COVID-19 and the ADA: Implications for Title II and Post-Secondary Education

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Title II Basics

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Title II Basics

• Covers all programs, services, and activities of state and local government agencies, also called “public entities”
  • Executive, legislative, and judicial branches

Section 504 of the Rehabilitation Act

• Covers
  • Federal executive branch agencies
  • Any program or activity that receives federal financial assistance
    • Most state and local government entities receive federal financial assistance
Administrative Requirements

• Notice
  • All public entities must make information about the ADA available to the public
• Public entities with 50 or more employees
  • Designate at least one employee responsible for coordinating compliance efforts
  • Adopt and publish a grievance procedure to offer a way to resolve problems

Qualified Individuals

• People with disabilities must be qualified to participate in programs, services, or activities
  • They must meet valid, essential eligibility requirements, just like everyone else, though they may need reasonable adjustments in policies, barriers removed, or communication aids or services provided in order to do so
General Requirements

• Programs and services must be as *integrated* as possible
• Eligibility criteria should not screen out people with disabilities unless the criteria are necessary for programs or services
• Auxiliary aids and services to communicate effectively with people who have hearing, vision, and/or speech disabilities
  • Large print materials, audio-described media, sign language interpreters, assistive listening devices, captioning, exchanging written notes, etc.
• Reasonable modifications of policies, practices, or procedures

Examples of Reasonable Modifications

• Provide individualized assistance to help a person with an intellectual disability fill out a form
• Give extra test-taking time when appropriate for a student with a disability
• Modify emergency evacuation plans to consider needs of people with disabilities
• Modify “no pets” policy to allow individuals with disabilities to be accompanied by service animals
Limitation on Obligations

- Public entities are not required to take any action that would cause...
  - Fundamental alteration
    - Changing the essential nature of goods, services, activities
  - Undue burden
    - Significant difficulty or expense
- When fundamental alterations or undue burdens arise, entities must consider alternatives!

Health and Safety

- Public entities may establish legitimate, necessary safety requirements based on actual risks
- Public entities do not have to allow an individual with a disability to pose a direct threat to the health or safety of others
  - Individualized assessment
Finding the Balance

• ADA = civil rights
  • Balancing rights and responsibilities of individuals with disabilities and covered entities

COVID-19 and the ADA
Implications for Title II

A Special Session from the Mid-Atlantic and Great Lakes ADA Centers, ADA National Network

Presentation by John Wodatch
COVID-19 and the ADA
Implications for Title II

- CDC Guidelines
- General Approach: Title II
  - How Title II Applies
  - Person with a Disability
- Testing Issues
- Face Mask Issues
- Voting
- Health Care Rationing and Visitation
- Transportation
- Emergency Preparedness

CDC: How COVID Spreads

- COVID-19 spreads mainly from person to person through respiratory droplets produced when an infected person coughs, sneezes, talks, shouts or sings.
- Droplets can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs.
- A significant portion of individuals with COVID-19 lack symptoms (“asymptomatic”) and even those who eventually develop symptoms (“pre-symptomatic”) can transmit the virus to others before showing symptoms.
- Scientific studies are constantly reevaluating how the disease spreads and what its impact is
CDC Recommendations

• CDC recommends that people wear masks in public settings and when around people who don’t live in your household, especially when social distancing is difficult to maintain.
• Why: Masks may help prevent people who have COVID-19 from spreading the virus to others.
• Masks should NOT be worn by children under the age of 2 or anyone who has trouble breathing, is unconscious, incapacitated, or otherwise unable to remove the mask without assistance.
• Many States or localities have issued mandatory guidelines requiring the wearing of masks.

How Title II Applies

• Title II of the ADA, Section 504 of the Rehabilitation Act of 1973, and other Federal disability rights laws (such as Section 1557 of the Patient Protection and Affordable Care Act, prohibiting race, color, national origin, age, disability and sex discrimination in certain health programs or activities) continue to apply during the national health emergency declared during the COVID pandemic.
• Four provisions of the Title II regulations form the basis for analyzing this situation. The provisions on:
  • “legitimate safety requirements,”
  • “eligibility criteria” that screen out participation of persons with disabilities,
  • “reasonable modifications,” and
  • “direct threat.”
Legitimate Safety Requirements

• The Title II regulation states that public entities may impose “legitimate safety requirements” that are necessary for the safe operation of its services, programs, or activities. 28 CFR 35.130(h).
• Such safety requirements must be based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities.
• CDC’s statements represent scientific basis for action.

Eligibility Criteria

• Subsection 35.130(b)(8) of the Title II regulation states that a public entity “shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.”
Reasonable Modifications

• 28 CFR section 35.130(b)(7)(i) states that a “public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”

Direct Threat

• 28 CFR 35.139 makes clear State and local governments can deny services when an individual poses a direct threat to the health or safety of others.
• In determining whether an individual poses a direct threat to the health or safety of others, the State or local government must make an individualized assessment.
• The assessment must be based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence.
• The assessment must balance three issues:
  • the nature, duration, and severity of the risk;
  • the probability that the potential injury will actually occur; and
  • whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.
Person with a Disability

- Is someone with COVID-19 a person with a disability?
- It depends. Case law eliminating the common flu from ADA coverage may not be applicable.
  - Nature of the condition itself
  - Relationships of an existing condition and the pandemic environment
  - Judge in Silver v. City of Alexandria (W.D. La. July 6, 2020) found that cardiovascular condition in the context of a COVID-19 environment established disability
- Application of “transitory and minor” principle
  - Actual disability: use of “and” and 6-month approach not applicable
  - “Regarded as”: Public entity must demonstrate that the impairment would be objectively, both “transitory,” lasting or expected to last 6 months or less, and “minor.”
- Remember: The definition of disability is construed very broadly, in favor of expansive coverage

Testing for COVID-19

- Widespread access to testing to determine whether persons have the COVID-19 virus is essential to controlling the health pandemic
- HHS agencies have provided significant funding to establish a network of testing sites, including community health sites in all 50 states, D.C., and the 8 territories, and have provided testing sites in pharmacies and retail chains and on tribal lands
- Covered entities are responsible for ensuring that testing sites are accessible
Accessible Testing Sites

• Testing sites must expand beyond only drive-in testing sites to accommodate those who do not have access to vehicle transportation
• Where necessary, provide home visitation testing in rural areas where transportation is a challenge for persons with disabilities
• If using vans or other medical vehicles that have steps for access and/or narrow passageways, adopt policies to provide curbside testing services outside the vehicle safely and privately
• Ensure that communication access is provided to persons who are deaf or hard of hearing or have low vision or are blind, including notice about testing sites, registration for testing, information and recordkeeping on site, and provision of test results

Face Mask Issues

• The CDC and a number of states, counties, and local jurisdictions have adopted policies recommending or, in some cases, mandating the wearing of face masks in public settings. In addition, some private businesses have also required the wearing of face coverings to enter business premises and receive services. These approaches sometimes include exceptions for small children and those with certain health conditions.
• Persons with disabilities and organizations representing them have raised concerns with policies requiring face masks because some persons with disabilities are unable to wear masks because of their disabilities, including persons with breathing difficulties, those with anxiety disorders, those who are unable to put on and remove masks independently, and those with seizure disorders. Persons who rely on lip reading for communication have also raised concerns.
Face Mask Issues (2)

- How should public entities address situations where a person with a disability requests to enter a facility or receive services without wearing a mask?
- Federal agencies with ADA technical assistance obligations have provided little guidance on how to apply the ADA in situations where persons with disabilities request exemptions from mandatory face mask policies or on whether public entities may ask for documentation of the requestor’s disability.

Face Masks: Applying the ADA

One Approach:
- A State policy restricting access to customers who wear face masks can be viewed, under the ADA regulatory framework, as a “legitimate safety requirement” that is not based on stereotypes, speculation, or generalizations because these policies follow CDC guidance.
- If those State policies contain exceptions for those with health conditions or disabilities, they would not appear to screen out persons with disabilities.
- Complication: What if the State policy includes exemptions for persons with disabilities, but the private building housing the program does not, e.g., a welfare office in a private office building that requires everyone wear a face mask to enter.
Face Masks: Applying the ADA (2)

- If State policies do not contain exceptions, they will likely screen out from services some persons with disabilities. Here the appropriate analysis is whether there are available any “reasonable modifications” that would allow the person to receive the services and whether the available reasonable modification would not fundamentally alter the nature of the program, service, or activity.
- “Reasonable modifications” may include providing curbside service to the customer, allowing the use of a face shield instead of a cloth face covering, providing free-of-charge home delivery service, use of a drive-through service, participation on computer, smart phone, or other similar device or service rather than in-person, the use of paper-and-pen transactions for deaf persons who rely on lip reading of the employee with a face mask or the use of a special face mask with clear covering allowing lips to be seen.
- Whether any action is a reasonable modification will be an individualized inquiry and will depend on the circumstances of the services being delivered or the programs being offered.

Face Masks: Applying the ADA (3)

- Issue: what if no reasonable modifications exist without allowing the person to enter a facility without a mask? Can person with a disability be excluded?
- One approach: view the person making the request to enter unmasked as someone who may have COVID-19 and be asymptomatic and may spread the disease and analyze the specific circumstances
- Factors to consider:
  - The likelihood of exposure increases with the closeness of any interactions, the length of the interaction, and whether it takes place in a facility, enclosed space, or out of doors,
  - The availability of personal protective equipment equipment on those providing the services or programs, and
  - Whether participants include those at higher risk, including older adults and persons with medical limitations.
Face Masks: Applying the ADA (4)

- Recognize that in some situations no reasonable modifications may exist and that risk of exposure may be too high
- In such circumstances the mask requirement is a “legitimate safety requirement” that is necessary for the safe operation of the program and that the eligibility criterion (wearing a mask for entry) is “necessary” for the safe operation of the program.

Face Masks: Complicating Factors

- CDC and State agency policies depend on available scientific evidence and as scientists and medical personnel continue to do studies, the nature of the science changes affecting our understanding of how the virus spreads and is treated. The changing scientific evidence will affect policies and may affect how courts interpret and rely upon those policies.
- Whether public entities may require documentation of disability or how the wearing of masks affects a particular disability has not been addressed.
- Federal regulations protect the privacy of individuals and ADA regulations specifically address how and when a person with a disability must reveal the nature of their disability to receive services (e.g., service animals, requesting accommodations for a job or for a standardized test).
- Evidence exists of persons fraudulently claiming a disability to avoid wearing a mask
- One State, Connecticut, has required that persons with disabilities must obtain a doctor’s letter to support claims that their disability requires them not to wear a mask
Voting

- A number of Federal disability rights laws provide for nondiscrimination in voting, including the ADA, the Voting Accessibility for the Elderly and Handicapped Act of 1984 (accessible polling places in federal elections), the Help America Vote Act of 2002 (at least one accessible voting system for persons with disabilities at each polling place in federal elections), the National Voter Registration Act of 1993, and the Voting Rights Act of 1965 (providing assistance to voters with disabilities).
- Recent Federal implementation of these laws has focused on accessibility of polling places, accessibility of voting machines for people with disabilities can vote privately and independently, registration practices, and website access.
- Voting during the COVID-19 pandemic has shifted emphasis to issues of absentee and mail-in voting, early voting, and accessible registration.
- Issue: Is the desire to avoid in-person voting because of the pandemic a legitimate reason to request an absentee ballot?
Presenter

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Faculty Member: National Association of ADA Coordinators (NAADAC); OCR Disability Network;
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Caveat

These materials are provided for informational purposes only and are not to be construed as legal advice. You should seek
independent or house counsel to resolve the legal issues that you are responsible for addressing. Further, any policy or
procedure additions or revisions under consideration should be reviewed by your college’s legal counsel prior to implementation.

Many issues that pertain to COVID-19 will also require coordination, consultation, and collaboration with campus
physical and mental health-care providers.
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Three Key Distinctions
Key Distinction I: The Applicable Laws

Key Distinctions for Higher Education: Applicable Laws (1)

- The pertinent laws and regulations may different
  - Title II for communications but not necessarily for everything else
    - 28 CFR Part 35
    - 28 CFR Part 35, subpart A for definitions including definition of auxiliary aids, direct threat, housing at a place of education, and qualified interpreter
    - 28 CFR section 35.139 for exclusion of persons who represent a direct threat to health and safety, unless the threat can be sufficiently mitigated by reasonable accommodation
    - 28 CFR Part 35, subpart E for its comprehensive coverage of communications issues
Key Distinctions for Higher Education: Applicable Laws (2)

- The pertinent laws and regulations may be different
- Section 504 for most post-secondary issues
  - 34 CFR Part 104
    - Subpart A including the definitions
      - 34 CFR 104.3, the key, definition of a “qualified student with a disability”
      - 34 CFR 104.4, if nothing else works, the general prohibitions against discrimination
    - Subpart E including just about everything
      - 34 CFR 104.43, general prohibitions that focuses on higher ed.
        - This regulation makes clear that, except as to retaliation, to be protected by Part 104 you must be a “qualified student with a disability”
      - 34 CFR 104.44 academic adjustments and auxiliary aids (aka “reasonable accommodation”)
      - 34 CFR 104.45 housing (rarely used)
      - 34 CFR 104.47 nonacademic services which includes athletics and counseling

Key Distinctions for Higher Education: Applicable Laws (3)

- There are certain terms and commonly applied concepts that are not expressly in the language of the subpart E to the Section 504 regulations but have been widely read into it by the courts:
  - Technically “reasonable accommodation” and “undue hardship” are only in the Subpart B – Employment Practices, but the courts have read these terms into Subpart E
  - “Fundamental alteration” appears no where in subpart E, it is nonetheless THE most important defense to a failure to accommodate. *Southeastern v. Davis*, 442 U.S. 397 (1979); *Alexander v. Choate* 469 U.S. 287 (1985)
  - As close as subpart E gets to this concept is found in the following language, “Academic requirements that the recipient can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section.” 34 CFR section 104.44 (a)
Key Distinctions for Higher Education: Applicable Laws (3)

- 34 CFR 104.3(l) (3) definition of a “qualified student with a disability” (QSD)
  - “With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient’s education program or activity”
  - Courts have made clear:
    - Reasonable accommodation must be taken into account before this definition is applied to exclude a student
    - A student who is a direct threat to health and safety cannot be a QSD
    - This means that the student is as direct threat, even if the mitigating effects of reasonable accommodation are taken into account
    - Many health science and medical school precedents to support this; e.g. Stebbins v. Univ. of Arkansas, 2012 WL 6737743 (W.D. Ark. 2012); 543 Fed. Appx. 616 (8th Cir. 2013); Halpern v. Wake Forest University of Health Sciences, 2010 WL 3057597 (M.D.N.C. 2010); 669 F.3d 454 (4th Cir. 2012)
  - For more on the direct threat test, see Wodatch, John, COVID-19 and the ADA, Implications for Title II, Great Lakes ADA (August 27, 2020), slide 9

Key Distinctions for Higher Education: Applicable Laws (4)

- A private party, can only obtain monetary damages, as opposed to injunctive relief, under Section 504
  - As under Title IX, such a Plaintiff to prevail, must show “deliberate indifference”
  - Not easy to do
  - Part of the cost/benefit analysis when a student refuses to wear a mask or face covering.
Key Distinction II: Settings

Key Distinctions: Settings (5)

- Range of settings:
  - Brick and mortar classrooms and laboratories
  - On-line classroom synchronous and asynchronous
  - Hybrid, e.g., Northern Arizona University
  - Housing/Residence Halls
  - Campus healthcare facility or hospital
  - Mass meeting sites such as auditoria and stadia
  - Exercise and athletic centers
  - Books, clothing, and souvenir stores

- Each setting may require a different set or type of accommodation; all to be taken into account in an “individual, interactive, diligent” evaluation process *Wynne v. Tufts Medical Center I & II*, respectively, 932 F.2d 19 (1st Cir. 1991); 976 F.2d 791 (1st Cir. 1992)
Key Distinction III: Range of People

Key Distinctions: Range of People (1)

- Employees
  - Classified and unclassified
  - Tenured and tenure track faculty
  - Adjunct faculty
  - Police and security personnel
- Students
  - Individuals considering submitting applications
  - Individuals submitting applications
  - Students in the classroom
  - Students on-line only
  - Students in a hybrid setting
  - Students approved for accommodations
  - Students who have not requested accommodations or have been denied accommodations
- Parents
  - On campus and on-line
- Visitors
  - On campus and on-line
- Alumnae
  - On campus and on-line
Key Distinctions: Range of People (2)

- This large range will require different analyses in qualification, accommodations, and documentation of disability
  - Visitors, parents, alumnae:
    - More like customers under Title III (or persons with service animals)
    - Not a lot of interaction
    - Not a high standard of qualification for program participation
  - Students
    - More likely to be subject to documentation requirements like an employee
    - The qualification standard is higher
  - Employees
    - Treat them as they are: “employees” under Title I of the ADA
  - Note: None of these individuals, while on campus, need be permitted to represent a direct threat to health and safety

Eighteen Informed Suggestions for College Administrators, Faculty and Staff
Informed Suggestions (1)

- Do not open campuses for brick and mortar activities unless there is a plan for addressing each kind of setting and each type of person
- Seriously consider placing most but not all classes on-line
  - Reduces the chance that COVID-19 will be spread
  - Greatly reduces the need to accommodate persons who cannot tolerate standard practices to prevent the spread of COVID-19
  - Addresses the fact that some experiences cannot be simulated on-line
    - The nondidactic part of healthcare education such as teaching nurses how to place an IV or medical students how to insert a trach tube
    - Laboratory-intense classes such as engineering labs
    - Hard-skill classes such as firefighter, EMT, peace officer, or line-repair
    - Some licensure and other professional requisite requirements such as on-site internship experiences
  - Frees up use resident halls, labs, eating commons space so that social distancing is actually feasible
  - Example: Cal. State University Sacramento

Informed Suggestions (2)

- Unless your campus can provide rapid testing, treat everyone as if he or she has COVID-19 and can spread it
  - Many people with COVID-19 are asymptomatic but nonetheless can spread it
  - COVID-19 is highly contagious
  - COVID-19 can be acquired within a day
- To prevent the spread of COVID follow the greater level of guidance from:
  - State and county health officials, e.g., State of CA
  - The Centers for Disease Control (CDC) Considerations for Institutes of Higher Education www.cdc.gov
  - The EEOC (as to employees) www.eeoc.gov/coronavirus
Informed Suggestions (3)

• Treat everyone as if he or she represents a direct threat to health and safety
  • If he or she cannot abide by your campus's requirements to prevent the spread of COVID-19; the individual must demonstrate:
    • that she or he can document a disability-based need for an exception
    • And through a diligent, individualized, interactive process with your campus can identify an accommodation that would mitigate the threat the individual represents to less than that of a direct threat
    • And the individual agrees to reliably participate in implementation of the identified accommodation
    • And the identified accommodation does not represent a fundamental alteration
  • See Gary Phelan, JD, EEOC Should Classify COVID-19 as a Disability Under the ADA https://www.law360.com/articles/1280583/eeoc-should-classify-covid-19-as-a-disability-under-ada
  • Note: a student who wants to come on campus, but represents an unmitigable direct threat is not an otherwise qualified individual under 34 CFR 104.3

Informed Suggestions (4)

• Make sure your campus's online programs, services and classes at least meet the requirements of WCAG 2.0 level AA; better yet, WCAG 2.1 level AA
  • All recent OCR remedies include coming into compliance with WCAG 2.1 level AA
  • This the most frequently type of complaint filed with OCR or in Federal Court; since March 2020, 35 campuses have been sued for inaccessible on-line classes https://edscoop.com.cdn.ampproject.org/c/s/edscoop.com/increasingly-online-more-universities-being-sued-students-disabilities/?amp
  • Ensure that all on-line course audio and video content is captioned when produced; with two permissible exceptions:
    • Imbedded content produced by other entities not under contract or control of your university NAD v. Harvard University
    • A class in which all students are known and none have an identified auditory impairment
      • And it is possible to very promptly add captions if such a student should register late
  • Similarly, narrate and describe all visual content, such as video content and blackboard content for persons with visual impairments
Informed Suggestions (5)

• Other on-line and web-based accommodations
  • Appoint an “access czar”
  • Review all on-line content for access and make access feasible to faculty
  • Build access into your acquisition process

Informed Suggestions (6)

• Do not let a pivot to on-line instruction decrease support of students
  • Follow the telemedicine model for counseling for both academic and mental health services
    • For brick and mortar schools still consider telemedicine
    • Or purchase a lot of plexiglass and PPE
    • Negotiate for student health insurance that will be available for purchase or claims through accessible on-line sources
  • Make sure that research and library services, like the card catalogue are accessible
  • Make sure teaching from home does not diminish the opportunity for the digital equivalent of office hours
Informed Suggestions (7)

- Buy protective gear for students and faculty; particularly gear that will facilitate access such as transparent masks for all students and faculty in a class with a deaf student
- Assign responsibilities for medical recordkeeping
  - Health services?
  - DSS?
  - Develop in advance a protocol for students who decline to wear face masks or face coverings
  - What is an accommodation question?
  - When does a refusal become a discipline question?
- Publish, in an accessible manner, all policies and protocols pertaining to COVID-19

Informed Suggestions (8)

- Use this as a moment to plan for and implement universal design in instruction
  - Reexamine what is essential or fundamental
    - E.g., speaking in front of a speech class
    - Standardized test scores for admissions
  - Reconsider what is unduly burdensome
    - E.g., all classes on line synchronously and asynchronously
  - Implement successful accommodative practices as universal design best practices for the benefit of all students
    - E.g., notetaking
A Paradigm for Most Masking Questions

A Mask Analytical Paradigm (1)

- The failure to wear a mask, on campus, is a direct threat to the health and safety of all other members of the campus community
- Consequently, all students must wear a mask or face covering
- An exception to this rule must be interactively, diligently, and individually considered for all students with disabilities
- The need for an exception must be documented, though the documentation may already be on file with the DSS office
  - Persons with respiratory problems may not always have a solid basis for an exception
  - The stronger case will be for persons with physical limitations that prevent them from putting on or taking off a mask, persons with psychiatric disabilities, and persons on the Autism Spectrum
A Mask Analytical Paradigm

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  - The stronger case will be for persons with physical limitations that prevent them from putting on or taking off a mask, persons with psychiatric disabilities, and persons on the Autism Spectrum

A Mask Paradigm

- Persons who need an exception to the making rule, on the basis of disability, are entitled to an interactive process to identify an accommodation that will reduce the level direct threat to health and safety down to permissible level
  - A draped shield
  - A transparent mask
  - Alternative fabrics or ways to wear the mask
  - On-line only participation
  - Not a difficult question, if this form of instruction, as to the class in question, already exists
  - But, if it does not?
    - An old, but still emerging question
A “Third Rail”

• Currently, this is largely a matter of State Law.
• What if a student is pretty much compelled to return to campus or is refused accommodation in the form of on-line/remote/ITV services and, as a consequence, the student becomes injured or dies?
• Will recent cases concerning a “special relationship” between colleges and universities and their students apply?
  • *Regents of University of California v. Superior Ct.*, __P.3d__. 2018 WL 1415703 (S.Ct. Cal., April 22, 2018) [duty to protect and warn students from violent students with psychological disabilities]
  • *Nguyen v. Massachusetts Institute of Technology*, S.Ct. Mass., SJC-12329 (May 7, 2018) [duty to intervene with a student to prevent suicide]
• Might counsel for such a student argue that, now, the duty to protect students from injury is even greater as the coercive power, authority and discretion of the post-secondary institution is even greater?
Prologue for Questions and Answers

Prologue to Questions and Answers (1)

- Questions pertaining to COVID-19 are so novel (pun intended) that the many opinions will be subject to change as agencies, courts, and expert commentators weigh in on COVID-related legal and scientific issues [https://www.cdc.gov/coronavirus/2019-ncov/index.html](https://www.cdc.gov/coronavirus/2019-ncov/index.html); [https://www.coronavirus.gov](https://www.coronavirus.gov); [https://www.nih.gov/coronavirus]

- As John Wodatch explained, a big factor complicating the ability to answer confidently legal questions pertaining to COVID-19 is what is unknown about the impact of COVID-19 on our bodily systems and, in turn, our daily living activities:
  - Long term or transitory?
  - In a minor fashion or in an intense manner?
  - Bodily systems that may include: acute respiratory distress such as by pneumonia, lung damage, loss of taste (a neurological symptom), mental confusion, anxiety, depression, and post-traumatic stress, nausea, vomiting, diarrhea, loss of appetite, strokes, blood clots, seizures, liver damage, kidney damage, multisystem inflammatory syndrome (MIS) in children, and “COVID toes” [https://health.clevelandclinic.org/are-covid-toes-and-rashes-common-symptoms-of-coronavirus/](https://health.clevelandclinic.org/are-covid-toes-and-rashes-common-symptoms-of-coronavirus/)
Prologue to Questions and Answers (2)

- At this time, no Federal court decision that I am aware of has explicitly identified COVID-19, by itself, as a disability under the ADA or Section 504
  - But they come close as in Faour Abdalla Fraihat, et al. v. U.S. Immigration and Customs Enforcement, et. al., EDCV 19-1546 JGB (SHKx) (C.D. Cal., April 20, 2020) [In light of COVID-19, ICE detention conditions, in many facilities, are unconstitutional]
  - And closer yet in Silver v. City of Alexandria, __ F. Supp. 3d __; 2020 WL 3639696 (W.D. La. July 6, 2020) [plaintiff’s cardiovascular condition in the context of a COVID-19 environment established both a disability and a need for an accommodation]

Prologue to Questions and Answers (3)

- Is COVID-19, in any form, a disability?
- To date, Federal guidance has fallen into two categories:
  - Addressing the other civil rights protections that may pertain to persons with COVID-19; such as:
    - US ED OCR Fact Sheet --Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students, guidance to school districts, colleges and universities that they must not allow concerns over the origin of COVID-19 to serve as the basis for discrimination against students who are of a particular national origin (March 16, 2020) https://www2.ed.gov/about/offices/list/ocr/docs/ocr-coronavirus-fact-sheet.pdf
    - US ED OCR Questions and Answers -- ED guidance on continuation of services or compensatory services for students who are on IEPs https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-COVID-19-03-12-2020.pdf (March 2020)
Prologue to Questions and Answers

- Most on point, but equivocal and brief, ED OCR: *Questions and Answers for Post Secondary Institutions regarding the COVID-19 National Emergency* (May 12, 2020)
  https://www2.ed.gov/about/offices/list/ocr/docs/20200512-qa-psi-covid-19.pdf
  - Colleges and universities are still required to comply Section 504, Title II, and Title IX
  - But OCR will cut them some slack for what is impossible or infeasible, if you will provide a second-best creative alternative
    - Some focus on the challenges in accommodation of students with sensory impairments
- Other ED OCR resources:
  - OCR Year in Review Plenary Session at AHEAD, July 21, 2020 11:30 Eastern Time
  - OCR National Web Accessibility Team – OCRWebAccessTA@ED.GOV
  - Questions and Technical Assistance – OPEN@ed.gov including valuable advice like “be creative”
  - *OCR Short Webinar on Online Education and Website Accessibility* (May 17, 2020) --
    https://www.youtube.com/watch?v=DCMLk4cES6A&feature=youtu.be
  - Also pertinent, OCR advice about enforcement of Title IX during the pandemic, which includes a presumption that Title IX sex harassment investigations will not be postponed

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Prologue to Questions and Answers (5)

- Addressing COVID-19 as if it is a disability, but never actually stating such a conclusion; such as, EEOC guidance about what are or are not permissible actions for employers to take in the workplace to limit the spread of the COVID-19 virus among their workforces at home or when returning to work
  https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitation_act_coronavirus.cfm
  - Of note, the EEOC’s treatment of COVID-19 as a “direct threat to the health and safety of others.”
    - “Masking questions” will be effected by this conclusion as it means a direct threat - interactive communication – reasonable accommodation analysis should take place if someone is an individual with a disability
  - See the analysis by Bill Goren, J.D. of this EEOC guidance at
  - Keep checking the EEOC website as updates are frequent: www.eeoc.gov/coronavirus
Other Sources of Information (1)


- Looking back over all the material I have reviewed, in the main, EEOC guidance seems the most useful but remember that employee and student law are not identical (respectively, Title I vs. Titles II and III) [https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitation_act_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitation_act_coronavirus.cfm) [EEOC guidance is subject to frequent updates]

Other Sources of Information (2)


Captioning-Related Resources Provided by NAD

- National Deaf Center (NAD): Why Captions Provide Equal Access
- National Deaf Center: Creating Offline Captions
- Described and Captioned Media Progra: Captioning Key Guidelines
- 3Play Media: State of Captioning Report
- Morton Ann Gernsbacher’s research “Video Captions Benefit Everyone”
- Wisconsin Technical College System Captioned Media Guide

Direct Contact Information

- paulgrossman@comcast.net
- https://paulgrossman.myportfolio.com/
  - Beginning August 15: The Intersectional Protest Art of Oakland, California
    - No cookies
    - Nothing for sale
QUESTIONS

Questions can be submitted via the Q&A function within the platform or emailed to webinars@adaconferences.org

Next Session:
Tuesday, September 15, 2020

Moving the Needle on Employment

Registration available at: www.ada-audio.org