THE LAW OF DISABILITY DISCRIMINATION

EIGHTH EDITION

2018 Supplement*

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Chapter 1

OVERVIEW OF THE LAW OF DISABILITY DISCRIMINATION

A. Historical Discrimination Against Individuals with Disabilities

p. 4, add note 3:

3. One issue that affects some members of the disability community is lack of access to reproductive freedom or marriage. The Court's decision in *Buck v. Bell*, discussed above, failed to repudiate the practice to sterilizing women due to their alleged intellectual disabilities. Further, some individuals with disabilities claim they do not have full access to the institution of marriage due to financial constraints like the loss of Medicaid, SSDI or subsidies under the Affordable Care Act if they choose to marry. Recently, the Supreme Court affirmed the liberty interest in the right to marry. *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (right to marry for same-sex couples). Will the decision in *Obergefell* have an impact on individuals with disabilities? Will it strength the right to reproductive freedom, a liberty interested protected by the same progeny of cases?

B. Early Civil Rights Protection

p. 6, at end of second full paragraph add:

The Supreme Court ratified the disparate impact model in a race discrimination case brought under the Fair Housing Act. *See Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.,* 135 S. Ct. 2507 (2015).

Chapter 2

DEFINITION OF INDIVIDUAL WITH A DISABILITY

B. POST-2008 OVERVIEW

1. Prong One: Actually Disabled

a. Physical or mental impairment

i. Statutory Definition

p. 25, at end of note 5, add:

6. The ADA covers physical and "mental" disabilities yet some lower courts have narrowly construed the coverage of mental health disabilities. In *Jacobs v. N.C. Administrative Office of the Courts,* 780 F.3d 562 (4th Cir. 2014), the Sixth Circuit reversed the trial court's grant of summary judgment for the employer. Christina Lynn Jacobs was terminated after she sought accommodations that would lessen her customer service responsibilities as a deputy clerk. She had a lengthy history of mental illness since childhood and had allegedly informed her employer that she had a "social anxiety" disorder when her job position was changed to require more direct customer contact. The Fourth Circuit also emphasized that "interacting with others" is a major life activity under the relevant EEOC regulations. *See* 29 C.F.R. § 1630.2(i). The Fourth Circuit heavily chastised the district court judge for granting summary judgment for the defendant without viewing the evidence in the light most favorable to the plaintiff.

ii. Exclusions

p. 27, at end of note 1, add:

A district court recently denied defendant's motion to dismiss in a lawsuit brought by an individual with gender dysphoria. Plaintiff had alleged that her gender dysphoria substantially limited her interacting with others, reproducing, and social and occupational functioning. *See Blatt v. Cabela's Retail, Inc.*, 2017 WL 2178123 at *2 (E.D. Pa. May 18, 2017). The court found that she could be covered by the ADA by reading the exclusion "narrowly to refer to only the condition of identifying with a different gender, not to encompass (and therefore exclude from ADA protection) a condition like Blatt's gender dysphoria, which goes beyond merely identifying with a different gender and is characterized by clinically significant stress and other impairments that may be disabling." *Id.* at 2. Do you think this ruling will be affirmed on appeal?

p. 28, at end of note 6, add:

6. The exclusion of individuals from coverage who currently use illegal drugs raises difficult interpretation questions in states that have legalized marijuana even though it is still illegal under federal law. Courts are generally allowing cases to go forward under state anti-discrimination law if marijuana use is legal under state law. *See Barbuto v. Advantage Sales and Marketing*, 447 Mass. 456 (2017) (plaintiff who failed drug test while using medical marijuana legally under state law has a viable claim under state anti-discrimination law); *Noffisnger v. SSC Niantic Operating Co.,* 273 F. Supp.3d 326 (D. Conn. 2017) (allowing state anti-discrimination case to go forward where employee was using marijuana lawfully under state law); *Callaghan v. Darlington Fabrics Corporation,* 2017 WL 2321181, No. PC-2014-5680 (R.I. Superior Ct. May 23, 2017) (granting summary judgment under state anti-discrimination law for applicant for employment who was using marijuana lawfully under state law but could not pass employer's drug screening test).

b. Major Life Activities
i. Statutory and Regulatory Language
ii. Supreme Court Interpretation

p. 31, at end of note 2, add:

For examples of court broadly construing the definition of disability, *see Jones v. Honda of America*, 2015 WL 1036382 (S.D. Ohio March 9, 2015) (finding plaintiff established a prima facie case, under state law, of disability discrimination where she had intermittent back pain that limited her ability to engage in repetitive motion activities and, by extension, the major life of working particular to her occupation at Honda); *Mazzeo v. Color Resolutions, Int'l,* 746 F.3d 1264 (11th Cir. 2014) (reversing district court's granting of summary judgment in favor of employer where treating physician stated in his affidavit that former employee's disc herniation problems and resulting pain, which had existed for years and required surgery, substantially limited former's employee's ability to walk, bend, sleep, and lift more than ten pounds).

p. 33, at end of note 6, add:

What kind of evidence meets the rule that one is substantially limited in "interacting with others"?

> Christina Jacobs worked as a deputy clerk at a courthouse and was assigned a job requiring her to provide customer service. Due to a previously diagnosed and long-standing, social anxiety disorder, she requested reassignment to a role with less direct interpersonal communication. Jacobs argued that her social anxiety disorder substantially limited her ability to interact with others. Her employer waited three weeks without acting on her request and then terminated her. District court granted summary judgment on behalf of employer on employee's wrongful termination claim, retaliatory discharge

> claim, and failure to accommodate claim. There were 30 total deputy clerks, four or five of whom provided customer service. Should district court's grant of summary judgment be reversed?

See Jacobs v. N.C. Administrative Office of the Courts, 780 F.3d 562, 573 (4th Cir. 2015) (finding that "a person need not live as a hermit in order to be 'substantially limited' in interacting with others").

> Matthew Weaving joined the Beaverton Police Department in July 1995. In 2001, he became a narcotics detective on an interagency team. He then worked for the Hillsboro Police Department from 2006 to 2009. During the application period, he disclosed that he had a childhood diagnosis of ADHD but did not believe that ADHD continued to affect him. He also disclosed "intermittent interpersonal communication issues" he experienced at his previous employment. He was promoted to sergeant in 2007. In 2009, after receiving disciplinary action for his misconduct, he advised the Department that his psychologist had informed him that his ADHD has affected his communication problems within the Department. He requested reasonable accommodations and reinstatement. He was terminated. The jury found Weaving to be disabled and awarded damages, back pay, front pay and attorney's fees. The district court denied the City's motion for judgment as a matter of law based on insufficient evidence to support the verdict. Should the district court's ruling be reversed?

See Weaving v. City of Hillsboro, 763 F.3d 1106 (9th Cir. 2014) (yes) (finding that Weaving's ADHD may have limited his ability to get along with others but there was insufficient evidence that it limited his ability to interact with others).

p. 42, at end of note 2, add *But see Alston v. Park Pleasant, Inc.,* 2017 WL 627381 (3rd Cir. Feb. 15, 2017) (affirming district court's grant of summary judgment to defendant because plaintiff did not aver how she was substantially limited in any major life activity due to her breast cancer diagnosis).

c. Substantial Limitation
iv. Condition, Manner, or Duration
(1) Learning disabilities

p. 46, at end of paragraph before Notes and Problems for Discussion, add:

The Department of Justice has issued regulations to implement ADA 2008 Amendments, focusing on standardized testing and higher education entities, which have extensive discussion of documentation of disabilities, ADHD, and condition, manner, or duration analysis for disabilities that exist on a spectrum. *See* 28 CFR Parts 35 and 36, Amendment of Americans with Disabilities Act Title II and Title III Regulations to Implement ADA

Amendments Act of 2008 (August 16, 2016), available at http://federalregister.gov/a/2016-17417

p. 47

citation at end of note one, should read: *Bartlett v. New York State Board of Law Examiners*, 2001 U.S. Dist. Lexis 11926 (S.D.N.Y. 2001) (Sotomayor, C.J. sitting by designation).

3. Prong Three: Regarded as Having an Impairment

p. 53, at the end of note 5, add:

It is important to remember, however, that the exception for "transitory and minor" impairments only applies to the "regarded as" prong. As recently noted by the Seventh Circuit, an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. *Gogos v. AMS Mechanical Systems, Inc.*, 737 F.3d 1170, 1172-73 (7th Cir. 2013). Anthimos Gogos had elevated blood pressure that caused him to experience intermittent vision loss; he was fired as a result of one episode of intermittent vision loss. The Seventh Circuit reversed the district court's dismissal of his claim, finding that he had alleged a covered disability. Similarly, as the Sixth Circuit has noted, the temporary exception does *not* apply to an individual who is actually impaired, even if the disability is not expected to be permanent. *See also Summers v. Altarum Institute, Corp.,* 740 F.3d 325 (4th Cir. 2014) (plaintiff had a severe leg break and other injuries that precluded him from walking normally for seven months).

p. 54, add new note 8:

8. The D.C. Circuit reversed and remanded a case, which had been brought under the "regarded as" definition of disability. Plaintiff had alleged that Washington Metropolitan Area Transition Authority ("WMATA") had discriminated against him in violation of Section 504 when it refused to rehire him after being previously discharged for violating their alcohol use policy. The district court had granted summary judgment to the defendant, finding that he did not meet the statute's definition of disability. The court of appeals reversed, finding that the district court had mistakenly required plaintiff to allege that he had a substantial limitation in a major life activity. *See Alexander v. Washington Metropolitan Area Transit Authority,* 826 F.3d 544 (D.C. Cir. 2016). The D.C. Circuit quoted with approval the following statement from the regulatory guidance: "Where an individual is not challenging a covered entity's failure to make reasonable accommodations … it is generally unnecessary to proceed under the 'actual disability' or 'record of' prongs …. In these cases, the evaluation of coverage can be made solely under the 'regarded as' prong of the definition of disability." 29 C.F.R. § 1630.2(g)(3). It also noted that "the regarded-as prong has become the primary avenue for bringing the type of discrimination that Alexander asserts." *Id.* at 546. This case is an important affirmation of the central role that "regarded as" claims play under the 2008 Amendments.

C. DOCUMENTATION

p. 58, add a new note 5:

One issue that often arises, that is related to documentation, is how an individual might provide notice to a covered entity that he or she is a person with a disability. For example, Heather Grabin was a student at a university that had a policy that a student could only request an accommodation if the student first registered with the disabled student services office. When Heather was hospitalized, she contacted a professor by email to request an accommodation but did not contact the disabled student services office. She had also mentioned her disability on her transfer and housing registration forms. The district court judge refused to rule in favor of the university's summary judgment motion on the issue of whether it had sufficient notice of plaintiff's disability finding that a jury could find that she had given the university sufficient notice of her disability and request for accommodation despite the statement in the student handbook. *See Grabin v. Marymount Manhattan College*, 2014 WL 2592416 (S.D.N.Y. June 10, 2014). In later developments, however, the court granted the university's motion for summary judgment because plaintiff offered insufficient evidence that she was disabled. *See Grabin v. Marymount Manhattan College,* 2015 WL 4040823 (S.D.N.Y. July 2, 2015), *affirmed*, 659 Fed. Appx. 7 (2nd Cir. 2016).

Chapter 3

EMPLOYMENT DISCRIMINATION

B. QUALIFIED INDIVIDUAL WITH A DISABILITY
1. General Requirements

p. 65, at the end of note 2 add:

See also Rorrer v. City of Stow, 743 F.3d 1025 (6th Cir. 2014) (reversing district court's grant of summary judgment for defendant where firefighter with monocular vision could not drive fire apparatus in emergency situations and where job description evidence was "mixed" with respect to whether that task was really "essential" or could be subject to reasonable accommodation).

p. 68, at the end of note 7 add:

Another permutation of the attendance issue is whether an employee should be permitted to telework as a reasonable accommodation. The Sixth Circuit recently vacated an opinion that had said that technology has advanced such that attendance at the workplace no longer is assumed to mean attendance at the employer's physical location. *See EEOC v. Ford Motor Co.,* 752 F.3d 634 (6th Cir. 2014), opinion vacated; rehearing en banc granted (August 29, 2014). By contrast, in the en banc opinion, the Sixth Circuit said: "with few exceptions, 'an employee who does not come to work cannot perform any of his job functions, essential or otherwise.'" *EEOC v. Ford Motor Co*., 782 F.3d 753 (6th Cir. 2015). It therefore found, as a matter of law, that the plaintiff's request for up to four days each week of telecommuting to perform her job as a resale buyer was unreasonable because of the strong evidence that her job required some face-to-face interactions. Those "few exceptions" would appear to be jobs with virtually no requirements of face-to-face interactions. *Id.* at 761. In this case, the Sixth Circuit ruled (over a vigorous dissent) that there was not sufficient evidence to send to the jury the issue of whether this job could be performed with limited face-to-face interactions. Plaintiff was therefore not considered to be a qualified individual with a disability because she could not perform the essential functions of the job even with accommodations. The Sixth Circuit applied the *Ford Motor Co.* holding to a case involving a customer service representative, finding that regular attendance was an essential function of the position. *See Williams v. AT&T Mobility Services, LLC,* 847 F.3d 384 (6th Cir. 2017). The *Williams* case, however, did not involve telework. *See also Mosby-Meachem v. Memphis Light, Gas & Water Division*, 883 F.3d 595 (6th Cir. 2018) (upholding jury verdict for employee in attorney, telework case where in-house attorney sought ten weeks of telework due to pregnancy-related complications).

Rather than work from home, some employees request a flexible work schedule. In a case that proceeded under Section 501 of the Rehabilitation Act, Linda Solomon argued that the Department of Agriculture should have allowed her to have a flexible work schedule, which

the Department called a "maxiflex" schedule, as an accommodation for her disability (depression). The district court judge ruled that a maxiflex work schedule is unreasonable as a matter of law. The D.C. Circuit reversed, finding that the question of whether an accommodation is reasonable is contextual and fact-specific. Further, the Court found that she had offered sufficient factual evidence that she was able to complete her work when given flexibility and that other nondisabled employees were allowed to work flexible schedules to survive summary judgment. *See Solomon v. Vilsack*, 763 F.3d 1 (D.C. Cir. 2014)

Other employees have requested indefinite leave as a reasonable accommodation. Courts have generally ruled against such requests finding that one is not able to perform the essential functions of the job if one needs to be on leave. *See, e.g., Echevarria v. Astrazeneca Pharmaceutical LP,* 856 F.3d 119 (1st Cir. 2017); *Moss v. Harris County Constable Precinct One,* 851 F.3d 413 (5th Cir. 2017); *Maat v. County of Ottawa,* No. 15-1836, 657 Fed. Appx. 404 (6th Cir. 2016). The Seventh Circuit has affirmed summary judgment in case where employee request two to three month leave after FMLA expired because a medical leave spanning several months does not allow employee to perform essential functions of the job. *See Severson v. Heartand,* 872 F.3d 476 (7th Cir. 2017). In an unpublished opinion, Seventh Circuit applied same reasoning to conclude that a request for an additional six months leave of absence was not a reasonable accommodation request under ADA. *See Golden v. Indianapolis Housing Agency,* 698 Fed. Appx. 835 (7th Cir. 2017).

p. 68, at the end of note 9 add:

10. The issue of whether one is qualified can blend with the issue of whether one is disabled. Michael Cannon had a rotator cuff injury that prevented him from lifting his right arm above his shoulder. He applied for a position as a mechanical engineer. Cannon and his employer agree that this position required him to be able to climb a ladder. Two hours after learning of Cannon's injury, the employer rescinded the job offer. After Cannon filed a disability charge, the employer asserted that he wasn't disabled and, even if he were disabled, that he was unqualified for the position because he could not climb a ladder. Although the district court ruled in the company's favor under the "disability" question, the Fifth Circuit easily reversed that determination. *See Cannon v. Jacobs Field Services North America,* 813 F.3d 586 (5th Cir. 2016). Cannon was restricted in "lifting," which is expressly defined as a major life activity under the ADA and its regulations. Further, the employer clearly regarded Cannon as disabled because he his job offer was rescinded as soon as he completed his physical. The "qualified" issue, however, was more difficult. Cannon submitted a doctor's note and a video showing that he could climb a ladder but Cannon also conceded at this deposition that he raised his injured arm above his shoulder in violation of his doctor's orders in the video. Because this issue was disputed, the court of appeals ruled that summary judgment in favor of the defendant was inappropriate. *Id.* at 593-94.

11. Reasonable accommodation must be taken into account before determining whether someone is qualified. A shipping clerk who was diagnosed with an impairment in both elbows was terminated. The job required moving objects from one place to another. But employer needed to consider affordable assistive devices such as a scissor lift table and onsite carts that could have facilitated plaintiff performing essential functions of the job.

See Dunlap v. Liberty Natural Products, 878 F.3d 794 (9th Cir. 2017). Contrast with pharmacist who was not willing to give immunizations due to fear of needles; because that is an essential function, no need to consider reasonable accommodations. *See Stevens v. RiteAid Corp.,* 851 F.3d 224 (2nd Cir. 2017).

C. NONDISCRIMINATION REQUIREMENTS

1. Reasonable Accommodations and Undue Hardship

b. Interpretive Questions

p. 88, add new notes 13 and 14:

13. After the 2008 ADA amendments, establishing that a plaintiff is an individual with a disability has become much easier. That fact, in turn, has put pressure on other parts of the legal analysis, such as whether the plaintiff has requested an accommodation that is reasonable. For example, employers have tried to argue that an accommodation is only reasonable if it makes it possible for an employee to perform an essential function of the job. In *Feist v. Louisiana, Department of Justice*, 730 F.3d 450 (5th Cir. 2013), an attorney with osteoarthritis of the knee requested a free on-site parking space to accommodate her disability. The district court granted summary judgment for the employer, saying that the plaintiff failed to demonstrate a need for an accommodation to perform her essential functions. The Fifth Circuit reversed, saying that a request for a reasonable accommodation does not have to be connected to an essential job function. Look at the statutory language, and relevant regulations. What is the basis for the Fifth Circuit's opinion?

14. With more cases raising the issue of reasonable accommodation and undue burden, courts are increasingly offering guidance on the meaning of "undue burden." The Fourth Circuit recently hard a case involving Yasmin Reyazuddin, who was no longer able to perform her job at a call center after the County updated software to software that was inaccessible to a JAWS user. In arguing that it should not need to expend the funds necessary to make the software accessible, the County argued that one factor under the undue burden analysis should be that it had only budgeted $15,500 for accommodations. The Fourth Circuit rejected this reasoning, stating in pertinent part, "Allowing the County to prevail on its undue hardship defense based on its own budgeting decisions would effectively cede the legal determination on this issue [undue burden] to the employer …. Taken to its logical extreme, the employer could budget $0 for reasonable accommodation and thereby avoid liability. The County's overall budget ($3.73 billion in fiscal year 2010) and the [new system] operating budget (about $4 million) are relevant factors. But the County's line-item budget for reasonable accommodations is not." *Reyazuddin v. Montgomery County,* 789 F.3d 407 (4th Cir. 2015). On remand, the district court held that the employer provided reasonable accommodation, warranting denial of employee's request for injunctive relief, and that employee was not entitled to prohibitory injunction. *See Reyazudden v. Montgomery County*, 276 F. Supp.3d 462 (D. Md. 2017). An appeal is pending.

p. 88 c. Reassignment to a Vacant Position as a Reasonable Accommodation

p. 103, add note 8. An important issue in reassignment cases is whether the employee can seek, as a reasonable accommodation, the opportunity to be assigned an open, vacant position without competition. *See EEOC v. St. Joseph's Hospital, Inc.,* 842 F.3d 1333 (11th Cir. 2016). The Eleventh Circuit ruled that the *Barnett* "in the run of cases" analysis is appropriate in a situation where an employer has a "best-qualified applicant policy." Under such a policy, they are entitled to hire the best qualified applicant rather than allow an incumbent employee to be transferred to that open, vacant position under the reassignment rule. The court said:

> As things generally run, employers operate their businesses for profit, which requires efficiency and good performance. Passing over the best-qualified job applicants in favor of less-qualified ones is not a reasonable way to promote efficiency or good performance. In the case of hospitals, which is this case, the well-being and even the lives of patients can depend on having the best-qualified personnel. Undermining a hospital's best-qualified hiring or transfer policy imposes substantial costs on the hospital and potentially on patients.

Id. at 1346.

This position is arguably consistent with the position taken by other circuits. *See Huber v. Wal-Mart Stores,* 486 F.3d 480, 483 (8th Cir. 2007); *Daugherty v. City of El Paso,* 56 F.3d 695, 700 (5th Cir. 1991*), modified on other grounds by Kapche v. City of San Antonio,* 304 F.3d 493, 494 (5th Cir. 2002). What argument would you make to suggest that preferential consideration is required by the reassignment rule?

Note 9. In order for the vacant position as a reasonable accommodation rule to apply, there must be a vacancy. *See Audette v. Town of Plymouth*, 858 F.3d 13 (1st Cir. 2017); *Boyle v. City of Pell City,* 866 F.3d 1280 (11th Cir. 2017) (in both cases, no existing vacation position that was not a promotion).

2. Medical Examinations and Inquiries

p. 107, add to end of note 5:

When employee sought to return to work following a back injury, employer sought medical records about both his back injury and treatment for cancer. Found unfit for work and fired. Was the request for information about cancer an unlawful inquiry of an incumbent employee? *See Bingman v. Baltimore County*, 714 Fed. Appx. 244 (4th Cir. 2017) (upholding jury award).

p. 107, add new notes 6 and 7:

6. When may an employer require an employee to take a psychiatric fitness-for-duty exam? Consider these facts:

> During a meeting with management, an employee banged his hand on the table, after describing what he considered to be harassing treatment on the basis of his national origin, and said that someone was "going to pay for this." His employer referred him to a psychiatric fitness-for-duty exam, where he was given the Minnesota Multiphasic Personality Inventory. The plaintiff's job was a quality assurance specialist; he typically worked from home but was required to report to the call center for certain meetings. Was the employer legally permitted to require him to take that psychiatric exam?

See Owusu-Ansah v. Coca-Cola Co., 715 F.3d 1306 (11th Cir. 2013) (yes)

> The White Lake Ambulance Authority required Emily Kroll to obtain psychological counseling as a condition to keeping her job based on one emotional outburst and disregard of safety rules at work (related to a stormy extra-marital relationship with a co-worker). The district court entered summary judgment in employer's favor and employee appealed. Was summary judgment warranted on employer's business necessity defense?

See Kroll v. White Lake Ambulance Authority, 673 F.3d 619 (6th Cir. 2014)(no)

> University required that Professor have a medical evaluation and/or mental health evaluation to ascertain his fitness for duty after it received numerous, substantiated complaints that Professor had been verbally abusive towards students, had been disrespectful towards his colleagues and engaged in sexual harassment. District court granted summary judgment in favor of university. Professor appealed. Should decision be affirmed?

See Coursey v. University of Maryland Eastern Shore, 577 Fed.Appx. 167 (4th Cir. 2014) (yes)

7. The EEOC has promulgated rules that offer guidance on the extent to which employers may use incentives to encourage employees to participate in wellness programs that include disability-related inquiries and/or medical examinations. *See* https://www.federalregister.gov/articles/2016/05/17/2016-11558/regulations-under-the-americans-with-disabilities-act. (allowing employer to offer incentives up to a maximum of 30 percent of the total cost of self-only coverage to promote an employer's participation in a wellness program that includes disability-related inquiries or medical examinations).

8. Although an employer is permitted to require an employee to submit to monthly drug tests, it is not necessarily permitted to require the employee to disclose his use of legally-prescribed medications. Requiring disclosure of prescription medications may violation 42 U.S.C. § 12112(d)(4)(A). *See Williams v. FedEx Corporate Services,* 849 F.3d 889 (10th Cir. 2017) (remanding to district court to determine if § 12112(d)(4)(A) was violated through request for list of prescription medications).

E. Defenses

p. 152, add to end of note 11:

> Biagio Stragepede worked in water services for the City of Evanston for 14 years. After suffering a traumatic brain injury, he was medically cleared to return to work. He was then fired for alleged safety reasons when he went to the wrong address on two occasions and was seen driving through a red light (with no accident occurring). Jury ruled in favor of employee and the court of appeals affirmed the jury verdict. There was conflicting testimony and the court of appeals concluded that issue of whether risk posed by employee's traumatic brain injury was significant was for jury.

See Stragapede v. City of Evanston, Illinois, 865 F.3d 861 (7th Cir. 2017).

Chapter 4

ADA TITLE II

A. BACKGROUND

p. 176, add after note 9:

10. One issue under ADA Title II is when is a program one of state government's for which they have some legal responsibility. This issue recently arose in Texas. *See Ivy v. Williams*, 781 F.3d 250, 251 (5th Cir. 2015), *cert. granted,* 2016 WL 3496748 (U.S. June 28, 2016). In Texas, individuals under the age of 25 cannot obtain driver's licenses unless they submit a driver education certificate to the Department of Public Safety. But none of the Texas-licensed private driver education schools are willing to accommodate deaf students, thereby precluding these individuals from obtaining driver's licenses. The relevant regulation is one that prohibits a state from aiding entities that discriminate against "beneficiaries of the public entity's program." *See* 28 C.F.R. § 35.130(b)(1)(v). The Fifth Circuit concluded the state agency "does not provide the program, service or activity of driver education. Thus, it is not required to ensure that driver education complies with the ADA." *Id.* at 258. The Supreme Court granted cert., vacated the judgment, and remanded the case to the Fifth Circuit with instructions to dismiss as moot. *See Ivy v. Morath,* 137 S. Ct. 414 (2016).

11. Defendants have also raised the statutory interpretation question of whether ADA Title II gives DOJ standing to pursue a legal claim. *Compare C.V. v. Dudek,* 209 F. Supp.3d 1279 (S.D. Fla. 2016) (no) *with U.S. v. Harris County,* No. 4:16-CV-02331 (S.D. Tex. April 26, 2017) (yes). *See also U.S. v. Harris County*, see 2016 WL 4159016 (S.D. Tex. Aug. 4, 2016) (complaint).

D. DISCRIMINATION ON THE BASIS OF DISABILITY

1. Generally

p. 214, add after note 8:

9. As there is increased publicity about law enforcement officials being poorly trained when dealing with individuals with disabilities, plaintiffs may be seeking to use a "failure to train" theory against law enforcement officials. While denying the validity of the claim in the context of a case in which law enforcement officials killed a man with Down Syndrome when he refused to leave a movie theatre, the district court did recognize that such a theory could be viable when there has been a pattern of such conduct. *See Estate of Robert Ethan Saylor v. Regal Cinemas, Inc.,* 2016 WL 4721254 (D. Md. Sept. 9, 2016). The Department of Justice has also issued guidance on how law enforcement officials should

treat individuals with disabilities. *See* Civil Rights Division, U.S. Dept. of Justice, Examples and Resources to Support Criminal Justice Entities in Compliance with Title II of the Americans with Disabilities Act (January 2017), available at https://www.ada.gov/cjta.html.

2. Right to Vote

p. 218, add after note 2:

3. The Second Circuit found that the City of New York was not providing meaningful access to the voting booth for individuals with disabilities and imposed a remedial order. *See Disabled in Action v. Board of Elections in the City of New York*, 752 F.3d 189 (2nd Cir. 2014). Title II and Section 504 mandate that voting administrators, such as boards of election, provide individuals with disabilities meaningful access to its voting program by making reasonable modifications. A survey of New York voting sites showed 80% had some form of access barrier such as inadequate signage, steep ramps, ADA voting booths in accessible locations and inoperable voting machines with adaptive technology – conditions that meant that individuals with disabilities either could not vote or could do so independently and privately. Despite notice the Board of Elections (BOE) did not respond to address these barriers either promptly or at all on election days. Nor did it have an ADA coordinator. These and other conditions were alleged as violations of Section 504 of the Rehabilitation Act and Title II of the ADA with regard to individuals with mobility and vision disabilities. Following discovery a motion for summary judgment was issued to the plaintiffs. BOE was unable to demonstrate compliance on the grounds that it offered voters with disabilities alternate sites, made *ad hoc* fixes on Election Day, and provided for absentee balloting. Subsequent court sanctioned remedial settlement conferences did not prove productive and the United States (DOJ) intervened with a proposed remedial plan. The District Court largely adopted the DOJ plan and the BOE appealed the order to the Second Circuit arguing that it was not violating the ADA or Section 504 and that the district court's order exceeded it remedial authority. In a decision that thoroughly explores the relationship between program access and addressing architectural barriers, the Second Circuit rejected both arguments as despite BOE efforts, the plaintiffs was still denied "meaningful access" which includes the opportunity to cast a private [independent] ballot, and that the remedial authority of district courts under title II is quite broad. Moreover the order was well tailored to fit the scope of the violation.

> "[T]he first part of the order outlines policies and procedures for on-site accessibility coordinators and … [Assembly District monitors, trained in disability issues and charged with ensuring that poll sites are operated in accordance with all applicable standards, to visit poll sites at least twice on election days.] The second part [of the order] attempts to remedy barriers to access or ineffective accommodations that likely stem from BOE's failure to identify accessible facilities or determine how sites may be temporarily modified (the "Facilities Provisions"). The Facilities Provisions create a process by which [a] Third Party Expert surveys facilities and makes suggestions to BOE as to how to improve accessibility. BOE

then adopts the suggestions or confers with the Third Party Expert to find alternative measures." "If BOE, plaintiffs, and the Third Party Expert are unable to agree as to the implementation of a recommendation, BOE may petition [an appointed magistrate] for relief …." "Further, the remedial order provides accountability mechanisms…."

For DOJ Guidance, see http://www.ada.gov/ada_voting/ada_voting_ta.htm (September 2014) http://www.ada.gov/ada_voting/voting_solutions_ta/polling_place_solutions.htm (October 2014) *See also Cal. Council of the Blind v. County of Alameda*, 985 F. Supp. 2d 1229 (N.D. Cal. 2013) (motion to dismiss by county granted in part and denied in part); *Hindel v. Husted*, 875 F.3d 344 (6th Cir. 2017) (reversing and remanding district court's judgment on the pleadings for the defendant; requiring Ohio to implement certified electronic ballot marking tool for November 2018 election).

4. The National Federation of the Blind won a significant voting rights case in Maryland regarding Maryland's absentee voting program. *See National Federation of the Blind v. Lamone,* 813 F.3d 494 (4th Cir. 2016). Maryland only permitted absentee voting by use of a hardcopy ballot. Plaintiffs requested the availability of an online ballot marking tool, which would give them meaningful access to absentee voting by being able to vote privately and independently. The tool had been developed but not certified pursuant to state law requirements. The district court found that plaintiffs' proposed remedy was a reasonable modification that did not fundamentally alter Maryland's voting program. *Id.* at 502. On appeal, Maryland argued that its availability of in-person, accessible polling place voting gives voters with disabilities meaningful access to voting. The Fourth Circuit rejected that holistic perspective; instead, it found that the ADA regulations "clearly contemplate[] a focus on accessibility at a more granular level than entire government programs." *Id.* at 504. Further, the Fourth Circuit affirmed "the district court's conclusion that by effectively requiring disabled individuals to rely on the assistance of others to vote absentee, defendants have not provided plaintiffs with meaningful access to Maryland's absentee voting program." *Id.* at 504. Finally, the Fourth Circuit rejected the argument that the proposed modification would require a fundamental alteration in Maryland's voting program because it would cause them to act inconsistently with the state's certification requirement. In clear language, the Fourth Circuit found that the ADA "trumps state regulations that conflict with its requirements." *Id.* at 507, especially where those requirements are merely procedural.

3. Community Access

p. 229, at end of note 1, add: The Department of Justice continues to bring enforcement actions (or join enforcement actions brought by others) involving lack of emergency planning for individuals with disabilities. For example, a settlement was recently reached against the city of Brooklyn, New York. See http://www.cidny.org/resources/Class_Notice_FINAL.pdf. (notice of settlement). Similarly a settlement was reached in a case against the state of Arizona and various cities for their failure to provide text-to-911 service for plaintiffs who were deaf or hard of hearing. *See*

Enos v. Arizona, 2017 WL 553039 (D. Ariz. Feb. 10, 2017).

p. 230, at end of note 2, add:

3. People with disabilities often want access to city buildings and public rights-of-way within the city's recreational park program. Plaintiffs who bring such actions have trouble establishing standing as well as demonstrating that facilities, when viewed in their entirety, do not meet ADA standards. For one case in which plaintiffs attain standing but do not win on the merits, see *Kirola v. City and County of San Francisco*, 860 F.3d 1161 (9th Cir. 2017).

4. Curb Ramps

p. 248, at end of note 1, add:

Following the decision in *Barden*, the City of Lomita argued that it was not required to provide handicap-accessible public parking in on-street diagonal parking stalls because, unlike curb ramps, there is no specific regulatory requirement imposing such an obligation. Relying on the general regulatory language governing all Title II activities, such as 28 C.F.R. **§** 35.150 and 35.150(a), the Ninth Circuit ruled that the program accessibility rules do require the provision of on-street public parking even if there is no specific regulation requiring the installation of on-street public parking. *See Fortyune v. City of Lomita*, 766 F.3d 1098 (9th Cir. 2014).

p. 252, at end of note 10, add:

See also Chapman v. Pier 1 Imports, 779 F.3d 1001 (9th Cir. 2015) (upholding summary judgment for plaintiff on ADA claims related to store aisles but concluding that summary judgment for plaintiff was not warranted on ADA claims related to accessible sales counter).

5. Prisons and Jails

p. 260, add a new note 3

3. Eleven states have a blanket policy against use of motorized wheelchairs by inmates. The justifications for the exclusion are security concerns. Without a motorized wheelchair, many inmates would be entirely dependent on others pushing their manual chair. The Second Circuit has vacated and remanded a district court decision, which had granted summary judgment in favor of the New York State Department of Corrections in a case involving a motorized wheelchair user. *See Wright v. New York State Dept. of Corrections and Community Supervision,* 831 F.3d 64 (2nd Cir. 2016).

4. Effective communication cases are occurring in many settings, including the prison setting. The Fourth Circuit recently vacated and remanded a district court case involving a detainee who was deaf. *See Heyer v. United States Bureau of Prisons*, 849 F.3d

202 (4th Cir. 2017) (holding that there were genuine issues of material fact regarding substantial risk of serious harm from failure to have effective communication in various settings). A district court adopted a report and recommendation of a magistrate, which required that deaf and hard of hearing inmates' communications were as effective of those of hearing prisoners. *See McBride v. Michigan Department of Corrections*, 294 F. Supp.3d 695 (E.D. Mich. 2018).

5. An issue that occurs outside the context of the ADA is when it violates the Eighth Amendment to impose the death penalty on someone who is disabled. In *Atkins v. Virginia,* 536 U.S. 304 (2002), the Supreme Court held that executions of criminals who were "mentally retarded" constituted cruel and unusual punishment prohibited by the Eighth Amendment. In 2014, the Supreme Court concluded that a state's rule for determining if someone has an intellectual disability is unconstitutional under the Eighth Amendment if it has an arbitrary cut-off score of a 70 IQ. That cut-off created an unacceptable risk that a person with an intellectual disability would be executed in violation of the Eighth Amendment. *See Hall v. Florida,* 134 S. Ct. 1986 (2014). Most recently, in *Moore v. Texas,* 137 S. Ct. 1039 (2017), the Supreme Court vacated and remanded a decision by the Texas Criminal Court of Appeals to permit an execution of a prisoner who was allegedly intellectually disabled. It found that the state court deviated from prevailing clinical standards by overemphasizing prisoner's perceived adaptive strengths.

E. LICENSING RULES

p. 267, at end of note 3, add:

The United States Department of Justice reached a settlement agreement with the state of Louisiana regarding its character and fitness questions. See http://www.ada.gov/louisiana-supreme-court_sa.htm. Under the settlement agreement, questions must closely relate to the applicant's conduct rather than the applicant's diagnosis.

F. INTEGRATION

p. 285, add a new note 8

8. A landmark 2014 settlement that the Department of Justice attained against the state of Rhode Island may be the blueprint for future *Olmstead* litigation. Essentially, the case involved a common practice of a state sending people with developmental disabilities to what are called "sheltered workshops" for many years where they engage in work but get paid extremely minimal wages in an environment in which they work exclusively with people with disabilities. For example, one plaintiff was paid about $2 per hour and assembled jewelry, packed medical supplies into boxes, grated cheese and stuffed peppers for an Italian food company. He did that kind of work for thirty years in a sheltered workshop expecting but never moving from "training" into regular, paid employment. Under the settlement, the state is supposed to facilitate residents with developmental disabilities attain jobs in the community that pay at least the minimum wage. They are also

supposed to be supported in community activities rather than spend their days in disability-segregated environments. *See* http://www.ada.gov/olmstead/documents/ri-olmstead-statewide-agreement.pdf.

9. One issue that arises when *Olmstead* is enforced is what to do with individuals who are living in large institutional settings. Typically, the state tries to put them in community-based care but, sometimes, family members object to an individual being removed from an institutional setting. This issue recently arose in Illinois when the state started to close some of its facilities. *See Illinois League of Advocates for the Developmentally Disabled v. Illinois Department of Human Services,* 803 F.3d 872 (7th Cir. 2015). The plaintiffs in that case sought to enjoin the state from assessing the capacity of residents of one facility to reside in community-based facilities in the absence of guardian consent to the assessment, and to prevent that facility from being closed. The district court refused to grant the requested injunction and the Seventh Circuit affirmed. In its ruling, the Seventh Circuit noted that the "plaintiffs say that residents of community-based facilities are treated worse on average than residents of institutional facilities. But they have not substantiated their claim by a systematic comparison of residents of the two types of facilities." *Id.* at 875.

Chapter 5

ADA TITLE III

A. COVERED ENTITIES

2. Coverage of the Internet & Digital Technology

p. 314, at end of last full paragraph add:

The current trend is that courts in the Third, Sixth, Ninth, and Eleventh Circuits have found that entities need to be a physical structure to be covered by ADA Title III but that websites can be covered under a "gateway theory" as discussed above in the *Target* case. By contrast, courts in the First, Second and Seventh Circuits have concluded that places "of" public accommodation need not be physical structures to be covered by ADA Title III. As exemplified by *Andrews v. Blick Art Materials*, *LLC,* 268 F. Supp.3d 381 (E.D. N.Y. 2017), entities can be covered by ADA Title III when they sell products exclusively through a website. This is clearly an evolving area of the law. What is the current rule in your circuit?

p. 315, at end of first carry-over paragraph, add:

The Second Circuit affirmed on appeal, finding that digitalization of copyrighted works to provide print-disabled patrons with versions of all works contained in digital archive in formats accessible to them qualified as fair use. *See Authors Guild, Inc. v. HathiTrust,* 755 F.3d 87 (2nd Cir. 2014).

p. 318, at end of footnote 1 (at bottom of page), add:

On January 18, 2017, the Access Board published a final rule that jointly updates requirements for information and communication technology covered by Section 508 of the Rehabilitation Act and Section 255 of the Communication Act. The Section 508 Standards apply to electronic and information technology procured by the federal government, including computer hardware and software, websites, multimedia such as video, phone systems, and copiers. The Section 255 Guidelines address access to telecommunications products and services, and apply to manufacturers of telecommunication equipment. The final rule jointly updates and reorganizes the Section 508 and Section 255 guidelines in response to market trends and innovations, such as the convergence of technologies. The refresh also harmonizes these requirements with other guidelines and standards both in the U.S. and abroad, including standards issued by the European Commission and with the Web Content Accessibility Guidelines (WCAG), a globally recognized voluntary consensus standard for web content and ICT. *See* Information and Communication Technology (ICT) Final Standards and Guidelines, 36 CFR Parts 1193 and 1194, available at https://www.access-board.gov/guidelines-and-standards/communications-and-it/about-the-ict-refresh/final-rule (January 18, 2017).

p. 320, add a new note 6

6. Another way that digital technology can impede access for individuals who are blind is when they seek to use a debit or credit card to complete a purchase. For example, Lucky Brand Jeans store allows customers to swipe a debit or credit card to complete a purchase. These machines typically have touch screen displays that customers must use to key in their personal identification numbers ("PIN") when making a debit card transaction. Because individuals who are blind are unable to independently use these devices, they must seek the assistance of a third party to whom they must divulge their confidential PIN or forego using a debit card altogether. Lucky Brand has argued that it has no obligation to ensure that customers who are blind can make purchases using their debit payment option because neither the Title III regulations for the ADA Standards for Accessible Design contain such a specific requirement.

How would you respond to Lucky Brand's argument? See *New v. Lucky Brand Dungarees Store,* 51 F. Supp.3d 1284 (S.D. Fla. 2014) (dismissed for lack of standing because customer failed to adequately allege imminent future injury).

7. The Department of Justice and the U.S. Department of Education, Office for Civil Rights continue to take enforcement actions against universities whose web sites and services are not accessible to students who use JAWS software (or other screen readers) to read text. These actions are usually taken under Title II but the same principles would apply to a Title III entity. *See, e.g.,* *http://www2.ed.gov/documents/press-releases/youngstown-state-university-letter.pdf* (Youngstown State); http://www2.ed.gov/documents/press-releases/university-cincinnati-agreement.pdf (University of Cincinnati); https://nfb.org/national-federation-blind-and-two-blind-students-resolve-complaint-against-atlantic-cape-community (Atlantic Cape Community College). Here are some of the elements of the Atlantic Cape Community College consent decree:

- Conducting a technology audit and, based on the audit results, developing a plan to make all student-facing electronic and information technology used by ACCC accessible to students with disabilities no later than three years from the completion of the technology accessibility audit;
- Making ACCC's websites accessible to blind students within 240 days of the execution of the consent decree;
- Making ACCC's integrated library system and its website fully accessible to blind students;
- Developing a plan to provide accessible instructional materials, including textbooks, course materials, and tactile graphics, to blind students and to other students with disabilities at the same time that these materials are made available to students without disabilities, and to implement this plan no later than three years from the effective date of the consent decree;

- Requiring cooperation among faculty, staff, and ACCC's Disability Support Services office to handle accommodation requests made by students with disabilities;
- Reviewing and revising ACCC's policies and procedures for accommodating students with disabilities and for processing and resolving grievances brought by students with disabilities, including requiring ACCC's Disability Support Services office to self-report any failure to resolve a student's complaint or accommodation request, triggering an automatic grievance procedure; and
- Requiring training of all personnel on the Americans with Disabilities Act and on ACCC's policies for accommodating students with disabilities, as well as training for such students on their rights and the procedures available to them to enforce those rights.

In 2016 and 2017, the US Department of Education, Office for Civil Rights, opened over 100 investigations into whether the electronic information technology services of college and universities such as, web-sites, email systems, card catalogues, course management systems, and academic courseware were accessible to students with hearing and visual impairments. As a number of cases have settled, a common set of requirements has emerged:

- Conduct accessibility audit of websites
- Adopt standards for all technology
- Make web pages accessible using WCAG 2.0 Level AA as benchmark
- Set up system of on-going testing and accountability (including quality assurance)
- Accessibility Coordinator who has "sufficient resources and authority to coordinate and implement the EIT Accessibility Policy"
- Establish Procurement Procedures to ensure all third party products and sites are accessible.
- Verify vendor's claims of accessibility for third party materials and web pages
- Train all appropriate personnel on web accessibility
- New Content must be made accessible
- Must be a process for requesting legacy content
- Process for reporting of inaccessible content

See Aleeha Dudley v. Miami University, No. 1:14-cv-38 (S.D. Ohio filed January 10, 2014). *See* https://nfb.org/images/nfb/documents/pdf/miami%20teach.pdf (last viewed on May 22, 2014). Consent decree approved by Judge Susan J. Dlott on December 14, 2016. Consent decree may be found at https://www.ada.gov/miami_university_cd.html (last visited June 17, 2017.)

Does the duty of colleges and universities to make on-line and posted content have any limits? Does this duty extend to free content for the public? *See* University of California at Berkeley, DOJ investigation findings, DJ No. 204-11-309 (August 30, 2016), available at https://news.berkeley.edu/wp-content/uploads/2016/09/2016-08-30-UC-Berkeley-LOF.pdf

B. DISCRIMINATION (UNDER ADA TITLE II OR III

2. Specific Forms of Discrimination

b. Failure to Make Reasonable Modifications

p. 349, at the end of note 4, add:

On remand, the district court awarded $487,000 in attorney fees, expert fees and costs to Argenyi, who the court concluded was the prevailing party. It ordered Creighton to provide CART in didactic settings and sign-supported oral interpreters in small-group and clinical settings. It also suggested that the attorney, under ADA Title III, should bear the costs of interpreter expenses when Argenyi met with his lawyer. *See Argenyi v. Creighton University*, 2014 U.S. Dist. Lexis 63726 (D. Neb. 2014). The university has withdrawn its appeal.

c. Service animals

p. 359, at end of note 9, add:

Some students are requesting permission to bring an emotional support animal to class, rather than merely have the emotional support animal in student housing. In one determination letter, the U.S. Department of Education, Office for Civil Rights, concluded that such requests should be considered on a case-by-case basis for individual students who present sufficient documentation to support this form of accommodation. *See* https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03152416-a.pdf. What if another student in that classroom as an allergy to that breed of animal? *See Entine v. Lissner,* 2017 WL 5507619, No. 2:17-cv-946 (S.D. Ohio Nov. 17, 2017) (requiring university to permit student to have a service animal in campus housing despite allegation by another student that she was allergic to the service animal).

p. 360, at the end of note 12, add:

13. There is not much litigation about miniature horses. The Sixth Circuit recently reversed a grant of summary judgment in favor of the city of Blue Ash in a case involving a family who wanted to maintain a miniature horse in their backyard for the use of their disabled daughter when she wanted to play in the backyard. *See Anderson v. City of Blue Ash,* 798 F.3d 338 (6th Cir. 2015). The court recited the various factors that are supposed to be weighed in determining if it is reasonable to permit a family to house a miniature horse and recognized that each factor, such as being house trained, does not have to be met for a family to have the right under the ADA to maintain a miniature horse. For example, is it sufficient under ADA and FHAA for the child to only use the horse in the backyard and not use the horse to travel beyond the house or even inside the house? Does the horse need extensive training? What evidence of the horse's usefulness to the child is necessary?

3. Provision of Auxiliary Aids or Services
a. Statutory and Regulatory Language
b. Case Law

p. 380, add at end of note 8:

8. On Nov. 21, 2016, DOJ issued its Final Rule regarding movie theaters and captioning/audio description, https://www.ada.gov/regs2016/movie_captioning_rule_page.html. Paul McGann successfully argued that a movie theatre violated the ADA by not providing him with a tactile interpreter as an auxiliary aid or service. *See McGann v. Cinemark*, 873 F.3d 218 (3rd Cir. 2017). He filed this lawsuit before DOJ had issued its final rule but the court's decision is consistent with that rule.

9. Hospitals continue to be sued for not providing effective communication to patients or their family members. *See Perez v. Doctors Hospital at Renaissance, Ltd.,* 624 Fed. Appx. 180, 2015 WL 5085775 (5th Cir. 2015). Hospitals sometimes use video remote imaging machines ("VRI" machines) to facilitate conversations through an interpreter at a remote location. In this case, the parents (who were deaf) alleged that the VRI machines did not always work or staff did not always know how to use them, which made it difficult to communicate with staff as they sought chemotherapy treatments for their young child. The district court had granted summary judgment for the hospital but the Fifth Circuit reversed. *See also Silva v. Baptist Health South,* 856 F.3d 824 (11th Cir. 2017) (reversing and remanding district court's grant of summary judgment to defendant hospital in case involving hearing-impaired patients who sought auxiliary aids so they could communicate effectively with hospital staff.) In *Silva*, the 11th Circuit rejected the demanding standard of the district court, requiring deaf plaintiffs to establish injury in fact by demonstrating actual misdiagnosis, incorrect treatment or adverse medical consequences. Rather, it was sufficient for the plaintiffs to show that they experienced "impairment in their ability to communicate" "medically relevant information." That holding is important to arguments made in other cases that courts need to consider the quality of communication in assessing whether it meets the ADA Title III standard. The decision of the appellate court also rested on specific standards set by DOJ in its Title III auxiliary aids regulation concerning video remote interpreting (VRI), as the hospital staff was alleged to have been poorly trained in the operation of the VRI machines and the hospital appeared to have insufficient band-width to provide useable VRI services. *But see Durand v. Fairview Health Services,* 2017 WL 217649 (D. Minn. Jan. 18, 2017) (granting defendant hospital's motion for summary judgment in case involving failure to provide auxiliary aids for parents, both of whom were deaf, during their son's hospitalization).

7. Examinations and Courses
a. Statutory and Regulatory Provisions

p. 404, add to the end of note 5:

The Law School Admission Council recently entered into an agreement with the United States Department of Justice regarding its testing practices. Under the consent

decree, LSAC will pay $7.74 million in penalties and damages to compensate over 6,000 individuals nationwide who applied for testing accommodations on the LSAT over the past five years. LSAC will also end its practice of "flagging" or annotating, LSAT score reports for test takers with disabilities who have received extended time as an accommodation. *See* *http://www.justice.gov/opa/pr/2014/May/14-crt-536.html* (last viewed on May 22, 2014). The consent decree created a "Best Practices" panel to resolve about ten issues under the decree. LSAC has challenged most of the recommendations of the Best Practices Panel and this matter was subject to further hearings before the district court on July 31, 2015. The district court largely upheld the recommendations of the Best Practices Panel and they are now being implemented by LSAC. *See Department of Fair Employment & Housing v. Law School Admission Council Inc*, No. 12-CV-01830-JCS, 2015 WL 4719613 (N.D. Cal. Aug. 7, 2015). On March 4, 2018, LSAC was held in contempt of court for not complying with the consent decree. The court extended the consent decree by two years and required additional audits of their compliance. *See Department of Fair Employment and Housing v. Law School Admission Council,* 2018 WL 1156606 (N.D. Calif. March 5, 2018).

The Department of Justice has issued regulations to implement ADA 2008 Amendments, focusing on standardized testing and higher education entities, which have extensive discussion of documentation of disabilities, ADHD, and condition, manner, or duration analysis for disabilities that exist on a spectrum. *See* 28 CFR Parts 35 and 36, Amendment of Americans with Disabilities Act Title II and Title III Regulations to Implement ADA Amendments Act of 2008 (August 16, 2016), available at http://federalregister.gov/a/2016-17417.

p. 404, add after note 6:

6. The Department of Justice has issued new guidance on testing accommodations that tracks the recommendations of the LSAC Best Practices Panel. *See* https://www.ada.gov/regs2014/testing_accommodations.html. They are copied below in their entirety.

* * *

Testing Accommodations

> Standardized examinations and other high-stakes tests are gateways to educational and employment opportunities. Whether seeking admission to a high school, college, or graduate program, or attempting to obtain a professional license or certification for a trade, it is difficult to achieve such goals without sitting for some kind of standardized exam or high-stakes test. While many testing entities have made efforts to ensure equal opportunity for individuals with disabilities, the Department continues to receive questions and complaints relating to excessive and burdensome documentation demands, failures to provide needed testing accommodations, and failures to respond to requests for testing accommodations in

a timely manner.

The Americans with Disabilities Act (ADA) ensures that individuals with disabilities have the opportunity to fairly compete for and pursue such opportunities by requiring testing entities to offer exams in a manner accessible to persons with disabilities. When needed testing accommodations are provided, test-takers can demonstrate their true aptitude.

The Department of Justice (Department) published revised final regulations implementing the ADA for title II (State and local government services) and title III (public accommodations and commercial facilities) on September 15, 2010. These rules clarify and refine issues that have arisen over the past 20 years and contain new and updated requirements.

Overview

This publication provides technical assistance on testing accommodations for individuals with disabilities who take standardized exams and other high-stakes tests. It addresses the obligations of testing entities, which include private, state, or local government entities that offer exams related to applications, licensing, certification, or credentialing for secondary (high school), postsecondary (college and graduate school), professional (law, medicine, etc.), or trade (cosmetology, electrician, etc.) purposes. Who is entitled to testing accommodations, what types of testing accommodations must be provided, and what documentation may be required of the person requesting testing accommodations are also discussed.

What Kinds Of Tests Are Covered?

Exams administered by any private, state, or local government entity related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes are covered by the ADA and testing accommodations, pursuant to the ADA, must be provided.[1]

Examples of covered exams include:

- High school equivalency exams (such as the GED);
- High school entrance exams (such as the SSAT or ISEE);
- College entrance exams (such as the SAT or ACT);
- Exams for admission to professional schools (such as the LSAT or MCAT);

- Admissions exams for graduate schools (such as the GRE or GMAT); and

- Licensing exams for trade purposes (such as cosmetology) or professional purposes (such as bar exams or medical licensing exams, including clinical assessments).

What Are Testing Accommodations?

Testing accommodations are changes to the regular testing environment and auxiliary aids and services[2] that allow individuals with disabilities to demonstrate their true aptitude or achievement level on standardized exams or other high-stakes tests.

Examples of the wide range of testing accommodations that may be required include:

- Braille or large-print exam booklets;

- Screen reading technology;

- Scribes to transfer answers to Scantron bubble sheets or record dictated notes and essays;

- Extended time;

- Wheelchair-accessible testing stations;

- Distraction-free rooms;

- Physical prompts (such as for individuals with hearing impairments); and

- Permission to bring and take medications during the exam (for example, for individuals with diabetes who must monitor their blood sugar and administer insulin).

Who Is Eligible To Receive Testing Accommodations?

Individuals with disabilities are eligible to receive necessary testing accommodations. Under the ADA, an individual with a disability is a person who has a physical or mental impairment that substantially limits a major life activity (such as seeing, hearing, learning, reading, concentrating, or thinking) or a major bodily function (such as the neurological, endocrine, or digestive system). The determination of whether an individual has a disability generally should not demand extensive analysis and must be made without regard to any positive effects

of measures such as medication, medical supplies or equipment, low-vision devices (other than ordinary eyeglasses or contact lenses), prosthetics, hearing aids and cochlear
implants, or mobility devices. However, negative effects, such as side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially limits a major life activity.

A substantial limitation of a major life activity may be based on the extent to which the impairment affects the condition, manner, or duration in which the individual performs the major life activity. To be "substantially limited" in a major life activity does not require that the person be unable to perform the activity. In determining whether an individual is substantially limited in a major life activity, it may be useful to consider, when compared to most people in the general population, the conditions under which the individual performs the activity or the manner in which the activity is performed. It may also be useful to consider the length of time an individual can perform a major life activity or the length of time it takes an individual to perform a major life activity, as compared to most people in the general population. For example:

- The condition or manner under which an individual who has had a hand amputated performs manual tasks may be more cumbersome, or require more effort or time, than the way most people in the general population would perform the same tasks.

- The condition or manner under which someone with coronary artery disease performs the major life activity of walking would be substantially limited if the individual experiences shortness of breath and fatigue when walking distances that most people could walk without experiencing such effects.

- A person whose back or leg impairment precludes him or her from sitting for more than two hours without significant pain would be substantially limited in sitting, because most people can sit for more than two hours without significant pain.

A person with a history of academic success may still be a person with a disability who is entitled to testing accommodations under the ADA. A history of academic success does not mean that person does not have a disability that requires testing accommodations. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in one or more of the major life activities of reading, writing, speaking, or learning, because of the additional time or effort he or she must spend to read, write, speak, or learn compared to most people in the general population.

What Testing Accommodations Must Be Provided?

Testing entities must ensure that the test scores of individuals with disabilities accurately reflect the individual's aptitude or achievement level or whatever skill the exam or test is intended to measure. A testing entity must administer its exam so that it accurately reflects an individual's aptitude, achievement level, or the skill that the exam purports to measure, rather than the individual's impairment (except where the impaired skill is one the exam purports to measure).[3]

Example: An individual may be entitled to the use of a basic calculator during exams as a testing accommodation. If the objective of the test is to measure one's ability to solve algebra equations, for example, and the ability to perform basic math computations (e.g., addition, subtraction, multiplication, and division), is secondary to the objective of the test, then a basic calculator may be an appropriate testing accommodation. If, however, the objective of the test is to measure the individual's understanding of, and ability to perform, math computations, then it likely would not be appropriate to permit a calculator as a testing accommodation.

What Kind Of Documentation Is Sufficient To Support A Request For Testing Accommodations?

All testing entities must adhere to the following principles regarding what may and may not be required when a person with a disability requests a testing accommodation.

Documentation. Any documentation if required by a testing entity in support of a request for testing accommodations must be reasonable and limited to the need for the requested testing accommodations. Requests for supporting documentation should be narrowly tailored to the information needed to determine the nature of the candidate's disability and his or her need for the requested testing accommodation. Appropriate documentation will vary depending on the nature of the disability and the specific testing accommodation requested.

Examples of types of documentation include:

- Recommendations of qualified professionals;
- Proof of past testing accommodations;
- Observations by educators;
- Results of psycho-educational or other professional evaluations;

- An applicant's history of diagnosis; and
- An applicant's statement of his or her history regarding testing accommodations.

Depending on the particular testing accommodation request and the nature of the disability, however, a testing entity may only need one or two of the above documents to determine the nature of the candidate's disability and his or her need for the requested testing accommodation. If so, a testing entity should generally limit its request for documentation to those one or two items and should generally evaluate the testing accommodation request based on those limited documents without requiring further documentation.

- **Past Testing Accommodations. Proof of past testing accommodations in similar test settings is generally sufficient to support a request for the same testing accommodations for a current standardized exam or other high-stakes test**.
    - **Past Testing Accommodations on Similar Standardized Exams or High-Stakes Tests.** If a candidate requests the same testing accommodations he or she previously received on a similar standardized exam or high-stakes test, provides proof of having received the previous testing accommodations, and certifies his or her current need for the testing accommodations due to disability, then a testing entity should generally grant the same testing accommodations for the current standardized exam or high-stakes test without requesting further documentation from the candidate. So, for example, a person with a disability who receives a testing accommodation to sit for the SAT should generally get the same testing accommodation to take the GRE, LSAC, or MCAT.
- **Formal Public School Accommodations. If a candidate previously received testing accommodations under an Individualized Education Program (IEP)[3] or a Section 504 Plan,[4] he or she should generally receive the same testing accommodations for a current standardized exam or high-stakes test.** If a candidate shows the receipt of testing accommodations in his or her most recent IEP or Section 504 Plan, and certifies his or her current need for the testing accommodations due to disability, then a testing entity should generally grant those same testing accommodations for the current standardized exam or high-stakes test without requesting further documentation from the candidate. This would include students with disabilities publicly-placed and funded in a private school under the IDEA or Section 504 placement procedures whose IEP or Section 504 Plan addresses needed testing accommodations.

- **Example.** Where a student with a Section 504 Plan in place since middle school that includes the testing accommodations of extended time and a quiet room is seeking those same testing accommodations for a high-stakes test, and certifies that he or she still needs those testing accommodations, the testing entity receiving such documentation should generally grant the request.

- **Private School Testing Accommodations. If a candidate received testing accommodations in private school for similar tests under a formal policy, he or she should generally receive the same testing accommodations for a current standardized exam or high-stakes test.** Testing accommodations are generally provided to a parentally-placed private school student with disabilities pursuant to a formal policy and are documented for that particular student. If a candidate shows a consistent history of having received testing accommodations for similar tests, and certifies his or her current need for the testing accommodations due to disability, then a testing entity should generally grant those same testing accommodations for the current standardized exam or high-stakes test without requesting further documentation from the candidate.

  - **Example.** A private school student received a large-print test and a scribe as testing accommodations on similar tests throughout high school pursuant to a formal, documented accommodation policy and plan. Where the student provides documentation of receiving these testing accommodations, and certifies that he or she still needs the testing accommodations due to disability, a testing entity should generally grant the candidate's request for the same testing accommodations without requesting further documentation.

- **First Time Requests or Informal Classroom Testing Accommodations. An absence of previous formal testing accommodations does not preclude a candidate from receiving testing accommodations.** Candidates who are individuals with disabilities and have never previously received testing accommodations may also be entitled to receive them for a current standardized exam or high- stakes test. In the absence of documentation of prior testing accommodations, testing entities should consider the entirety of a candidate's history, including informal testing accommodations,to determine whether that history indicates a current need for testing accommodations.

- **Example.** A high school senior is in a car accident that results in a severe concussion. The report from the treating specialist says that the student has post-concussion syndrome that may take up to a year to resolve, and that while his brain is healing he will need extended time and a quiet room when taking exams. Although the student has never previously received testing accommodations, he may nevertheless be entitled to the requested testing accommodations for standardized exams and high-stakes tests as long as the post-concussion syndrome persists.

- **Example.** A student with a diagnosis of ADHD and an anxiety disorder received informal, undocumented testing accommodations throughout high school, including time to complete tests after school or at lunchtime. In support of a request for extended time on a standardized exam, the student provides documentation of her diagnoses and their effects on test-taking in the form of a doctor's letter; a statement explaining her history of informal classroom accommodations for the stated disabilities; and certifies that she still needs extended time due to her disabilities. Although the student has never previously received testing accommodations through an IEP, Section 504 Plan, or a formal private school policy, she may nevertheless be entitled to extended time for the standardized exam.

- **Qualified Professionals. Testing entities should defer to documentation from a qualified professional who has made an individualized assessment of the candidate that supports the need for the requested testing accommodations.** Qualified professionals are licensed or otherwise properly credentialed and possess expertise in the disability for which modifications or accommodations are sought. Candidates who submit documentation (such as reports, evaluations, or letters) that is based on careful consideration of the candidate by a qualified professional should not be required by testing entities to submit additional documentation. A testing entity should generally accept such documentation and provide the recommended testing accommodation without further inquiry.

    - Reports from qualified professionals who have evaluated the candidate should take precedence over reports from testing entity reviewers who have never conducted the requisite assessment of the candidate for diagnosis and treatment. This is especially important for individuals with learning disabilities because face-to-face interaction is a critical component of an accurate evaluation, diagnosis, and determination of appropriate testing accommodations.

- A qualified professional's decision not to provide results from a specific test or evaluation instrument should not preclude approval of a request for testing accommodations where the documentation provided by the candidate, in its entirety, demonstrates that the candidate has a disability and needs a requested testing accommodation. For example, if a candidate submits documentation from a qualified professional that demonstrates a consistent history of a reading disorder diagnosis and that recommends the candidate receive double time on standardized exams based on a personal evaluation of the candidate, a testing entity should provide the candidate with double time. This is true even if the qualified professional does not include every test or subtest score preferred by the testing entity in the psychoeducational or neuropsychological report.

How Quickly Should A Testing Entity Respond To A Request For Testing Accommodations?

A testing entity must respond in a timely manner to requests for testing accommodations so as to ensure equal opportunity for individuals with disabilities. Testing entities should ensure that their process for reviewing and approving testing accommodations responds in time for applicants to register and prepare for the test.[6] In addition, the process should provide applicants with a reasonable opportunity to respond to any requests for additional information from the testing entity, and still be able to take the test in the same testing cycle. Failure by a testing entity to act in a timely manner, coupled with seeking unnecessary documentation, could result in such an extended delay that it constitutes a denial of equal opportunity or equal treatment in an examination setting for persons with disabilities.

How Should Testing Entities Report Test Scores for Test-Takers Receiving Disability-Related Accommodations?

Testing entities should report accommodated scores in the same way they report scores generally. Testing entities must not decline to report scores for test-takers with disabilities receiving accommodations under the ADA.

Flagging policies that impede individuals with disabilities from fairly competing for and pursuing educational and employment opportunities are prohibited by the ADA. "Flagging" is the policy of annotating test scores or otherwise reporting scores in a manner that indicates the exam was taken with a testing accommodation. Flagging announces to anyone receiving the exam scores that the test-taker has a disability and suggests that the scores are not valid or deserved. Flagging also discourages test-takers with disabilities from exercising their right to testing accommodations under the ADA for fear of discrimination. Flagging must not be used to circumvent the requirement that testing entities provide testing accommodations for persons with disabilities and ensure that the test results for persons with disabilities reflect their abilities, not their disabilities.

To view model testing accommodation practices and for more information about the ADA, please visit our website or call our toll-free number:

- **ADA Website: www.ADA.gov**
- **ADA Information Line: 800-514-0301 (Voice) and 800-514-0383 (TTY); M-W, F 9:30 a.m. – 5:30 p.m., Th 12:30 p.m. – 5:30 p.m. (Eastern Time)**
- **Model Testing Accommodation Practices Resulting From Recent Litigation:**

  http://www.ada.gov/lsac_best_practices_report.docx

For persons with disabilities, this publication is available in alternate formats. Duplication of this document is encouraged.

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1 This document does not address how the requirements or protections, as applicable, of Title II of the ADA, Section 504 of the Rehabilitation Act, the assessment provisions in the Elementary and Secondary Education Act (ESEA) and the Individuals with Disabilities Education Act (IDEA), and their implementing regulations, apply to, or interact with, the administration of state-wide and district-wide assessments to students with disabilities conducted by public educational entities.

2 *See* 28 C.F.R. §§ 36.303(b), 36.309(b)(3) (providing non-exhaustive lists of auxiliary aids and services).

3 Under Section 309 of the ADA, any person (including both public and private entities) that offers examinations related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes must offer such examinations "in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals." 42 U.S.C. § 12189. Under regulations implementing this ADA provision, any private entity that offers such examinations must "assure that the examination is selected and administered so as to best ensure that, when the examination is administered to an individual with a disability that impairs sensory, manual or

speaking skills, the examination results accurately reflect the individual´s aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual´s impaired sensory, manual, or speaking skills (except where those skills are the factors that the examination purports to measure)." 28 C.F.R. § 36.309. Likewise, under regulations implementing title II of the ADA, public entities offering examinations must ensure that their exams do not provide qualified persons with disabilities with aids, benefits, or services that are not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others, 28 C.F.R. § 35.130(b)(1)(iii), and may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability. 28 C.F.R. § 35.130(b)(6). Both the title II and title III regulations also require public and private testing entities to provide modifications and auxiliary aids and services for individuals with disabilities unless the entity can demonstrate an applicable defense. 28 C.F.R. §§ 35.130(b)(7), 35.160(b), 35.164; 28 C.F.R. §§ 36.309(b)(1)(iv-vi), (b)(2), 36.309(b)(3).

4 An IEP contains the special education and related services and supplementary aids and services provided to an eligible student with a disability under Part B of the IDEA, 20 U.S.C. §§ 1400 *et seq*. and 34
C.F.R. part 300.

5 A Section 504 Plan could contain the regular or special education and related aids and services provided pursuant to section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 and 34 C.F.R. part 104.

6 Testing entities must offer examinations to individuals with disabilities in as timely a manner as offered to others and should not impose earlier registration deadlines on those seeking testing accommodations.

Chapter 6
PRIMARY AND SECONDARY EDUCATIONAL INSTITUTIONS

A. HISTORICAL BACKGROUND AND OVERVIEW

p. 420, at the end of note 1, add:

The IDEA imposes on a school district what is sometimes called a "child find" obligation. *See* 20 U.S.C. § 1414. When a school district has reason to suspect that a child is disabled, then it must assess the child "in all areas of suspected disability" using appropriate assessment tools and strategies. *Id.* at § 1414(b)(3). In *Timothy O. v. Paso Robles Unified School District,* 822 F.3d 1105 (9th Cir. 2016), the school district had failed to assess a child for autism using formal evaluative criteria. The parents filed a due process complaint and received a multi-day hearing before at state ALJ. The ALJ found that the school district did not need to assess the child for autism and the district court affirmed. *Id.* at 1118. The Ninth Circuit found that an information observation of the child did not relieve it of its obligation to conduct a formal assessment. In reversing the district court, the Ninth Circuit said:

> To hold that Peck's informal observation could overcome Paso Robles' statutory obligation to formally assess Luke for a suspected disability would allow school districts to disregard expressed and informed concerns about a child's disabilities on the basis of prejudicial stereotypes about what certain disabilities look like, rather than on the objective evidence and the thorough and reliable standardized testing that the IDEA requires. This result would be particularly devastating for children with autism because, as Dr. Freeman explained at the administrative hearing, the condition "can be very subtle" and manifest itself in many different ways. It would likely be missed by an informal observation, resulting in many children remaining undiagnosed, untreated, and unable to reach their full educational potential. The effect, moreover, would be felt most heavily by children from disadvantaged families without the sophistication or resources to obtain outside professional opinions.
>
> *Timothy O. v. Paso Robles Unified Sch. Dist.,* 822 F.3d 1105, 1122 (9th Cir. 2016)

p. 421, at the end of note 2, add:

The requirement not to make a determination based on one single test sometimes arises in the context of students who may be considered "twice exceptional" in that they have a very high cognitive aptitude while also have a specific learning disability in reading. The First Circuit recently vacated and remanded a district court opinion, which had concluded that a student did not have a specific learning disability and thus was not eligible to receive special education and related services under the IDEA. *See Doe v. Cape Elizabeth*

School District, 832 F.3d 69 (1st Cir. 2016) (finding that hearing officer and lower court placed too much weight on student's overall academic achievement and insufficient attention to her reading fluency skills in determining if she qualified as disabled under IDEA).

p. 421, at the end of note 3, add:

Because the IDEA does not specifically list dyslexia as a specified disability (and many state regulations also do not list dyslexia), the use of this and related terms has spawned some confusion. The United States Department of Education has sought to clarify with a Dear Colleague Letter, stating that," [N]othing in the IDEA … would prohibit the use of the terms dyslexia, dyscalculia, and dysgraphia in IDEA evaluation, eligibility determinations, or IEP documents." (October 23, 2015). http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-dyslexia-10-2015.pdf

p. 422, at the end of note 5, add:

The Third Circuit ruled that a mother had to exhaust IDEA's administrative process before bringing retaliation claims against school district under Rehabilitation Act and ADA because her retaliation claim related to her advocacy for her child under the IDEA. *See Batchelor v. Rose Tree Media School District*, 759 F.3d 266 (3rd Cir. 2014).

The Supreme Court recently offered guidance on the exhaustion requirement in *Fry v. Napoleon Community Schools,* 137 S. Ct. 743 (2017). Reversing the Sixth Circuit, the Supreme Court said the proper test in determining whether IDEA exhaustion is required is whether "the gravamen of a complaint against a school concerns the denial of a FAPE, or instead addresses disability-based discrimination." *Id.* at 756. To answer that question, the Court said that one can gain an important "clue" as to whether the gravamen of an ADA/Section 504 complaint is an IDEA matter by asking "a pair of hypothetical questions":

- "First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school – say, a public theater or library?"
- "[S]econd, could an *adult* at the school – say, an employee or visitor – have pressed essentially the same grievance?"

Id. at 756.

The Court then provided two contrasting examples to show how those rules would be implemented. First, a child uses a wheelchair and the school building lacks any ramps. Because the child could sue a municipal library or theatre for failing to have a ramp under Section 504 or the ADA, then she could sue the school district under Section 504 or the ADA without exhausting her IDEA remedies. Second, a child with a learning disability sues a school district to obtain remedial tutoring in math. Because one could not obtain that kind of relief against a public theater or library, the student would have to exhaust IDEA remedies.

Further, to determine the "gravamen" of a suit, the Court said one might look at whether the parent ever sought to invoke the IDEA's procedures before switching to the

Section 504/ADA remedies. "A plaintiff's initial choice to pursue that process may suggest that she is indeed seeking relief for the denial of a FAPE – with the shift to judicial proceedings prior to full exhaustion reflecting only strategic calculations about how to maximize the prospects of such a remedy." *Id.* at 757. The *Fry* decision was path-breaking in suggesting that students who were seeking services that are available under ADA or Section 504, outside the school setting, need not exhaust their IDEA remedies before suing directly in federal court under ADA or Section 504. Although the Frys' case involved access to a service animal in the classroom, the decision could be especially helpful for students who have effective communication complaints, like requests for sign language interpreters or Braille text where the ADA effective communication regulations (which are also applicable to Section 504 claims) are much stronger than the IDEA auxiliary aide rules. *See* 28 C.F.R. § 35.160(a)(1) ("A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.")

p. 422, at the end of note 8, add:

9. Typically, parents cannot bring a Section 504/ADA claim until they have exhausted their IDEA remedies. In *A.G. v. Paradise Valley Unified School District No. 69,* 815 F.3d 1195 (9th Cir. 2016), the Ninth Circuit reversed the district court's dismissal of a ADA and Section 504 claim. The parents had sought administrative remedies under IDEA and the parties entered into a settlement agreement in 2012 releasing plaintiffs' IDEA claims. The settlement agreement expressly reserved plaintiffs' ability to proceed on their Section 504 and ADA claims, which were already pending in federal court. In reversing the district court's summary judgment decision, the Ninth Circuit emphasized that Section 504 has a broader "meaningful access" standard than the IDEA. The court emphasized that the Section 504 regulations require a school district to provide "regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons *as adequately* as the needs of nonhandicapped persons are met." 34 C.F.R. § 104.33(b)(1) (emphasis added). Under this regulation, the plaintiffs were allowed to go forward with the argument that the educational placement "denied her meaningful access because certain educational opportunities such as art, music, and gifted clases were not available … and because she was inappropriately placed in the Intervention Room for a total of approximately sixty hours." *Id.* at 1205. The Ninth Circuit also broadly interpreted the "reasonable accommodation" requirement that applied to this educational situation. The Ninth Circuit cited the rule that a plaintiff must show that the "defendant failed to make reasonable modifications that would accommodate the plaintiff's disability without fundamentally altering the nature of the program or activity." *Id.* at 1206. Even though the parents had not requested some of the services that they now argue the school district should have provided, the Ninth Circuit said that such a request is not legally necessary where the parents "did not have the expertise – nor the legal duty – to determine what accommodations might allow [child] to remain in her regular educational environment." *Id.* at 1206. This case may serve as an important precedent for the broader rights available to K-12 students under Section 504 in comparison to IDEA.

10. The single largest number of elementary and secondary disability discrimination complaints received by the US Department of Education, Office for Civil Rights, concern students with ADHD. In July of 2016, OCR issued extensive guidance to educators, parents, and students on this topic: *Dear Colleague Letter (DCL) on Students with ADHD* and accompanying *Resource Guide on Students with ADHD, and* 2) *Know Your Rights: Students with ADHD.* This document covers what is ADHD, documentation of ADHD, coverage under Section 504 and the IDEA, identification, evaluation, placement (services) and due process (procedural safeguards). https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201607-504-adhd.pdf (last visited July 12, 2017)

B. APPROPRIATE EDUCATION

p. 437, at the end of note 4, add:

In *K.M. v. Tustin Unified*, 725 F.3d 1088 (9th Cir. 2013), the Ninth Circuit reversed and remanded the district court case, which had granted summary judgment for the school district, in a case involving a student with a hearing impairment. The Ninth Circuit ruled that a school district's compliance with its obligations to students with hearing impairments did not necessarily establish compliance with its effective communication obligations to that child under Title II of the ADA. The U.S. Department of Justice and U.S. Department of Education, Office for Civil Rights have issued a joint "Dear Colleague" letter reinforcing the Ninth Circuit's decision. *See* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-effective-communication-201411.pdf (last viewed on June 24, 2015).

p. 437, at the end of note 5, add:

The Supreme Court recently decided *Endrew F. v. Douglas County School District RE-1,* 137 S. Ct. 988 (2017). The issue was the definition of FAPE under the IDEA. The parents withdrew their child from public school and enrolled him in a private school that specialized in educating autistic children. They sought tuition reimbursement because they claimed the school district had failed to provide him with FAPE. They filed a due process complaint. The ALJ denied the request and the district court affirmed the denial. The Tenth Circuit also affirmed. As the Tenth Circuit recognized, the circuits have somewhat different standards in determining whether a child has been provided with FAPE. Some circuits use a "meaningful educational benefit" standard whereas others, like the Tenth Circuit, use a "some educational benefit" standard. "Some education benefit" is the language found in *Rowley*. In *Endrew F.,* the parents argued that the failure by the school district to address their child's behavioral issues resulted in his being unable to make educational progress in the classroom. The lower courts found, and the Tenth Circuit, affirmed that the child had made "some academic progress." Arguably, if the standard had been higher, the parents could have prevailed and received tuition reimbursement. The Supreme Court reversed the Tenth Circuit's exceptionally narrow test for determining whether an IEP was appropriate, but it declined to reconsider *Rowley*. It reaffirmed *Rowley's* "meaningful educational benefit" standard, concluding that it was inappropriate to reconsider *Rowley* to

create a higher, equal educational opportunity standard, as plaintiffs sought, without further guidance from Congress through an IDEA amendment.

p. 438, at the end of note 9, add:

10. In determining whether an IEP complies with the IDEA courts make a two-part inquiry that is, first, procedural, and, second, substantive. The *Rowley* case governs the substantive rule. The IDEA has language that governs the procedural rule. Procedural violations will entitle parents to relief only they:

> (I) impeded the child's right to a free appropriate public education;
> (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
> (III) caused a deprivation of educational benefits.
>
> 20 U.S.C.A. § 1415.

Mere procedural irregularities without satisfaction of one of these criteria do not provide a basis for relief. It is difficult for parents to meet that burden of proof. In *K.T. v. New York City Department of Education,* 822 F.3d 95 (2nd Cir. 2016), the Second Circuit reversed the summary judgment decision of the district court, which had affirmed the administrative determinations that the child was entitled to no relief for the procedural violations that had occurred. The court found that the following procedural violations were sufficient, on a cumulative basis, to meet that legal standard: failure to memorialize which evaluative information was reviewed, omissions of functional behavior assessments and behavioral intervention plan, failure to satisfy state regulations regarding frequency and group size for speech and language services, inadequate speech and language services, and failure to comply with state regulations requiring counseling and training for parents.

C. RELATED SERVICES

p. 442, at the end of note 3, add:

See also American Nurses Association v. Torlakson, 57 Cal.4th 570, 160 Cal. Rptr.3d 370 (Calif. 2013) (Nursing Practice Act did not prohibit school personnel other than licensed health care providers to administer medication). *See also K.C. v. Torlakson*, 762 F.3d 963 (9th Cir. 2014) (attorney fees).

E. REMEDIES

p. 456, at the end of note 4, add:

In *B.D. v. District of Columbia,* 817 F.3d 792 (D.C. Cir. 2016), the D.C. Circuit reversed the district court's summary judgment decision on the issue of the adequacy of a hearing

officer's compensatory education award. The hearing officer had ordered five hours of occupational therapy per week for three months to help the student redress the negative behaviors that had manifested or worsened during the school year but declined to order any compensatory education to provide the student with the educational benefits the student missed while having a denial of FAPE. Because the evidence indicated that the child failed to make meaningful educational progress during the FAPE denial period, the court ruled that "the Hearing Officer had an obligation either to fashion a compensatory education program to redress that harm or to provide an adequate explanation for his decision not to do so." *Id.* at 799. Thus, although the Hearing Officer had discretion in fashioning a compensatory education award, the district court was wrong to approve the denial of *any* compensator education award.

p. 460, at end of note 11, add:

12. Not all procedural violations constitute a denial of FAPE. A child is denied FAPE when procedural inadequacies result in the loss of an educational opportunity or seriously infringe on the parents' opportunity to participate in the IEP formulation process. A procedural error is harmless if the student is substantively ineligible for IDEA benefits. The Ninth Circuit recently found that procedural violations did cause a denial of FAPE, reversing and remanding the district court opinion. *See L.J. by and through Hudson v. Pittsburg Unified School District,* 850 F.3d 996 (9th Cir. 2017) (finding the School District violated important procedural safeguards such as failing to disclose assessments, treatment plans, and progress notes, which deprived the student's mother of her right to informed consent; a failure to conduct a health assessment rendered the IEP team unable to evaluate and address the student's medication and treatment related needs). *See also M.C. v. Antelope Valley Union High School District,* 852 F.3d 840 (9th Cir. 2017)(school district violated procedural requirements of IDEA by failing to present accurate offer of services in IEP, and then unilaterally revising IEP; by failing to identify in IEP the types of assistive technology it offered the student; and by failing to respond to mother's complaint violated IDEA.)

Chapter 7
HIGHER EDUCATION

C. ADMISSIONS
1. Pre-Admission Inquiries

p. 498, add note 4:

4. Students and universities often disagree about whether a student is "qualified." Consider these two fact patterns:

a. Carrie Johnson is a student with dyslexia who was admitted into defendant's surgical technologist program. She requested various accommodations include extended time to take tests, a reader to use while taking tests, scanning of course materials into the reader, and a word bank to use on tests. The reader had various functional problems and lacked internet access (which plaintiff needed to access all of its functionality). Although the defendant provided plaintiff with access to the scanner, it refused to provide the scanning service itself to plaintiff. Plaintiff was not provided with a word bank for her medical terminology class because her instructor thought such an accommodation was not fair to the other students in the class. Whereas the other students received the results of their tests and quizzes soon after they took tests, plaintiff did not receive her results until two weeks before the final exam, and after the in-class review session had ended. When she failed the final exam in her medical terminology class, she was allowed to retake the final but the "retest" was unlike the original test, requiring correct spelling throughout. When plaintiff was not able to attain a passing, 70 % score in that course (to continue in the program), she brought suit arguing that she had not been provided reasonable accommodations and had been subject to disparate treatment. The defendant moved for summary judgment, arguing that she was not "qualified" for the program because of her inability to meet the neutral requirement of 70% proficiency. *See Johnson v. Washington County Career Center,* 2013 U.S. Dist. LEXIS 161138 (S.D. Ohio 2013).

b. Complainant applied for admission to the medical assistant program at Gwinnett College. As part of the enrollment process, she disclosed that she has HIV. She was admitted to the program. On the first day of class during the second quarter, the President of Gwinnett College informed her that she would have to switch to the Medical Office Administrator or Massage Therapy program, or leave Gwinnett College. The Department of Justice brought an action on her behalf, which resulted in a settlement. In addition to providing the complainant with damages for her harm and loss of tuition, should Gwinnett be required to stop asking : "Are you free of all blood-borne pathogens such as HIV/AIDS?" *See* Settlement Agreement Between The

United States of America and Gwinnett College, available at http://www.ada.gov/gwinnett-col-sa.htm.

5. Can a student with a disability be dismissed or not readmitted when the standard he or has failed to meet is not "essential."? *See Shaikh v. Texas A & M University*, 2018 WL 3090415, No. 16-20793 (5th Cir. June 20, 2018) (unpublished opinion) (holding that student has a plausible claim for disability discrimination under Section 504 and remanding case for further proceedings). Should a medical student who performed well before the onset of his disability, and had his disability initially misdiagnosed, be allowed to seek readmission as a form of accommodation? *See Profita v. Regents of University of Colorado*, 709 Fed. Appx. 917 (10th Cir. 2017) (readmission held not to be a reasonable accommodation under ADA).

p. 499, at the end of the first paragraph add:

Typically, courts are fairly deferential in reviewing decisions of admissions committees but the Sixth Circuit recently reversed an award of summary judgment on that issue. The plaintiff was an applicant to a graduate program and she was denied admission after disclosing she had Crohn's disease at the interview. Applying a classic disparate treatment analysis, the Sixth Circuit reversed the grant of summary judgment in light of the fact that the applicant's disability was known by the admissions committee, she had strong paper qualifications in comparison to the other admitted applicants, and she was not given clear or consistent reasons for her rejection by the university. *See Sjostrand v. Ohio State University*, 750 F.3d 596 (6th Cir. 2014).

2. Admissions Tests

p. 503, replace the last paragraph with the following

Until recently, the entities that administer the MCAT and LSAT still flagged test scores. For a defense of this practice, see Michael E. Slipsky, *Flagging Accommodated Testing on the LSAT and MCAT: Necessary Protections of the Academic Standards of the Legal and Medical Communities*, 82 N.C. L. REV. 811 (2004). However, with regard to the LSAT, the matter was recently settled in litigation and flagging was ended.

The Law School Admission Council entered into an agreement with the United States Department of Justice regarding its testing practices. Under the consent decree, LSAC will pay $7.74 million in penalties and damages to compensate over 6,000 individuals nationwide who applied for testing accommodations on the LSAT over the past five years. LSAC will also end its practice of "flagging" or annotating, LSAT score reports for test takers with disabilities who have received extended time as an accommodation. *See* *http://www.justice.gov/opa/pr/2014/May/14-crt-536.html* (last viewed on May 22, 2014). *See also*

http://www.ada.gov/defh_v_lsac/lsac_consentdecree.htm (last viewed on May 22, 2014) (consent decree). The consent decree also seeks to ensure that LSAC's documentation requests are reasonable and limited to the need for the testing accommodation requested.

D. DOCUMENTATION

p. 505, after second full paragraph, add:

The Department of Justice has issued regulations to implement ADA 2008 Amendments, focusing on standardized testing and higher education entities, which have extensive discussion of documentation of disabilities, ADHD, and condition, manner, or duration analysis for disabilities that exist on a spectrum. *See* 28 CFR Parts 35 and 36, Amendment of Americans with Disabilities Act Title II and Title III Regulations to Implement ADA Amendments Act of 2008 (August 16, 2016), available at http://federalregister.gov/a/2016-17417

E. REASONABLE ACCOMMODATIONS

1. Generally

p. 519, after note 4, add new notes 5, 6 and 7:

5. A challenging issue that universities can face is whether they are entitled to apply their student code of conduct against a student with a disability who has purportedly violated their rules. Consider the following facts:

> Brett Rhodes was involved in a car accident that left him with substantial physical and mental disabilities. He enrolled at Southern Nazarene University, initially to pursue a degree in nursing. He documented his disabilities and made various requests for accommodations. The university agreed to his requests, and granted additional requests, upon additional documentation. Nonetheless, the University did not grant his request to receive syllabi, assignments and his textbooks six weeks in advance of classes because professors did not always have material available that far in advance.
>
> The biggest source of controversy arose over how much support he should receive from faculty. He believed his professors did not give him adequate support. Rhodes had many communications with one faculty member who felt threatened by some of his communications because they, for example, made reference to guns in his home. After this professor reported to university officials that she felt threatened, Rhodes "began sending [the university's disability officer] a flood of emails over the course of one day – most sent minutes from each other – containing lengthy, agitated, and threatening content."

> A school judicial hearing was conducted and Rhodes was placed on disciplinary probation under which limitations were placed on his communications with staff but he was allowed to return to class immediately. Rhodes never returned to the university but filed a claim against them under Section 504 and ADA Title III.

Does Rhodes have a viable claim for failure to accommodate or for retaliation? The student, proceeding pro se, lost at both the trial court and court of appeals. *See Rhodes v. Southern Nazarene University,* 554 Fed. Appx. 685, 2014 U.S. App. LEXIS 1851 (10th Cir. 2014). *See also Bied v. County of Rensselaer,* 2018 WL 1628831, No. 1:15-cv-1011 (N.D. N.Y. 2018) (student who had been receiving academic accommodations arrested for stalking in the fourth degree; court concludes that both ADA and Section 504 permit a college to discipline a student even if the student's misconduct is the result of a disability).

6. Universities can also struggle to determine what kinds of responses are appropriate to the conduct of students or their parents and what kind of response might be considered illegal retaliation. For example, the mother of a student with a disability had a reputation for being extremely vigilant about enforcing violations of parking rules for disabled parking spaces. When she noticed a car with an expired placard on campus on more than one occasion, she got into a verbal confrontation with the driver, and took the placard off the driver's vehicle. She was given a no-trespass order from the university following her arrest by local police. She filed suit against the university for retaliation under ADA Title III. What do you think is the correct result? *See Cottrell v. Norman***,** 2014 U.S. Dist. LEXIS 101645, 2014 WL 3729215 (D.N.J. July 25, 2014) (no violation)

7. Universities often struggle with deciding how to respond to what they might perceive as a student's threats to himself, herself or others. The Department of Justice recently obtained a settlement with Quinnipiac University concerning its response to a student who was hospitalized due to a suicidal episode. Once released, but before the student could return to the dorm, the student was placed on mandatory medical leave. Proposed accommodations, such as having the student attend college while living with her parents, were allegedly not considered.

The settlement agreement provides that Quinnipiac will conduct an individualized assessment and case-by-case determination as to whether and what modification(s) can be made to allow students with mental health disabilities to participate in the educational programs at Quinnipiac, and to continue to attend their classes while seeking treatment for mental health conditions and to pay the student $17K for emotional distress, pain and suffering, and other consequential injury and another $15K to student loan provider to reimburse for lost tuition. *See* http://www.ada.gov/ quinnipiac_sa.htm (settlement).

8. Do colleges and universities owe a duty of accommodation to students who engage in suicidal behaviors or may the colleges and universities simply suspend or dismiss such students in order to obviate liability for future injuries? *See* Settlement

between the United States and Tennessee Health Science Center (July 22, 2016), available at https://www.justice.gov/crt/case-document/university-tennessee-health-science-center-settlement-agreement. Do colleges and universities owe a duty of accommodation to students who are victims of sexual violence, given the real possibility that they are individuals with post-traumatic stress disorder? How does this obligation relate to simultaneous responsibilities to such students under Title IX? What kinds of accommodations are likely to be necessary? *See Shank v. Carleton Coll.*, No. 16-CV-1154 (PJS/FLN), 2017 WL 80249 (D. Minn. Jan. 9, 2017).

2. Burden and order of proof

p. 553, add new note 5:

5. The issue of how much deference to give to university officials continues to challenge the courts. Maxiam Dean was a medical school student at University of Buffalo School of Medicine and Biomedical Sciences. *See Dean v. University of Buffalo School of Medicine and Biomedical Sciences,* 804 F.3d 178 (2nd Cir. 2015). Dean requested, and was denied, a leave of absence beyond what is typically permitted, so that he could prepare for the Step 1 Medical Exam, which is required for maintaining good standing at a medical school, due to his disability-related depression. He had already failed the exam twice before making this request for additional leave. The medical school provided him with some additional leave time but not the extent of time requested. In ruling that the district court was wrong to grant summary judgment to the university and should allow Dean to demonstrate at trial that the accommodation he was provided was not sufficiently "effective" as to be reasonable, the Second Circuit explained how the burden-shifting process operates in a higher education case:

> Similarly, in the education context, a plaintiff alleging a failure to accommodate a disability bears the burdens of both production and persuasion as to the existence of some accommodation that would allow the plaintiff to meet the essential requirements of the service, program, or activity at issue. Once the plaintiff has met the light burden of producing evidence as to the facial reasonableness or plausibility of the accommodation, the burden falls to the defendant educational-institution to persuade the fact-finder that the proposed accommodation is unreasonable. That burden may be met by establishing that the requested accommodation would (a) impose undue hardship on the operation of the defendant's service, program, or activity, or (b) require a fundamental or substantial modification to the nature of its academic program or standards. See, e.g., Powell, 364 F.3d at 88 (allowing a student in medical school to continue in program without passing Step 1 ''would have changed the nature and substance of [the] program''); Zukle v. Regents of Univ. of Cal., 166 F.3d 1041, 1049–51 (9th Cir.1999) (rearranging medical clerkship rotations, reducing clinical hours, and otherwise decelerating schedule would lower medical

> school's standards); McGuinness v. Univ. of N.M. Sch. of Med., 170 F.3d 974, 979 (10th Cir.1998) (permitting student with marginal grades to advance in M.D. program as an exception to policy requiring repetition of coursework was a substantial rather than reasonable accommodation); Kaltenberger v. Ohio Coll. of Podiatric Med., 162 F.3d 432, 436–37 (6th Cir.1998) (allowing student to attend abbreviated remedial summer program instead of retaking failed examination would diminish podiatric training standards); Wynne v.Tufts Univ. Sch. of Med., 976 F.2d 791, 794–95 (1st Cir.1992) (providing biochemistry test in an alternative format would lessen academic standards and devalue university's credentials as an institution).
>
> *Id.* at 190.

As the parenthetical case descriptions indicate, the Second Circuit was not suggesting that medical schools would need to lower their academic standards to provide a reasonable accommodation. Nonetheless, the Second Circuit refused to defer to the university's judgment about the reasonableness of Dean's accommodation request because "the record is devoid of evidence indicating whether Defendants evaluated these considerations in determining the reasonableness of the accommodation sought." *Id.* at 191. "These considerations" consisted of "diligently assess[ing] whether the alteration would allow Dean the opportunity to continue in the M.D. program without imposing undue financial and administrative burdens on UB-MED or requiring a fundamental alteration to the academic caliber of its offerings." *Id.* at 191.

3. Students with Sensory Impairments
(a) Students Who Are Blind or Have Low Vision

p. 559, add new note 3:

3. A recently filed case may offer further guidance on a university's obligations to a student who is blind. Aleeha Dudley was an undergraduate student at Miami University in Ohio. She enrolled at Miami University in the fall of 2011 to pursue a bachelor's degree in zoology so that she might secure admission to veterinary school. According to her complaint, the university sent a letter to her instructors suggesting only two modifications: offering all classroom material in Rich Text Format and allowing double-time for exams and quizzes. The letter made no mention of Braille textbooks, tactile graphics, human assistants, timely course materials or accessible learning management software. Her lecture instructors used LearnSmart to manage homework assignments, which was not accessible to her. She was not permitted to participate fully in lab activities. In the complaint, she alleged that Miami University made technology procurement decisions with indifference to the accessibility of the technology in question, even though accessible technology existed and was being used at other universities. *See Aleeha Dudley v. Miami University*, No. 1:14-cv-38 (S.D. Ohio filed January 10, 2014). *See* https://nfb.org/images/nfb/documents/pdf/miami%20teach.pdf (last viewed on May 22,

2014). The case was successfully resolved with a broad consent decree that improved access to prospective students, applicants, accepted but not yet attending students, and former students. Consent decree approved by Judge Susan J. Dlott on December 14, 2016. Consent decree may be found at https://www.ada.gov/miami_university_cd.html (last visited June 17, 2017.) The settlement also provided financial assistance for Dudley to attend university elsewhere to obtain a four-year degree.

(b) Students Who Are Deaf or Hard-of-Hearing
ii. Individual cases

p. 582, after note 1, add:

2. Title II issues involving effective communication can also be raised with respect to K-12 students. The Ninth Circuit recently decided two cases brought under Title II against California school districts that refused to provide Communication Access Realtime Translation ("CART") to students. The plaintiffs conceded the school districts had complied with their IDEA obligations but argued they should still be able to argue a lack of compliance with their Title II obligation. The Ninth Circuit reversed the grant of summary judgment by the district courts, and held that the plaintiffs could go forward with their Title II claims because of three significant differences between IDEA and Title II: (1) that the ADA regulations require the public entity to "give primary consideration to the *requests* of the individuals with disabilities", (2) the ADA has a fundamental alteration and undue burden defense, and (3) the Title II effective communication regulation requires schools to communicate "as effective[ly]" with disabled students as with other students, and to provide disabled students the "auxiliary aids … necessary to afford … an *equal opportunity* to participate in, and enjoy the benefits of," the school program. *K.M. v. Tustin Unified School District*, 725 F.3d 1088, 1100-1101 (9th Cir. 2013). The district court ultimately awarded attorney fees in the amount of $369,608, as well as $15,282.58 in costs. *See K.M. v. Tustin Unified School District*, 78 F. Supp.3d 1289 (C.D. Calif. 2015).

F. SAFETY/DIRECT THREAT DEFENSE

p. 594, add note 8:

8. A new issue that is emerging under state tort law is a university's obligation to it students when a student commits violence or a student commits suicide. *See generally Regents of University of California v. Superior Court,* 4 Cal. 5th 607 (Calif. 2018) (university had duty of care to protect student from foreseeable violence during chemistry class from a student who had been treated by university for symptoms indicative of schizophrenia); *Nguyen v. Massachusetts Institute of Technology,* 479 Mass. 436 (Mass. Supreme Judicial Court 2018) (while a university may have a duty to take reasonable measures to protect a student from self-harm, that duty did not require dean or chancellors to take reasonable measures to prevent graduate student's suicide where he extensively consulted with clinicians not affiliated with the university).

Chapter 8

HOUSING

A. INTRODUCTION

p. 618, add note 7:

7. Many housing discrimination cases involve a "disparate impact" theory of discrimination where a neutral zoning ordinance is challenged due to its adverse impact on individuals with disabilities. Defendants have sometimes argued that the Fair Housing Act should not be interpreted to permit disparate impact claims. The Supreme Court recently concluded that the Fair Housing Act permits disparate impact claims in *race* discrimination cases. *See Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* 135 S. Ct. 2507 (2015). The rationale of that decision was closely tied to the steps needed to end persistent racial segregation in the United States. Will the FHAA survive a challenge to the use of disparate impact litigation in the disability context?