelchair tried to use a non-ADA compliant bathroom stall in the student union – injured and humiliated
- College argued: Accessible restroom in union not required
- **Appellate court:** Affirmed decision for student
 - ❖ “McNeese is emboldened enough to bring such a case to an appellate court where a published, written opinion will forever memorialize its discrimination against this country's disabled citizens.”



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DOJ Investigation Followed Court Case

DOJ Agreement: McNeese State University

- DOJ: Top priority to enforce laws that guarantee persons with disabilities have equal action to pursue their education
- **Settlement agreement (select terms):**
 - ❖ Required extensive changes to all university's operations
 - ❖ Bring all newly constructed facilities into compliance
 - ❖ Develop/implement campus wide Physical Access Plan to bring all buildings into compliance with Title II
 - Include specific remedial actions and time tables (by 9/1/16)
 - ❖ Publish info on website about accessibility, emergency plan
 - ❖ Designate an ADA coordinator

www.ada.gov/mcneese.htm

Architectural Access

DOJ continues to pursue work in this area – settlement from Feb '16

DOJ Agreement: University of Alabama at Birmingham

- DOJ responded to complaints about inaccessible campus buildings
- **Settlement agreement (select terms):**
 - ❖ University will complete an architectural review of its facilities identified by the DOJ, and will provide the DOJ with a written report of its findings
 - ❖ Within one month of receiving a response from the DOJ, the university will start remediating the deficiencies identified to comply with the 2010 ADA Standards (unless the facilities were in compliance with earlier standards at the time, in which case it must report that to the DOJ)

www.ada.gov/uab_sa.html

Housing: Reasonable Modifications of Food Service and Meal Plan System

DOJ Agreement: Lesley University

- Must modify meal plan and food service system to accommodate students with celiac disease and other food allergies
- **Settlement agreement (select terms):**
 - ❖ Serve ready-made hot and cold gluten- and allergen-free options
 - ❖ Develop individualized meal plans for students with food allergies; students can pre-order certain foods w/ 24 hour notice
 - ❖ Provide dedicated space in dining hall to store/prepare foods
 - ❖ Post notice of the use of potential common allergens
 - ❖ Establish meal delivery system should students want meals delivered to avoid entering a dining hall filled with allergens

Settlement: www.ada.gov/lesley_university_sa.htm

Q&A about settlement: www.ada.gov/q&a_lesley_university.htm

Housing: Service Animals & Assistance Animals

- **ADA (Titles II/III)**
 - ❖ Colleges/universities are generally required to admit service animals anywhere a student goes
 - ❖ Service animal: A dog that has been individually trained to do work or perform tasks for an individual w/ a disability
 - ❖ Similar modifications for miniature horses
 - ❖ No protections for assistance animals or therapy animals
- **Fair Housing Act**
 - ❖ Housing providers must allow a person with a disability to keep an assistance animal if it is a reasonable accommodation
 - ❖ Defines assistance animals as (any) animal that provides support, assistance, or service to a person with a disability
 - ❖ Includes emotional support and therapy animals

Housing: Service Animals & Assistance Animals

- Question for students with assistance animals: Are dorms covered by the Fair Housing Act?

United States v. Univ. of Neb. at Kearney 940 F. Supp. 2d 974 (D. Neb. 2013)

- Student had a therapy dog – not a service animal
- College refused to modify its “no pets” policy claiming dorm not covered by the FHA
 - ❖ Argued: Dorms were “transient” and students maintained permanent address elsewhere
- **Court:** Dorms fall within the FHA
 - ❖ Reasoned that the FHA applies to all sorts of temporary housing including migrant farm workers, and even halfway houses



Dismissals

Dismissals Based on Disability

Common dismissal issues

- Schools with codes of conduct that prohibit violence, including self-injurious behaviors
 - ❖ Such codes can serve penalize students who seek mental health treatment
 - ❖ The result can sometimes discourage students from getting help; isolate students; send the message that the student has done something wrong
 - ❖ Legal issue = Titles II/III do not include “direct threat” to self defense in Title I
- Students fail after University does not provide necessary accommodations
- Students don’t seek accommodations until dismissal hearings

Dismissals Based on Mental Health

Doe v. Hunter College

04-CV-6740 (S.D.N.Y.)

- Student admitted herself to a medical center after suicide attempt
- When she returned to the dorm, the locks were changed
- She was allowed to remove her belongings only in the presence of a security guard - not allowed to return to school even after her doctors determined that she was not a danger to herself or others
- Suit filed under the ADA, Rehab Act and Fair Housing Act.
- **Settlement (reached in 2006):**
 - ❖ \$65,000 payment to student
 - ❖ Reviewing/modifying “suicide policy” to require individualized assessments

Press release: www.bazelon.org/In-Court/Closed-Cases/Jane-Doe-v.-Hunter-College.aspx

Dismissals Based on Mental Health

DOJ Agreement: Quinnipiac University

- Student sought mental health counseling; diagnosed w/ depression
- Student placed on a mandatory leave with no tuition refund
- DOJ found that the University failed to modify its mandatory leave policy to permit student to complete course work while living off campus or attending classes online or in person
- **Settlement:**
 - ❖ Modify policy to consider accommodations other than leave
 - ❖ Pay over \$32,000 in damages
 - ❖ DOJ: “[U]niversities like Quinnipiac cannot apply blanket policies that result in unnecessary exclusion of students with disabilities if reasonable modifications would permit continued participation.”

www.ada.gov/quinnipiac_sa.htm

Dismissals Based on Mental Health

St. Joseph's College

OCR Letter and Resolution Agreement (No. 02-10-2171)

- Student engaged in inappropriate conduct toward another student
 - ❖ Tried to kiss him; refused to let him go; insisted that they were married; had to be physically removed by a security guard
- Returned after receiving clearance from her psychiatrist – incident happened again - suspended with no opportunity to appeal
- College had a disciplinary process w/ due process (notice, hearing, opportunity to present evidence) – not here or similar incidents
- **OCR Resolution Agreement:**
 - ❖ Will no longer use a separate disciplinary process in situations seemingly related to mental health

www.bazelon.org/LinkClick.aspx?fileticket=IV5EzSZQtDo%3d&tabid=313

Dismissals Based on Mental Health

Bazelon Center for Mental Health Law: Model Policy

- Acknowledge but do not stigmatize mental health problems and encourage students to seek help or treatment that they may need
- Ensure that personal information is kept confidential
- Allow students to continue their education as normally as possible
- Refrain from discriminating against student with mental illnesses, including taking punitive actions toward those in crisis
- Avoid using disciplinary rules to address mental health issues by addressing these issues through medical policies and procedures
- Do not require withdrawal following disclosure or treatment
- Conduct an individualized assessment in each situation

www.bazelon.org/portals/0/education/SupportingStudentsCampusMHPolicy.pdf

Dismissals Based on Assumptions of Disability Fail to Establish Direct Threat

Wells v. Cox Medical Centers

379 S.W.3d 919 (Mo. Ct. App. 2012)

- College dismissed deaf student based on “direct threat” to patients
- **Appellate court:** College offered nothing more than subjective belief
 - ✦ No fundamental alteration to use interpreters in clinical setting
- **Jury decision:** Found for student and awarded her \$50,000

DOJ Agreement: Gwinnett College

- Gwinnett College banned a student with HIV during her second quarter from the medical assistant program calling her a safety risk
- **DOJ:** Claim was not credible and based on unfounded fears about HIV
- Settlement: Policy revisions; removing questions about HIV on health questionnaire; monetary compensation

www.ada.gov/gwinnett-col-sa.htm

Dismissals Based on Late Request for Accommodations

Forbes v. St. Thomas University

768 F.Supp.2d 1222 (S.D. Fla. 2010)

- Student with PTSD received extended time / private testing room in college
- Did not request accommodations in law school until 1 week before finals
- University denied as too late in the semester – student earned a 1.7 GPA
- University granted extended time and distraction-free room for 2nd semester – 2.1 GPA – Student dismissed b/c she had less than 2.0 GPA for the year
- **Court:** Found for student initially (denied MSJ), then for school
 - ❖ School must take into account student's performance with reasonable accommodations in the second semester and make an individualized assessment about the 2.0 GPA requirement
 - ❖ Especially because student did not initially have accommodations
 - ❖ University cannot prevail without explaining how it reached decision
 - ❖ Gave University 45 days to new MSJ with additional evidence

Conclusion

- Higher education offers students a step toward independence, economic self-sufficiency, and the potential to meet their professional goals
- Ensuring that higher education is accessible to students with disabilities is critical to the advancement of people with disabilities
- The ADA, Rehab Act and FHA also offer important protections for students with disabilities, while ensuring that colleges and universities maintain their academic standards
- Students with disabilities are encouraged to understand their rights under these federal laws when pursuing their post-secondary to ensure that they are receiving equal access to their education



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ADA & Higher Education

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