

DISABILITY LAW CASES, MATERIALS, PROBLEMS

Sixth Edition

2021 Supplement

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OVERVIEW OF THE SUPPLEMENT

DISABILITY LAW was published for first use in Fall 2017. While still generally for most statutory and Supreme Court decisions up to spring 2017, there have been some major developments and some trends worth noting going forward. The 2017 to 2021 Trump administration made it quite challenging to stay current on regulatory developments, and the 2021 Biden administration developments that revisit the previous changes should be monitored on a regular basis throughout the semester in which this subject is being addressed.

The most significant issue affecting disability discrimination law since 2017 is almost certainly the impact of Covid-19 pandemic issues and the relationship to disability discrimination law. The issues are wide ranging and because of that, a new section devoted to that issue is provided as an insert into Chapter 1.

With respect to administrative agency activity, there are four areas to monitor. These are regulations and regulatory guidance, enforcement, research, and funding. The Trump administration's priority was deregulation, so it was no surprise that all federal regulations were affected. Regulatory activity included eliminating regulations promulgated during the last months of the Obama administration, changing or eliminating administrative agency guidance (including some documents that had provided guidance to schools, colleges, and others over a long period of time), and proposals to eliminate or significantly change existing regulations (which requires the notice and public comment process). Any case decision in the existing casebook that relies on deference to agency interpretation may be subject to reassessment in light of the current regulatory trends. The Biden administration has been revisiting all areas of regulatory activity, so any attention to regulations should take note of the current versions of relevant regulations.

The major regulatory change since 2017 is the clarification of animal accommodations on airlines. In 2020, the Department of Transportation issued clarifying regulations. These are discussed below. Of significant concern going forward are the changes being made by states regarding access to voting. These changes began to occur in 2021, and are of significant concern to individuals with disabilities.

There have been four Supreme Court decisions of direct application since the Sixth edition was published. All three cases are in the context of education. One involved special education under the IDEA (*Endrew F. v. Douglas County School District*), and the other involved accommodations under the ADA and the intersection of IDEA and ADA (*Fry v. Napoleon Community School*). The other two (*Our Lady of Guadalupe v. Morrissey Berru* and *St. James School v. Biel*), applied the ministerial exception to the ADA related to teachers at religious schools.

As set out in more detail for each chapter, there are several areas where there has been an increase in litigation or some clarification about the majority position within federal circuit courts. The two areas where the most litigation is occurring continue to be education and employment.

The issue of service and emotional support animals as accommodations has become an increasing area of judicial and media attention in all contexts. Laura Rothstein, *Puppies, Ponies, Pigs, and Parrots -- Policies, Practices and Procedures in Pads, Pubs, Planes, and Professions -- Where We Live, Work, and Play, and How We Get There -- Animals in Public Places, Housing, Employment, and Transportation*,” 28 LEWIS & CLARK ANIMAL L. REV. 1 (2018). The number of cases in which standing to seek relief for architectural barrier issues has increased significantly, and these cases have received media attention.

The 2008 ADAAA provided that the definition of disability should be evaluated more broadly, and now cases addressing that issue are beginning to receive more attention, including at the appellate court level. Conditions such as obesity, diabetes, pregnancy-related impairments, depression, and stress-related mental health impairments have been addressed. The goal of the 2008 legislation, however, has been partially accomplished, because courts are now more likely to focus on the issue of reasonable accommodations and whether the individual is otherwise qualified. The importance of an interactive process in addressing accommodation decisions has received increasing attention in employment and other settings. A recent scholarly study, however, raises serious questions, at least in the employment area, as to whether the lower courts are applying the new law in keeping with the purpose and language of the ADAAA. See Nicole Buonocore Porter, *Explaining ‘Not Disabled’ Cases Ten Years after the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEORGETOWN JOURNAL ON POVERTY LAW & POLICY 383 (2019) (finding that approximately one quarter of courts deciding whether a person has a disability after the passage of the ADA wrongfully find for the defendant).

Lack of clarity about what is required for website accessibility continues. It is not even certain in what situations a website is subject to the ADA requirements. While the weight of authority seems to be that most websites are subject to ADA requirements, clarity is still lacking regarding specific design standards and undue burden. Since 2017, there has been a substantial increase in the number of challenges of website access. There are now a number of differing circuit court opinions on whether websites are even subject to the ADA, and other opinions about what websites are required to include. This highlights the need for greater judicial or regulatory agency clarification.

There seems to be an increased interest in using the ADA and Section 504 of the Rehabilitation Act to address issues of students with disabilities in the education context. These cases are arising in interesting and unusual situations.

The treatment of individuals with disabilities in the criminal justice system has been a focus. These issues include access to mental health treatment and other health issues, provision of accommodations for individuals with hearing impairments, and architectural barriers within the criminal system. The Black Lives Matter movement in 2020-2021 highlighted concerns about police training in responding to mental health issues, which seem to have disparate impact on individuals of color.

Other issues that have given rise to attention by the courts are the application of disability discrimination law to ride-share/Uber type programs; the continued increase in cases applying

zoning issues to group home settings and also challenges by individuals with disabilities who are placed in restrictive nursing home settings rather than receiving services through home services or community service programs. Several cases were brought regarding whether gift cards distributed by stores and others must be in Braille. The courts are generally holding that this is not required.

The following are chapter specific notations about important developments. Cases that are unique or particularly interesting are also noted. Most case references are to appellate court decisions, but in a few instances where there is a body of developing trial court decisions, a few lower court cases are referenced to demonstrate the array of contexts in which these cases are being decided.

What is not apparent from the materials that follow is the impact of reduced federal agency enforcement during 2017 to 2021 and the indirect impact of new policies on disability rights issues. For example, reduced federal funding to state vocational rehabilitation agencies affect higher education. Access to funding for services such as interpreters for college students through state agencies affects whether the higher education agency would have to fund those services from their own budget. With new Congressional and Presidential leadership in 2021, the financial and regulatory support may change. These important policy issues, however, are generally beyond the scope of this **Supplement**.

Chapter 1 Introduction

C. The Laws and How They Developed

Note

Add to Note 2 on page 22:

For a discussion of the factors that were in place in 1990 that are not in place today, see Laura Rothstein, *Would the ADA Pass Today?: Disability Rights in an Age of Partisan Polarization*, 12 ST. LOUIS U. J. OF HEALTH L. & POL'Y 271 (2019) in which it is suggested that the ADA would be unlikely to pass today and that it is being indirectly eroded by a range of federal enforcement efforts. See also related articles in the same symposium issue by Michael Waterstone and Congressman Tony Coelho.

Add new subsection on page 27:

Covid-19 Issues and Disability Discrimination Law

As a result of the Covid-19 pandemic a number of legal issues have arisen that concern persons with disabilities. A threshold issue is whether infection with Covid-19 is itself a disability. Most cases conclude that it is not because of the generally temporary nature of the illness, but many victims of Covid-19 who have long covid or other conditions resulting from Covid-19 infection might meet the requirements of proving that they have a disability. A more difficult issue may be whether a person with Covid-19 who does not meet the definition of having an impairment that substantially limits a major life activity, may be regarded as having a disability. In *Champion v. Mannington Mills*, 2021 WL 2212067 (M.D. Ga. May 10, 2021), the court held that because the plaintiff's claim is an *associational claim* in which she alleges that her employer regarded her brother as having a disability, his Covid-19 was insufficient because associational claims do not include "regarded as" disabilities. The court relied on the language of the associational claim that states it is illegal to discriminate against an individual who has an association with a person with a "known disability." It is unclear whether other courts will agree that "regarded as" claims do not satisfy associational claims. But there also still remains the question of whether an individual with Covid-19 can satisfy the definition by proving that she or he is regarded as having an impairment. In any event, it is important to note that individuals who are regarded as having disabilities are not entitled to accommodations.

The cases on Covid-19 and disabilities generally fit into a number of categories below. Because it is too early to draw broad guidance from these, there is no synthesis of these cases. Relevant regulatory guidance is also listed within each topic. By the time the 2022 Letter Update is prepared, there may be greater clarity on these issues.

Employment

A number of issues have arisen as a result of Covid-19 and employers' interest in assuring that employees continue to work but only if they are not sick and do not present a risk to themselves or others. Concerns by individuals with disabilities about mandatory presence/attendance especially during the most critical times gave rise to concerns in both employment and education settings. Individuals with immunosuppressed conditions or other health risk situations such as asthma and other respiratory conditions were understandably very concerned about mandates to stay at work when the potential of becoming infected could result in significantly adverse health outcomes.

Employees are concerned about firings if they are vulnerable due to disabilities or because they contracted Covid-19. Employees have also questioned the right of employers to take temperatures or to test for Covid before permitting employees to return to work in person. Employees have also claimed that their employers should accommodate their disabilities by permitting them to work at home due to Covid. Another issue that has arisen and that will continue to create concern is whether employers may require that employees be vaccinated before returning to work.

The following are summaries of decisions on some of these employment issues. So few cases have been decided that synthesis is difficult.

Peoples v. Clinical Support Options, Inc., 487 F. Supp. 3d 56 (D. Mass. 2020) (granting plaintiff's preliminary injunction holding that he would likely succeed on the merits of a Title I ADA case for failing to give the plaintiff a reasonable accommodation where the plaintiff had moderate asthma, he had successfully teleworked from home and requested to continue to do so, he was at greater risk than other employees from working at the defendant's place of business, and the employer failed to consider plaintiff's case on an individual basis).

Brownlow v. Alfa Vision Insurance Company, 2021 WL 1087475 (M.D. Tenn. 2021) (work at home case – pre COVID, but references COVID, court ruled case could proceed on ADA failure to accommodate).

Norman v. NYU Langone Health System, 492 F. Supp. 3d 154 (S.D.N.Y. 2020) (healthcare database worker with no patient contact, but record of allergy to flu vaccine, case).

Sheylayno 'Sun v. Department of Defense, 62 Nat'l Disability L. Rep. ¶ 113 (D.D.C. 2021) (telework).

The guidance policies from the EEOC, OSHA, and other agencies have been consistently updated in response to the CDC changing recommendation, so it is important to update the information found on the websites. As of June 18, 2021, the following guidance is controlling:

<https://www.eeoc.gov/coronavirus>

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

<https://www.osha.gov/coronavirus/standards>

Taking employees' temperatures and testing employees for Covid-19 are generally permitted in light of the CDC recommendations and the EEOC guidance if the employees are working in person. The EEOC has stated that it is permissible to require that employees be vaccinated, with exceptions of reasonable accommodations for those with religious objections under Title VII of the 1964 Civil Rights Act and reasonable accommodations for individuals with disabilities who cannot take vaccinations. Employers may also create incentives for employees to be vaccinated. All information concerning individuals with Covid must be kept confidential, but employers may interview the infected individual about the persons with whom she or he has had contact. When an employer advises its employees that an individual has been infected, the employer should not provide the person's name. The person's identity should only be shared on a need-to-know basis.

In 2021, OSHA issued temporary emergency standards concerning workers' safety in health care employment settings. See <https://www.webmd.com/lung/news/20210614/osha-sets-covid-safety-rules-for-health-care-workers>; <https://www.osha.gov/coronavirus/ets>.

Education

There is likely to be a great deal of attention on the issue of lost education for special education students during Covid shutdowns. Those cases have not yet worked their way through the courts. It is also likely that there will be some students with health conditions for whom return to the classroom creates risk. Office for Civil Rights, Department of Education guidance - <https://www2.ed.gov/about/offices/list/ocr/docs/qa-reopening-202105.pdf>

The following are summaries of decisions on some education issues. So few cases have been decided that synthesis is difficult.

J.T. v. DeBlasio, 983 F.3d 516 (D.C. Cir. 2020), 496 F. Supp. 3d 190, 2020 WL 6748484 (S.D.N.Y. 2020) (school closures and special education in Covid settings).

Hernandez v. Grisham, 2020 WL 6063799 (D.N.M. 2020) (parent likely to prevail on claim that student's IEP violated FAPE requirement by misinterpreting state health regulations as forbidding in-person instruction during Covid-19, student not progressing under remote instruction).

For an article discussing the use of disability law to redress the educational deficits of children in impoverished neighborhoods, see Ann C. McGinley and Frank Rudy Cooper, *Intersectional Cohorts, Dis/Ability, and Class Actions*, 47 FORDHAM URB. L. J. 293 (2020) (discussing *P.P. v. Compton Unified School District* and arguing that courts should certify classes of children in cases brought under disability law against school districts where children's complex trauma is typical).

Housing

There is not much Covid/disability related development in the housing settings. One case, however, is the following.

Rogue v. Seattle Housing Authority, 61 Nat'l Disability L. Rep. ¶ 65 (W.D. Wash. 2020) (preliminary order requiring city housing authority to allow resident caregiver to park in building garage; caregiver needed during COVID and had difficulty parking on street and resident did not have a parking space in the building).

Health Care Settings

The most significant issue involved triaging of ventilator service during Covid hospitalizations. The following provide some insight into that issue.

Smith v. Ivey, 2020 WL 6802023 (M.D. Ala. 2020) (addressing policy for triaging ventilator services to individuals with intellectual disabilities in a way that was viewed as violating ADA and Rehabilitation Act; rule was not implemented).

Ari Ne'eman, *When It Comes to Rationing, Disability Rights Law Prohibits More Than Prejudice*, HASTINGS COVID 19 BIOETHICS FORUM (April 10, 2020) (regarding HHS policy prioritizing ventilator treatment that adversely affected individuals with disabilities) <https://www.thehastingscenter.org/when-it-comes-to-rationing-disability-rights-law-prohibits-more-than-prejudice/>.

Access to Citizenship

Voting

This is likely to be an ongoing issue in light of changes during 2021 by states regarding voting eligibility

People First of Alabama v. Merrill, 487 F. Supp. 3d 1237 (N.D. Ala. 2020) and 491 F. Supp. 3d 1076 (N.D. Ala. 2020) (addressing several voting regulations affecting individuals with disabilities during the pandemic; witness requirement and photo ID requirement during pandemic violated right to vote; curbside voting ban did not facially violate ADA outside of pandemic, but did during pandemic; notary requirement).

People First of Alabama v. Merrill, 467 F. Supp. 3d 1179 (N.D. Ala. 2020) and 487 F. Supp. 3d 1237 (N.D. Ala. 2020) (addressing curbside voting and absentee ballot rules about witnesses and photo ID during Covid that affected those with higher risk from Covid).

Taliaferro v. North Carolina State Board of Elections, 489 F. Supp. 3d 433 (E.D.N.C. 2020) (granting preliminary relief for blind and low vision voters under ADA and Rehabilitation Act during Covid).

Watson v. Oppenheim, 301 So. 3d 37 (Miss. 2020) (having a pre-existing condition that places a person at greater risk of contracting Covid-19 or of having a more serious case of Covid-19 does not automatically create under Mississippi law a “temporary disability” that would permit a voter to use an absentee ballot).

In re State of Texas, 602 S.W. 3d 549 (Tex. 2020) (holding that lack of immunity to Covid-19 is not equal to a disability under Texas law and, therefore, those who have no immunity do not automatically qualify to vote by mail).

See also Maggie Astor, *G.O.P. Bills Rattle Disabled Voters: “We Don’t Have A Voice Any More*, <https://www.nytimes.com/2021/06/14/us/politics/disability-voting-rights.html>.

Governmental Activities

Legislative and regulatory agency activities

In *Cushing v. Packard*, 2021 WL2216970 (1st Cir. June 1, 2021) (*en banc*), the issue was whether state legislators with disabilities can sue the state legislature for issuing a rule that required them to participate in the legislative process in person during the pandemic. The lower court held that there was legislative immunity. On appeal, however, the First Circuit concluded that the ADA abrogates legislative immunity of a state legislature. On a rehearing *en banc*, the First Circuit opinion was withdrawn and vacated. The *en banc* opinion invited the Justice Department to file an amicus brief that would deal with the following questions: 1. An analysis of the doctrine of legislative immunity and exceptions to it; and 2. Whether legislative immunity may attach in this matter and whether it applies to an action (such as this one) that requests only injunctive relief.

Additional cases on related issues include:

Selene v. Legislature of Idaho, 2021 WL 230040 (D. Idaho 2021) (failure to accommodate claim against state legislature was premature; advocacy group and individuals had requested remote participation in state process after Covid measures were implemented, but did not wait for decision before filing suit).

Chew v. Legislature of Idaho, 2021 WL 112146 (D. Idaho 2021) (denying preliminary injunction to provide accommodations for remote participation during COVID).

Silver v. City of Alexandria, 470 F. Supp. 3d 616 (W.D. La. 2020) (granting preliminary injunction to a city council member to attend council meetings virtually; his heart condition made him vulnerable to COVID related issues).

ASL Interpreters at Governmental Briefings

An issue that came up at both the federal and state level was providing interpreters at governmental briefings.

National Association of the Deaf v. Trump, 486 F. Supp. 3d 45 (D.D.C. 2020) (granting preliminary injunction under Rehabilitation Act against President and White House in suit seeking to have ASL interpreters during Covid briefings).

Yelapi v. DeSantis, 487 F. Supp. 3d 1278 (N.D. Fla. 2020) (denying motion for preliminary injunction in suit by deaf Florida residents and advocacy group against governor for not providing in-frame ASL interpreters for all live, broadcast press conferences, including Covid briefings).

Martinez v. Cuomo, 459 F. Supp. 3d 517, 51 Nat'l Disability L. Rep. ¶ 70 (S.D.N.Y. 2020) (preliminary injunction granted requiring Governor Cuomo to provide in-frame ASL interpretation during daily COVID press briefings because closed captioning and online ASL interpretation did not provide meaningful access for plaintiffs who lacked internet access and who could not read English well).

Jails and Prisons/ICE Detention

Federal and state prisoners have alleged numerous violations of the ADA and/or the Rehabilitation Act based on prison conditions, failure to social distance, and inability to keep the most vulnerable prisoners with disabilities safe from contracting Covid. These cases request an order to release the prisoners early under the federal statute allowing for compassionate care or are brought as habeas corpus petitions if the individual is in state prison, requesting a change of circumstance or early release. The habeas corpus petitions ordinarily are based on allegations of violations of the Eighth Amendment's prohibition against cruel and unusual punishment which requires the plaintiff prove deliberate indifference to the individual's rights; they also allege violations of the Americans with Disabilities Act and/or Rehabilitation Act. There is some difference of opinion as to whether intentional discrimination must be proved in the latter cases, but most courts seem to conclude that deliberate indifference is sufficient if the plaintiffs are merely seeking injunctive relief and not damages. The courts seem to agree that a showing of intent is required if the plaintiff is seeking damages. Perhaps because the cases are fact-based and require a weighing of interests, the courts facing these petitions ordinarily deny a preliminary injunction ordering immediate release. Nonetheless, some of these cases have ordered immediate release.

Wragg v. Ortiz, 462 F. Supp. 3d 476 (D.N.J. 2020) (granting defendant's motion to dismiss of Rehabilitation Act complaint of subclass of individuals who are federal prisoners with underlying disabilities; even assuming that there could be a cause of action to accommodate individuals whose disabilities make them more vulnerable to contracting Covid, the court concluded that the defendant had instigated a series of protective measure for all employees, and plaintiff subclass did not sufficiently and plausibly allege that the defendants discriminated against the plaintiffs because of their disabilities; court also concluded that an accommodation is an individual right and granting early release to all individuals with disabilities absent proof of individual vulnerabilities would be unreasonable as a matter of law).

U.S. v. Hambrock, 2021 WL775399 (E.D. Va. Sept. 19, 2021)(granting prisoner's release request under federal compassionate release statute and ordering the prisoner be confined at home; extraordinary and compelling reasons to grant the prisoner's motion because he is especially vulnerable to suffering from Covid, due to his obesity and Autism and the prison to which he was sentenced has had a high rate of Covid and a number of deaths; prisoner's rehabilitation for his possession of child pornography could take place outside of prison).

U.S. v. Asher, 467 F. Supp. 3d 1285 (N.D. Ga. June 15, 2020) (granting compassionate release petition to 54-year-old prisoner who suffered from heart disease, Parkinson's Disease, arrhythmia, and high blood pressure and who was housed in prison with dormitory-style living where it was impossible to social distance).

Denbow v. Maine Dept. of Corrections, 2020 WL 3052220 (D. Maine, June 8, 2020) (denying temporary injunction to subclass of prisoners with disabilities seeking early release in ADA case due to vulnerability to Covid exposure in prison because of need to establish facts, but asserting that the court will hold a hearing and move the case quickly)

Malam v. Adducci , 2020 WL1934895 (E.D. Mich. Apr. 22, 2020) (granting temporary injunction releasing individual from ICE custody due to Covid danger caused by his age and underlying disabilities).

A particularly interesting case is *Valentine v. Collier*, 141 S.Ct. 57 (2020), where the federal district court found a rampant failure to protect inmates with disabilities and to use health protocols in close quarters with a population that was primarily over 64 years of age, many with underlying conditions and disabilities. The trial court granted a permanent injunction requiring the prison to implement basic safety measures, but the Fifth Circuit, on appeal, stayed the injunction, pending appeal. The plaintiffs petitioned the U.S. Supreme Court to vacate the stay. The Supreme Court denied the petition. Justices Sotomayor and Kagan dissented from the Supreme Court's decision not to hear the issue.

Public Accommodation Settings

There is little case law in these settings, but there are a number of challenges by state legislatures to authority of governors to issue various mask mandates and social distancing. Those indirectly implicate disability concerns.

In one case, a customer challenged a mask requirement of a public business under Title III. *See Pletcher, et al, v. Giant Eagle Inc., et al*, 2020 WL 6263916 (W.D. Pa. Oct. 23, 2020) (denying plaintiff's motion for a preliminary injunction based on his Title III claim that the store did not reasonably accommodate his disability which allegedly prevented him from wearing a mask because of breathing difficulties and anxiety; court held there was no plausible evidence that he actually had a disability, and no plausible evidence of a failure to accommodate him, given the store's policy of permitting face shields instead of masks).

Cruise ships are unique facilities and are the subject of substantial attention by agencies and the industry and some state governors regarding what can be required regarding crew and passenger vaccinations.

Possible Increase in Animal Accommodation Requests

There is a substantial number of cases involving animal accommodations in various settings. The reason it is possible that disputes will increase for the foreseeable future is that during Covid shutdowns, many people worked from home with their pets close by. Many adopted animals during the pandemic. Now that they are being asked to return to work and to college campuses, there may not be the awareness of what the requirements are regarding service and emotional support animals in various settings. Both the individuals seeking to bring their animals outside their homes and the employers and entities where these individuals are going need to be aware of the requirements under statutory guidance. See Laura Rothstein, *Puppies, Ponies, Pigs, and Parrots -- Policies, Practices and Procedures in Pads, Pubs, Planes, and Professions -- Where We Live, Work, and Play, and How We Get There -- Animals in Public Places, Housing, Employment, and Transportation*, 24 ANIMAL LAW REVIEW 13-38 (2018)

Chapter 2 Who Is Protected under the Laws?

C. Defining Disability: Statutory Definitions and Judicial Interpretations

[4] Prong Three: Being “Regarded as” Having Such an Impairment

Notes and Questions

Add the following to note 2, p. 58

Shell v. Burlington Northern Santa Fe Railway, Co., 57 Nat’l Disability L. Rep. ¶ 4 (N.D. Ill. 2018) (employer who did not hire applicants with high body mass indexes for safety sensitive positions due to fears they would develop disabilities in the future regarded applicants as disabled under ADA); *Odyseos v. Rine Motors*, 54 Nat’l Disability L. Rep. ¶ 163 (M.D. Pa. 2017) (employee terminated after wearing heart monitor for six weeks, during which time employer repeatedly asked about his health, stated cause of action that he was regarded as disabled); *EEOC v. Amsted Rail Co., Inc.*, 280 F. Supp. 3d 1141 (S.D. Ill. 2017) (employer who refused to hire applicant because his history of carpal tunnel syndrome and corrective surgery indicate that applicant might develop CTS again regarded applicant as disabled); *EEOC v. Gulf Logistics Operating, Inc.* (E.D. La. 2017) (employer required employee with mental health issues to undergo medical exam before returning to work; terminated employee based on perceived disability although the employee was medically cleared without restrictions).

[6] Special Situations

Associational Disabilities

Add at the end, p. 65

See also *Milchak v. Dep’t of Defense*, 54 Nat’l Disability L. Rep. ¶ 44 (E.D. Mo. 2016) (not required to accommodate nondisabled employees based on associations with persons with disabilities; not required to assign employee to shift that would allow him to stay home to care for wife with disability).

In association cases, the courts will permit proof of a short time between the employer’s knowledge that the employee is associated with a person with a disability and an adverse employment action to create an inference that the employer’s action was caused by the association. See *Reiter v. Maxi-Aids Inc.*, 56 Nat’l Disability L. Rep. ¶ 122 (E.D.N.Y. 2018) (two weeks after the employer learned of employee’s daughter’s disability and employee’s termination sufficient for inference of associational discrimination). See also *Aliferis v. Generations Health Care Network at Oakton Pavilion*, 54 Nat’l Disability L. Rep. ¶ 8 (N.D. Ill. 2016) (court can infer that administrator discriminated against receptionist where he fired receptionist’s girlfriend for poor health due to breast cancer treatment, and when receptionist not at post, he refused to allow him to get schedule change form showing authorization for absence from his bag).

Other

- *Size, Obesity*

Add at the end of the second full paragraph on p. 68

The cases go both ways as to whether one has to demonstrate an underlying physical condition causing obesity in order to prove that morbid obesity is a physical impairment. See e.g., *Valtierra v. Medtronic, Inc.*, 54 Nat'l Disability L. Rep. ¶ 122 (D. Ariz. 2017) (morbid obesity alone not physical impairment); *Richardson v. Chicago Transit Auth.*, 54 Nat'l Disability L. Rep. ¶ 47 (N.D. Ill. 2016) (bus driver with obesity does not have to allege underlying disorder).

Chapter 3 Employment

B. Applicability of Title I of the Americans with Disabilities Act and the Rehabilitation Act

[1] Which Employers Are Covered?

Notes

Add at the end of note 5, p. 85

See also *Our Lady of Guadalupe v. Morrissey Berru*, 140 S. Ct. 2049 (2020) and *St. James School v. Biel*, 140 S. Ct. 680 (2020) (teachers at religious schools exempt from ADA employment discrimination protections because they are viewed as ministers in terms of guiding students in religious faith); *Demkovich v. St. Andrew the Apostle Parish, Calumet City*, 56 Nat'l Disability L. Rep. ¶ 23 (N.D. Ill. 2017) (church music director's claims barred by ministerial exception).

[2] Applicability of the Three-Prong Definition of Disability to Employment

Notes and Questions

Add a new note after note 2, p. 87

3. Conditions Considered Disabilities that Would Not Have Been Recognized before the ADAAA.

A number of cases that have held that the plaintiff is a person with a disability under the ADAAA would likely have been dismissed before the ADAAA. See, e.g., *Levy v. N.Y. State Dep't of Environmental Conservation*, 2018 WL 1441325 (N.D.N.Y. 2018) (employee with type 1 diabetes is disabled even though diabetes did not interfere with work performance); *Mullenix v. Eastman Chemical Co.*, 237 F. Supp. 3d 695 (E.D. Tenn. 2017) (employee who suffered broken arm requiring two surgeries substantially limited); *Quidachay v. Kansas Dep't of Corrections*, 239 F. Supp. 3d 1291 (D. Kan. 2017) (Crohn's disease is disability). But courts are still hesitant to find a person who works in a position related to security or safety is qualified if the disability may create a danger. See *Butler v. Washington Metro. Area Transit Auth.*, 275 F. Supp. 3d 70 (D.D.C. 2017) (bus operator with sleep apnea failed to obtain medical qualification certification rendering him incapable of performing essential functions); *Silver Entergy Nuclear Operations, Inc.*, 2017 WL 5508387 (S.D.N.Y. 2017) (nuclear securities officer not qualified, having valid Unescorted Access Authorization was essential function, and UAA was suspended due to mental disability).

6. HIV/AIDS as Per Se Disability

Add to end of note 6, pp. 89-90

See also *Rodriguez-Alvarez v. Municipality of Juana Diaz*, 54 Nat'l Disability L. Rep. ¶ 128 (D. Puerto Rico 2017) (HIV infection in "special category" entitled to broader protection on ADA and subject to lower standard for establishing whether it substantially limits major life activity).

7. ADA Employment Cases Often Fail on Definitional Issues

Add to end of note 7, p. 90

See also Curtis D. Edmonds, *Lowering the Threshold: How Far Has the Americans with Disabilities Act Amendments Act Expanded Access to the Courts in Employment Litigation?* 26 J. L. & POL'Y 1, 61 (2018) (concluding that, "By increasing the scope of coverage to include people that ought to have been covered under the ADA from the outset, the ADAAA has increased fairness for litigants with disabilities while meeting its function of screening out individuals with minor impairments that do not result in substantial limitation," but also noting that the ADA and its ADAAA amendments have not narrowed the unemployment gap between persons with and without disabilities). But see Nicole Buonocore Porter, *Explaining 'Not Disabled' Cases Ten Years after the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEORGETOWN J. POVERTY L. & POL'Y 383 (2019) (finding that approximately one quarter of courts deciding whether a person has a disability after the passage of the ADA wrongfully find for the defendant).

[3] Drug and Alcohol Users and Persons with Contagious and Infectious Diseases

Notes

3. Conduct/Disability Distinction.

Add to end of note 3, pp. 99-100

Courts tend to distinguish conduct from disability, especially when the conduct is egregious. Even if the bad conduct is caused by the disability, they conclude that discipline or firing based on conduct is not necessarily discrimination under the ADA. See *Szuskiewicz v. JPMorgan Chase Bank*, 257 F. Supp. 3d 319 (E.D.N.Y. 2017) (even if employee's egregiously harassing conduct towards one of employer's vendors was manifestation of his disability, ADA did not immunize him from discipline or discharge).

Add to the end of the notes on p. 100

5. Use of legal medical marijuana. A number of states have recently legalized the use of medical and recreational marijuana. Because marijuana use, whether for medical or recreational purposes, is still illegal under federal law, many employers contend that they have the right to fire or discipline employees who test positive for marijuana use, even those who have a disability for which they are using medical marijuana. They rely on the Supremacy Clause and the preemption of state law by federal law.

This is a particularly complex area because the tests for marijuana that reveal that someone has used the drug do not accurately measure whether the individual has used at work or is presently impaired (e.g. at the workplace). Thus, an employer that does drug testing that reveals marijuana use may actually be firing or refusing to hire the employee for drug use that: 1. Is medically beneficial; 2. Is legal under state law; 3. Occurs outside of the workplace; and 4. Does not affect the employee's ability to do the job. It can be even more complicated because the state may have disability discrimination laws that protect the employee who uses medical marijuana, or might have a statute that forbids employers from disciplining or firing employees for legal activities that take place outside of work. While the first cases challenging employer discipline of an employee

who tests positive for marijuana use even in states where marijuana use is legal have held that the employer has the right to discipline and fire the employee, a newer case has held that permitting an employee who uses medical marijuana is a possible reasonable accommodation to a disability. See *Barbuto v. Advantage Sales & Marketing, LLC*, 78 N.E.3d 37 (Mass. 2017) (where no equally effective alternative exists to medical marijuana, prohibited by employer's drug policy, employer bears burden of proving that employee's use of marijuana would cause undue hardship to business to justify refusal to make exception to drug policy to reasonably accommodate employee's medical needs). For an interesting discussion of these issues, see Dale L. Deitchler and Wendy M. Krincek, *Are Marijuana Users the Newest Protected Class?* 26-FEB NEV. LAW. 10 (2018).

C. Qualification Standards under the ADA and Rehabilitation Act: Technical Standards and Medical Examinations at the Hiring Stage

[2] Preplacement Examinations

Add on p. 109, before the Note

Tests that purport to predict whether an individual is vulnerable to conditions or diseases are generally illegal. See, e.g., *EEOC v. Amsted Rail Co., Inc.*, 280 F. Supp. 3d 1141 (S.D. Ill. 2017) (placement of applicants on medical hold due to abnormal nerve conduction test, which tested for possible future carpal tunnel syndrome, and requiring applicants to obtain further expensive testing on their own violated law).

An important case is *Gibbs v. City of Pittsburgh*, 989 F.3d 226 (3d Cir. 2021) (overturning lower court's grant of defendant's motion to dismiss Title I claim for discriminatory failure to hire the plaintiff as police officer with ADHD who offered evidence that the defendant relied exclusively on a psychologist who decided plaintiff was not fit for the job because of his misbehavior as a child even though other officers without ADHD had been hired who misbehaved as children, and even though five other police departments who employed the plaintiff had no problems with him).

[3] Posthiring

Notes and Questions

Insert after note 3, p. 123

4. Medical Exams after Returning to Work after FMLA leave.

An employee returning from medical leave may be required to undergo medical evaluation, so long as it is job-related and consistent with business necessity. The employer may require a doctor's evaluation or other medical testing to determine whether the employee poses a safety risk and whether the employee can perform the essential functions of the position, but employers must be cautious in this regard. They must ask for only the medical information that would shed light on whether the plaintiff is a direct threat to his own health and safety and that of others, and must be able to demonstrate that the information sought is job-related and consistent with business necessity. Moreover, employers must be aware that broad requests for medical records can run afoul of the Genetic Information Non-Discrimination Act. See *Jackson v. Regal Beloit American*,

Inc. 2018 WL 3078760 (E.D. KY, June 21, 2018) (concluding that the employer’s requests for medical records of employee returning to work after colon cancer surgery was not only excessively broad, but also not job-related and consistent with business necessity and therefore violated both the ADA and GINA even though she would be operating dangerous equipment); *Port Auth. Police Benevolent Ass’n, Inc. v. Port Auth. of N.Y. & N.J.*, 2017 WL 4838320 (S.D.N.Y. 2017) (requiring all officers regardless of job assignment to submit to annual medical exam not business necessity; broader and more intrusive than necessary to ferret out conditions that might affect job performance).

D. What Constitutes Discrimination?

[2] Disparate Treatment and Disparate Impact

Page 134, add the following case note to this section:

Exby-Stolley v. Bd. of Cty. Commissioners, 979 F.3d 784 (10th Cir.) (en banc), *cert. pet.* filed March 21, 2021 (holding that a lawsuit for failure to accommodate under Title I of the ADA does not require that the plaintiff prove an adverse employment action – a disparate treatment case—as well; in fact, unlike disparate treatment cases, failure to accommodate cases do not require proof of discriminatory intent).

E. Qualifications

[1] Fundamental and Essential Functions

[a] Attendance Requirements

Notes and Questions

4. Other Cases Involving Attendance

Add to end of note 4, pp. 147-9

In *Mosby-Meachem v. Memphis Light, Gas & Water Division*, 883 F.3d 595 (6th Cir. 2018), the plaintiff was an in-house lawyer placed on bed rest for 10 weeks during her pregnancy who requested an accommodation to work from home. Although the plaintiff continued to work during her absence from work, her employer denied her request for an accommodation of telecommuting, arguing that the request was unreasonable *per se* because attendance was an essential function of her job; a jury found for the plaintiff. Although the employer argued that attendance was an essential function of the job, the court of appeals upheld the jury verdict as supported by sufficient evidence that attendance was not necessary for the plaintiff to do the job for a 10-week period. The court concluded that although in-person attendance is essential for most jobs, whether it is essential in a particular job ordinarily requires a fact-specific inquiry.

See also *Williams v. AT&T Mobility Serv.*, 54 Nat’l Disability L. Rep. ¶ 105 (6th Cir. 2017) (employee with frequent absences not qualified where employer has strict attendance policy and presents evidence that employee absences cause strain on workplace); *Whitaker v. Wis. Dep’t of Health Serv.*, 54 Nat’l Disability L. Rep. ¶ 137 (7th Cir. 2017) (where employee’s job functions include answering phone calls, attending in-person meetings with clients, and using employer’s

internal computer system, regular attendance is essential function); *Evans v. Cooperative Response Center, Inc.*, 996 F.3d (8th Cir. 2021) (holding that because attendance was an essential job requirement, the plaintiff who suffered from an autoimmune disease and needed to take days off from work could not establish that significant time off from work was a reasonable accommodation).

[b] Employer-Provided Leaves

Add at the end of p. 155

While employers cannot automatically rely on the 12-week limit under the FMLA to determine what length of leave would be a reasonable accommodation under the law, a few courts have concluded that a months-long leave and an indefinite leave would not be reasonable *per se*. See *Moss v. Harris County Constable Precinct One*, 54 Nat'l Disability L. Rep. ¶ 156 (5th Cir. 2017) (while taking leave that is limited in duration may be reasonable accommodation, taking leave with intent of retiring is not; it would never enable employee to perform essential functions of job); *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017) (employer not required to accommodate employee by granting multi-month leave of absence following expiration of his FMLA leave); *Menoken v. EEOC*, 56 Nat'l Disability L. Rep. ¶ 160 (D.D.C. 2018) (request for indefinite paid leave not reasonable under Rehabilitation Act).

[d] Coping with Stress

Add at end of first paragraph, p. 159

See also *Yonemoto v. Dep't of Veterans Affairs*, 56 Nat'l Disability L. Rep. ¶ 143 (9th Cir. 2018) (not qualified when unable to perform essential functions of handling stress and interacting with others).

Add to p. 162 after [f] Marginal Functions

[g] Other Essential Functions

The essential functions for different jobs can be as varied as the jobs themselves and should normally be determined through factual inquiry. The following cases determined that the plaintiff could not perform the essential functions of the job. See *Bell v. Bd. of Educ. of Proviso Township Sch. Dist.* 209, 54 Nat'l Disability L. Rep. ¶ 1 (7th Cir. 2016) (bookroom clerk whose doctor prohibited her from standing for prolonged period not qualified as job required standing and climbing ladders for more than 30 minutes at a time while retrieving books for students; no accommodation would allow her to remain in position); *Perry v. City of Avon Park, Fla.*, 54 Nat'l Disability L. Rep. ¶ 56 (11th Cir. 2016) (ability to work outdoors in hot and cold weather is essential function of city worker's job; and when medically restricted to work in mild temperatures, she is no longer qualified).

[2] Direct Threat

Notes and Questions

2. Seizure Disorders and Direct Threat

Add the following before the last paragraph of this note on p. 174

See *Reinacher v. Alton & Southern Ry.*, 53 Nat'l Disability L. Rep. ¶ 137 (S.D. Ill. 2016) (railway car man with epilepsy in safety critical position who has three seizures in three years constitutes direct threat and is not qualified individual).

4. Threat to Self or Others

Add the following to the note on p. 175

Bey v. City of New York, __ F.3d __; 2021 WL 2345249 (2d Cir. 2021) (holding that the OSHA regulation requiring a tight seal in respirators for firefighters that bans facial hair at the location of the respirator seal precluded black firefighters' argument that it would be a reasonable accommodation to permit firefighters with PCB (a bacteria caused by shaving in black men) to have short beards, and, therefore, provided the City with an absolute defense in the firefighters' Title I claim under the ADA); *Todd v. Fayette County Sch. Dist.*, __ F.3d __; 2021 WL 2149351 (May 27, 2021, 11th Cir.) (upholding lower court's grant of summary judgment to defendant in a lawsuit alleging that the defendant school district violated Title I of the ADA by failing to renew the plaintiff's teaching contract because of her major depressive disorder; because the plaintiff had engaged in threats to kill herself and her son who was a student at the school where she was a teacher as well as threats against administrators, the school was not required to retain the teacher even if her threatening behavior resulted from her disability).

F. Reasonable Accommodation and Undue Hardship

[1] Proving that the Plaintiff Is a Qualified Individual, Reasonable Accommodation, and Undue Hardship

Notes and Questions

Add after note 2, p. 190

3. Proof in the 9th Circuit. In *Dunlap v. Liberty Natural Prods., Inc.*, 878 F.3d 794 (9th Cir. 2017), the 9th Circuit upheld a jury verdict finding that the plaintiff proved that the employer had violated the ADA by failing to reasonably accommodate her disability where she placed the employer on notice that she had a disability by providing her medical restrictions and releases, there were carts onsite that she could use, but the employer discouraged their use, and the employer failed to discuss or provide assistive devices, and terminated her due to perceived inability to perform her job.

[3] Physical Impairments and Reasonable Accommodations

Notes and Questions

Insert after note 7, p. 203

8. Sign language interpreters. A number of cases have dealt with whether the employer's provision of an ASL interpreter is a reasonable accommodation. The cases go both ways, depending on the facts of the individual case. See, e.g. *Cadoret v. Sikorsky Aircraft Corp.*, 56 Nat'l Disability L. Rep. ¶ 140 (D. Conn. 2018) (company unsuccessfully argued employee did not need sign interpreter to perform essential functions); *Vardon v. FCA US LLC*, 57 Nat'l Disability L. Rep. ¶ 8 (E.D. Mich. 2018) (reasonableness of communication with employee who is deaf was in question where employer used text messages, lip reading, and written notes, and employee required interpreter to understand or effectively express himself); *Smith v. Loudoun County Pub. Schs.*, 56 Nat'l Disability L. Rep. ¶ 155 (4th Cir. 2018) (special education teacher fired for poor job performance not because she requested full time ASL interpreter).

[5] Job Restructuring and Job Reassignment

Notes and Questions

Add to the end of note 1, p. 214

See *E.E.O.C. v. St. Joseph's Hosp.*, 54 Nat'l Disability L. Rep. ¶ 57 (11th Cir. 2016) (employer not required to undermine best qualified applicant policy to reassign employee with disability); *U. S. v. Woody, Jr. Sheriff City of Richmond*, 54 Nat'l Disability L. Rep. ¶ 59 (E.D. Va. 2016) (ADA does not require reassigning employee with disability to vacant position for which she is not most qualified candidate).

After note 6, p. 215, add the following

7. Animals as Accommodations

There are a number of cases dealing with whether the employee or applicant should be permitted to bring a dog to work as an accommodation to the person's disability. See *Clark v. School Dist. Five of Lexington & Richland Counties*, 55 Nat'l Disability L. Rep. ¶ 6 (D.S.C. 2017) (triable issues remain regarding whether reasonable accommodation would require permitting teacher to bring dog who placed deep pressure on chest of teacher to avert panic attacks).

[6] Duty to Engage in Interactive Process

Add at the end of this section, p. 218

A number of cases have been decided on the failure to engage in the interactive process. See *Sheng v. M & T Bank Corp.*, 848 F.3d 78 (2d Cir. 2017) (while there is no separate cause of action for failing to engage in interactive process, such failure is evidence of employer's refusal to offer a reasonable accommodation; offer of accommodation conditioned upon dropping monetary claims does not fulfill requirements as to interactive process); *Dillard v. City of Austin, Tex.*, 837 F.3d 557 (5th Cir. 2016) (interactive process is two-way street; thus worker who did not make

honest attempt to learn and carry out duties of new administrative position did not have claim for breakdown of interactive process against city); *Kowitz v. Trinity Health*, 54 Nat'l Disability L. Rep. ¶ 19 (8th Cir. 2016) (employee's notification to employer, who knows of her disability, that she is unable to complete required certification until she has completed four months of physical therapy may constitute request for accommodation sufficient to trigger interactive process); *McClain v. Tenax Corp.*, 56 Nat'l Disability L. Rep. ¶ 106 (S.D. Ala. 2018) (employer responded to employee's requests for accommodations by giving ultimatum to either keep working or resign; court held that company failed to engage in interactive process); *E.E.O.C. v. MGH Family Health Center*, 54 Nat'l Disability L. Rep. ¶ 121 (W.D. Mich. 2017) (employer cannot delegate process of performing individualized inquiries to third party and then rely solely on their advice, to avoid ADA liability); *Arndt v. Ford Motor Co.*, 247 F. Supp. 3d 832 (E.D. Mich. 2017) (employer not obligated to affirmatively suggest alternative accommodations).

G. Disability-Based Harassment and Retaliation

[2] Retaliation

Add to the end of note 1, p. 226

A number of cases holding that the plaintiffs have alleged or proved retaliation have recently been decided in the area of teachers who protest against violation of the rights of students with disabilities. See *Hamerski v. Belleville Area Special Services Coop.*, 56 Nat'l Disability L. Rep. ¶ 6 (S.D. Ill. 2017) (principal who opposed arresting students with disabilities, who was given option to resign or be demoted, alleges a cause of action for retaliation under ADA); *Sahrle v. Greece Cent. Sch. Dist.*, 53 Nat'l Disability L. Rep. ¶ 18 (W.D.N.Y. 2016) (disciplinary charges after advocacy for students with disabilities suggests retaliation); *Volpe v. N.Y. City Dep't of Educ.*, 195 F. Supp. 3d 582 (S.D.N.Y. 2016) (public school special education teacher alleged she attempted to speak with parent of special education student about student's rights and interests and was immediately kept in office under supervision at direction of principal sufficient to state claim for retaliation under ADA and §504). But see *Groening v. Glen Lake Community Schs.*, 56 Nat'l Disability L. Rep. ¶ 164 (6th Cir. 2018) (school board's decision to audit school district's tracking of employees' leave time, including superintendent who took FMLA leave, not enough to show retaliation).

I. Relationship of ADA to Other Federal and State Laws

[2] Family and Medical Leave Act

Notes

Add after the notes on p. 234

10. Interference and Retaliation under the FMLA.

It is a violation for an employer to interfere with an employee's FMLA rights and to retaliate against employees for asserting their rights (or those of others) under the FMLA. See *Guzman v. Brown County*, 884 F.3d 633 (7th Cir. 2018) (employee claiming FMLA interference failed to show that medical condition involved inpatient care or continuing treatment; not eligible

for FMLA leave); *Chase v. U.S. Postal Serv.*, 54 Nat'l Disability L. Rep. ¶ 91 (1st Cir. 2016) (carrier failed to show supervisor engaged in FMLA retaliation as he did not have knowledge of carrier's medical leave); *Stewart v. Snohomish County PUD No. 1*, 262 F. Supp. 3d 1089 (W.D. Wash. 2017) (disciplinary action against employee who suffered from chronic migraines was motivated by frustration about her disability, not by her using medical leave, precluding interference claim).

[4] Genetic Information Nondiscrimination Act (GINA)

GINA, the ADA, and the ADAAA

Add to p. 237, end of this section

In at least one case, the court was sensitive to the question of whether a request for medical records would reveal genetic information. In *Jackson v. Regal Beloit American, Inc.* 2018 WL 3078760 (E.D. KY, June 21, 2018), the court concluded that the employer's requests for medical records of an employee returning to work after colon cancer surgery was excessively broad and violated GINA because it would divulge her family's genetic information; the violation was not inadvertent because the request was not tailored to avoid genetic information and therefore would likely result in the defendant's obtaining of genetic information.

Wellness Programs. See *AARP v. E.E.O.C.*, 54 Nat'l Disability L. Rep. ¶ 76 (D.D.C. 2016) (while AARP had associational standing, EEOC's regulations regarding wellness programs not enjoined from taking effect due to ADA and GINA provisions that protect employees from involuntary disclosure of health and genetic information; incentives up to 30 percent not coercive); *E.E.O.C. v. Orion Energy Sys.*, 54 Nat'l Disability L. Rep. ¶ 21 (E.D. Wis. 2016) (employee wellness program is voluntary as long as employee not required to participate even if employee who opts out must then pay full amount of company health insurance premium).

For a discussion of this issue, see Rothstein, Roberts, Guidotti, *Limiting Occupational Medical Evaluations Under the Americans with Disabilities Act and The Genetic Information Nondiscrimination Act*, 41 AM. J. L. & MED. 523 (2015).

Add on p. 238 before the section on Enforcement

[6] The Pregnancy Discrimination Act

The Pregnancy Discrimination Act (PDA) which is part of Title VII of the 1964 Civil Rights Act, protects not only women who are pregnant, but also women who have pregnancy-related conditions, including post-partum-related conditions. There is potential for overlap between the PDA and the ADA if the condition substantially limits one or more major life activities. See *Hicks v. City of Tuscaloosa, Ala.*, 56 Nat'l Disability L. Rep. ¶ 3 (11th Cir. 2017) (lactation is a medical condition related to pregnancy and therefore protected by PDA); *EEOC v. Bob Evans Farms, LLC*, 56 Nat'l Disability L. Rep. ¶ 5 (W.D. Pa. 2017) (removing pregnant employee from automated scheduling system and requiring her to call in and confirm availability to get shifts simply because she was pregnant and her taking leave was "imminent" was discrimination). See also the discussion of *Young*, pp. 85-6 in the textbook.

J. Enforcement

[4] Title I of the Americans with Disabilities Act

Arbitration Clauses and the ADA

Add to the end of this section, p. 242

In *Epic Systems Corp. v. Lewis, Ernst & Young, LLP v. Morris*, and *National Labor Relations Board v. Murphy Oil USA, Inc.*, 138 S.Ct. 1612 (2018), the Supreme Court once again upheld the right of employers to require employees who had signed arbitration agreements to take their claims to arbitration. In these consolidated cases, the Court held that the National Labor Relations Act's provision that protects concerted action of workers does not forbid the employer's enforcement of a waiver of class actions in arbitration provisions signed by the worker before the dispute arose. There is no question that these cases will apply to cases brought by persons with disabilities under the ADA and the Rehabilitation Act. See, e.g. *Poole-Ward v. Affiliates for Women's Health*, 2017 WL 3923547 (S.D. Tex. 2017) (arbitration clause in employment agreement was enforceable for ADA violations). Workers' rights advocates see the arbitration cases as seriously undermining the rights of employees to assert their rights in federal court. As a practical matter, the arbitration cases could mean that most employers will include in their contractual agreements with applicants and employees a pre-dispute arbitration clause that waives the right to class actions not only in federal court but also in arbitration.

Chapter 4 Public Accommodations

A. Introduction and Overview

Add to Note 3 on pages 267-268:

In *Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266 (11th Cir. 2021) the court held that Title III of the ADA applies only to places and physical structures and does not apply to websites). There is a strong dissent from Judge Jill Pryor. There is a split in the circuits and a number of lower court rulings on the issue. *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 10 A.D. Cas. (BNA) 65, 24 Employee Benefits Cas. (BNA) 1393 (9th Cir. 2000) (Title III limits places of accommodation to physical spaces; websites not included).

In addition to whether websites are covered by the ADA is what the design standards should be and other related issues. For example, in *Gomez v. Bank & Olufsen Am. Inc.*, 54 Nat'l Disability L. Rep. ¶ 131 (S.D. Fla. 2017) the court dismissed a claim by a blind website user because it was not connected to a physical location. Many of the claims are class actions and raise concerns about frequent litigants. Many of these cases have reached settlements. Richard P. Lawson, ADA Litigation Continues with Recent Settlements, Lexology, Dec. 7, 2017, available at <https://www.lexology.com/library/detail.aspx?g=83aa5969-3226-4a68-b670-4152fb4f9e1a>.

An interesting issue about responsibility for web content was at issue in *National Association of the Deaf v. Harvard University*, 377 F. Supp. 3d 49 (D. Mass. 2019) (Title III applies to university's online audiovisual content hosted on its website; claim seeking accurate and timely captioning by university website and third-party websites; university made video recordings of class lectures available to the general public; nexus to physical place not required for Title III application). A consent decree was entered in November 2019 that increases online content access by captioning all online resources, included live-streamed school-wide events and student organization content sponsored by departments, and new audio or video material hosted by third-party platforms. <https://creeclaw.org/wp-content/uploads/2019/11/NAD-v-Harvard-Consent-Decree.pdf?eType=EmailBlastContent&eId=4cc687f3-ea3a-47c4-935f-19d1e5b56216>

While at one point the Trump Department of Justice signaled that it would provide design standard guidance, that has been put on hold. Current regulatory proposals were placed on the "inactive" list in August 2017 and have since been withdrawn.

Add a new Note 4 on page 268:

There have been some unusual cases involving what types of programs are subject to Title III. In *J.H. v. Just for Kids, Inc.*, 248 F. Supp. 3d 1210 (D. Utah 2017) the operator of educational activity program for adults with disabilities was found not to be a Title III program. The court found that having a physical headquarters and use of vans was not sufficient. Kiosks used for DVD rental were found not to be public accommodations in *Nguyen v. New Release*, 56 Nat'l Disability L. Rep. ¶ 65 (E.D. Pa. 2017).

B. Nondiscrimination

Koester v. Young Men's Christian Ass'n of Greater St. Louis, 55 Nat'l Disability L. Rep. ¶ 43 (8th Cir. 2017) (allowing summer camp to require submission of child's IEP to determine appropriate accommodations for child with autism and Down syndrome; policy had been in place for 15 years and had been used to accommodate more than 700 campers each summer; purpose was to serve not to screen out; YMCA offered to allow pediatrician's report to be used instead of IEP).

C. Reasonable Accommodations

Add to Note 2 on Pages 282-283:

Animal accommodations continue to receive a great deal of attention by the media and the courts. The following are some interesting cases raising this issue. *Kao v. British Airways*, 56 Nat'l Disability L. Rep. ¶ 113 (S.D.N.Y. 2018) (dismissing Title III claim by airline passenger seeking to fly with her two dogs; counter supervisor refused based on inadequate documentation; check-in counter not subject to Title III; held that airline operations not subject to ADA); *Riley v. Board of Comm'rs of Tippecanoe County*, 56 Nat'l Disability L. Rep. ¶ (N.D. Inc. 2017) (although the dog was trained to open doors and pull groceries, these tasks were unrelated to disability of PTSD); *Santiago Ortiz v. Caparra Center Associates*, 2016 WL 1092482 (D. Puerto Rico 2016) (shopping mall setting); *Johnson v. Oregon Bureau of Labor Industries*, 415 P.3d 1071 (Or. App. 2018) (grocery store owner violated state law (similar to ADA) in denying service dog based on claim that it was under control of husband not owner; also raising the issue of two dogs).

The Department of Transportation finalized the revised regulations for animals on planes. One of the goals is to provide consistency with the ADA, and the proposed definition aligns more with the ADA by not including comfort animals, companionship animals, and service animals-in training. Documentation beyond what is allowed in the ADA can be required. Attestation that the animal has appropriate training, is in good health, and can relieve itself in a sanitary way. 85 Fed. Reg. 6448 to 6476 (Feb. 5, 2020). <https://www.federalregister.gov/documents/2020/02/05/2020-01546/traveling-by-air-with-service-animals> (for summary of the proposed regulations); <https://www.govinfo.gov/content/pkg/FR-2020-02-05/pdf/2020-01546.pdf> (for the full proposal).

Add to Note 5 on pages 285-286:

In *McGann v. Cinemark*, 873 F.3d 218 (3d Cir. 2016) the court addressed whether it was a reasonable accommodation to provide ASL tactile interpreting at a movie theater for a deaf and blind attendee. The court vacated a lower court holding on the fundamental alteration defense and has not reached the undue burden issue. See also 81 Fed. Reg. 87348 (Dec. 2, 2016) (effective January 17, 2017); 28 C.F.R. § 36.303; https://www.ada.gov/regs2016/movie_captioning_rule_page.html.

The need for employee training is highlighted in *Thomas v. Kohl's Corp.*, 56 Nat'l Disability L. Rep. ¶ 131 (N.D. Ill. 2018) in which the court denied summary judgment in a claim where department store patron sought accommodations for her mobility impairment. Another

situation in which employee training was raised involved the removal of a moviegoer with Down syndrome. The parent's claim was in response to the claimed mishandling of forcibly removing the individual. Their claim for failure to train failed. See *Estate of Robert Ethan Saylor v. Regal Cinemas*, 53 Nat'l Disability L. Rep. ¶ 165 (D. Md. 2016).

D. Architectural Barriers

Although rarely raised as a design change, the case of *Magee v. Winn-Dixie Stores, Inc.*, 56 Nat'l Disability L. Rep. ¶ 114 (E.D. La. 2018) involved a grocery store's self-service water station that lacked Braille markings. The court dismissed the case finding that there were some markings on the machines before the visit and others were shortly thereafter, so there was not injury.

There are few cases involving historic buildings, but they do occasionally arise. In *Miraglia v. Board of Directors of the Louisiana State Museum*, 56 Nat'l Disability L. Rep. ¶ 12 (E.D. La. 2017) the court held that the exterior of a historic building need not be modified, but the retail store entries within the building were not protected by the exemption.

E. Exemptions from the ADA and Special Situations

[2] Private Clubs

An issue rarely raised is the application of the private club exemption. In *Lobel v. Woodland Golf Club of Auburndale*, 260 F. Supp. 3d 127 (D. Mass. 2017) a guest of a country club was denied a special single-rider adaptive golf cart. The policy of allowing members to host non-members did not preclude private club status.

F. Air Transportation

The weight of authority is currently that there is no private right of action under the Air Carrier Access Act. While some decisions reached before 2001 had recognized a private right of action, the substantial weight of authority after the Supreme Court decision in *Alexander v. Sandoval*, 532 U.S. 427 (2001) has held otherwise. The following are the federal circuit court opinions on this issue. *Stokes v. Southwest Airlines*, 57 Nat'l Disability L. Rep. ¶ 33 (5th Cir. 2018) (no private right of action under ACAA and collecting cases). The *Stokes* decision notes that all lower court decisions since *Sandoval* have so held and finds that *Sandoval* provides the basis for overruling its prior decision in *Shinault v. American Airlines, Inc.*, 936 F.2d 796 (5th Cir. 1991). The following decisions find no private right of action: *Lopez v. Jet Blue Airways*, 662 F.3d 593 (2d Cir. 2011); *Boswell v. Skywest Airlines Inc.*, 361 F.3d 1263 (10th Cir. 2004), *Lopez v. Jet Blue Airways*, 662 F.3d 593, 25 A.D. Cas. (BNA) 951 (2d Cir. 2011); *Segalman v. Southwest Airlines Company*, 895 F.3d 1219 (9th Cir. 2018); *Love v. Delta Air Lines*, 310 F.3d 1347 (11th Cir. 2002). Two circuits have currently reserved decision on this issue. See *Elassaad v. Indep. Air, Inc.*, 613 F.3d 119 (3d Cir. 2010) *Gilstrap v. United Airlines, Inc.*, 709 F.3d 995 (9th Cir. 2013). The Eighth Circuit remains the only circuit court to currently find that there is a private right of action. *Tallarico v. Trans World Airlines, Inc.*, 881 F.2d 566, 28 Fed. R. Evid. Serv. 337, 108 A.L.R. Fed. 551 (8th

Cir. 1989). *See also* Perez-Ramos v. Spirit Airlines, Inc., 39 Nat'l Disability Law Rep. ¶ 2, 2009 WL 890484 (D.P.R. 2009) (opining that there is a private action).

G. Telecommunications

[3] Internet and Other Web-Based Communication

Claims involving website access have increased significantly. There were at least 750 cases filed in 2017 and many more in 2018 and 2019. The Department of Justice withdrew the following proposed rulemaking in December 2017. Architectural and Transportation Compliance Board (Access Board), "Information and Communication Technology (ICT) Standards and Guidelines," Jan. 18, 2017, available at <https://www.federalregister.gov/documents/2017/01/18/2017-00395/information-and-communication-technology-ict-standards-and-guidelines>. This means that there are still no clear standards for compliance. One court has found that even if there is no specific design standard for ADA website compliance, entities subject to the ADA are not exempt from ensuring some website access. *See* National Association of the Deaf v. Harvard University, 377 F. Supp. 3d 49 (D. Mass. 2019).

H. Enforcement

Although it is unlikely to be enacted given the current political climate, the ADA Education and Reform Act of 2017, introduced in the House of Representatives, would require any person with a disability to give notice before filing a Title III claim regarding architectural barrier issues and an opportunity for the property owner to correct it. This bill responds to a handful of litigants who are viewed as abusing the ADA's current enforcement mechanisms. *See* Mike DeBonis, *House Passes Change to Americans with Disabilities Act Over Activists Objections*, New York Times, Feb. 15, 2018, available at https://www.washingtonpost.com/powerpost/house-passes-changes-to-americans-with-disabilities-act-over-activists-objections/2018/02/15/c812c9ea-125b-11e8-9065-e55346f6de81_story.html. *See also* Laura Rothstein, *Preserving Access for People with Disabilities*, NEW ENGLAND JOURNAL OF MEDICINE, 378:22(page 2065) (May 31, 2018).

There are a large number of recent cases. The following are circuit court decisions on this issue. *Civil Rights Educ. & Enforcement Center v. Hospitality Properties Trust*, 55 Nat'l Disability L. Rep. ¶ 148 (9th Cir. 2017) (affirming denial of class certification to wheelchair users against hotel investment trust claiming denial of wheelchair accessible shuttle services violated Title III; testers granted standing, but class not certified); *Kirola v. City and County of San Francisco*, 55 Nat'l Disability L. Rep. ¶ 92 (9th Cir. 2017) (granting standing to class action of plaintiffs in Title claim re: ADA access to public rights-of-way, parks, and playgrounds even though no specific guidelines apply to such facilities; could challenge facilities not personally visited). Where property is leased, the issue of who bears responsibility for architectural barrier issues can arise.

This has rarely been addressed by the courts, but in *Rogers v. China One Express Corp.*, 54 Nat'l Disability L. Rep. ¶ 97 (S.D. Fla. 2016) the court allowed a restaurant patron to proceed against both the landlord and the tenant of property, providing that the private allocation of ADA responsibilities between them does not prevent claim against either party.

Chapter 5 Governmental Services and Programs

B. Nondiscrimination

[1] Federal Government Programs

In an unusual case, the court in *American Council of the Blind v. Mnuchin*, 2017 WL 6564428 (D.C. Cir. 2017) addressed the continuing litigation about redesigning paper currency to meet accessibility requirements for individuals with visual impairments. The decision remands for further consideration of the matter based on changed timeframes for redesign.

E. Licensing Practices

[2] Professional Licensing

[a] Licensing Exam Accommodations

Add to Notes on page 375

Department of Justice regulations issued in August 2016 provide additional clarification to regulations affecting testing accommodations. DOJ has also issued guidance related to these new regulations. 81 Fed. Reg. 53,204 (Aug. 11, 2016) (effective October 2017). Although the Department of Justice has taken the position that the regulations apply only to private testing agencies under Title III, courts generally consider the Title III regulations in Title II testing settings. 75 Fed. Reg. 56,164, 56,236 (Sept. 15, 2010). The revised regulations add “writing” as a major life activity (28 C.F.R. 35.108(c)(1)(i)). https://www.ada.gov/regs2016/final_rule_adaaa.html.

F. Mass Transit

Add to text on page 38:

Courts rarely address cases involving mass transit issues. In one of the few opinions to do so, the court in *Presmarita v. Metro-North Commuter RR Co.*, 56 Nat’l Disability L. Rep. ¶ 100 (S.D.N.Y. 2017) held that a commuter railroad was not required to provide wheelchairs to passengers. While recognizing that airlines and ships have such affirmative requirements, these are specifically required under applicable regulations.

G. Driving and Parking

[1] The Driver’s License

Add to Note 3 on page 39:

See also *Ivy v. Morath*, 781 F.3d 250 (5th Cir. 2015), remanded 137 S. Ct. 414 (2016). The case was dismissed by the Supreme Court as moot. It addressed whether state mandated driver’s education classes required of drivers younger than 25 to obtain driving licenses violate Title II and Section 504. The issue was whether because it is a state mandated requirement the private companies providing the training are required to provide sign language interpreters and other

accommodations. The claim was that the state's pervasive regulation of these courses make those providing them agents of the state.

[2] The Automobile

Add to Note 2 on page 390

In *Karczewski v. DCH Mission Valley*, 55 Nat'l Disability L. Rep. ¶ 97 (9th Cir. 2017) the court allowed the case to proceed in a claim by individual with paraplegia who asked to have hand controls installed to test drive a car.

[3] Parking and Highways

There is an increasing amount of litigation involving parking issues, but most of it arises in the context of private providers of public accommodations. The following are a few of the decisions involving parking in both private and governmental programs. *Davis v. Anthony, Inc.*, 57 Nat'l Disability L. Rep. ¶ 27 (8th Cir. 2018) (claim regarding access in restaurant parking lot was moot because it had been remediated); *McCune v. Party City Corp.*, 53 Nat'l Disability L. Rep. ¶ 7 (E.D. Cal. 2016) (shopping center with common parking facility serving many buildings not required to have accessible parking in front of each individual store); *Feltenstein v. City of New Rochelle*, 254 F. Supp. 3d 647 (S.D.N.Y. 2017) (denying summary judgment re: whether city parking garage was in compliance with Title II; claim involved van accessible parking and dispersal of accessible parking spaces throughout the garage); *Hernandez v. AutoZone, Inc.*, 2018 WL 1110859 (E.D.N.Y. 2018) (allowing class action to go forward in claim against chain store involving lack of access in parking lots and walkways).

[4] Taxicab Service

Add to text on page 391

Media attention has been given to these services, although few cases have reached final court resolution. For recent circuit court opinions, see e.g., *O'Hanlon v. Uber Tech, Inc.*, 63 Nat'l Disability L. Rep. ¶ 31 (3d Cir. 2021) (potential Uber riders who could not download app that asked them to agree to compelled arbitration, they were not bound by a term that they could not access because of their claimed ADA violation); *Access Living of Metropolitan Chicago v. Uber Technologies, Inc.*, 958 F.3d 604 (7th Cir. 2020) (affirming decision dismissing Title III claims of disability advocacy organization and an employee against ridesharing company; parties failed to state cause of action or lacked standing; Uber app allows choice of wheelchair accessible vehicle; claim was that Uber failed to ensure that enough WAV drivers were available resulting in outsourcing at higher expense and longer wait times); *Namisanak v. Uber Technologies, Inc.*, 971 F.3d 1088 (9th Cir. 2020) (users of electric wheelchairs not stopped from avoiding arbitration agreement in seeking options for calling wheelchair-accessible vehicles).

H. Access to Justice

[2] Criminal Justice System

Add to text on Page 400

In January 2017, the United States Department of Justice (DOJ) issued a guidance statement to various criminal justice entities regarding compliance with Title II of the Americans with Disabilities Act (ADA). The guidance letter encourages prison staff to provide treatment when it is apparent that a prisoner's negative behavior is a result of their disability. It encourages effective training. That guidance, however, has apparently been withdrawn.

Add Note 6 to Notes on page 401-403:

2. Training for Law Enforcement Officers

The number of recent cases highlights that this is an important issue. Although the courts generally do not find liability by the institution, the fact that so many cases are being litigated indicates a need for attention to this issue.

The needed attention is both for treatment for mental health issues and for training of law enforcement officers in how to deal with individuals with all types of disabilities. The following are some examples of the range of issues being addressed by the courts. *Windham v. Harris County, Texas*, 2017 WL 5245104 (5th Cir. 2017) (no failure by county sheriff deputies to accommodate arrestee's neck disability in field sobriety test); *Roell v. Hamilton County, Ohio*, 870 F.3d 471 (6th Cir. 2017) (denying summary judgment because of disputed facts involving death of arrestee with mental illness and claim of excessive force in 1983 and ADA claims); *Montgomery v. District of Columbia*, 59 Nat'l Disability L. Rep. ¶ 133 (D.D.C. 2019) (allowing case to go forward regarding police officer interrogations of individuals with mental disabilities); *Gardner v. Samaniego*, 59 Nat'l Disability L. Rep. ¶ 80 (N.D. Ala. 2019) (failure to train deputies about handling individuals with mental illness did not give rise to claim for compensatory damages under Title II or Section 504; requires showing of discriminatory intent; requiring showing that deliberate indifference to known harm that was substantially likely and failure to act on that basis; 911 call involved individual with schizophrenia whose behavior was threatening); *J.S.X. v. Foxhoven*, 361 F. Supp. 3d 822 (S.D. Iowa 2019) (preliminary motions in class action by students with significant mental illness placed in state institution for male juveniles adjudged delinquent); *Ravenna v. Village of Skokie*, 388 F. Supp. 3d 999 (N.D. Ill. 2019) (preliminary motions in case by arrestee against village for manner of arrest of person with mental illness); *Stokes v. City of Chicago*, 56 Nat'l Disability L. Rep. ¶ 110 (N.D. Ill. 2018) (denying motion to dismiss arrestee with seizure disorder who requested observable cell as accommodation; placed in out of view area where he was sexually assaulted while unconscious); *Munroe v. City of Austin*, 57 Nat'l Disability L. Rep. ¶ 10 (W.D. Tex. 2018) (granting summary judgment for city police department in case where individual with mental disability was shot and killed during a police response); *Hammonds v. DeKalb County*, 54 Nat'l Disability L. Rep. ¶ 112 (N.D. Ala. 2017) (ADA/504 do not apply to decisions about medical treatment; prison failure to provide medical needs of prisoners with

diabetes not covered where there was no demonstration that treatment given was worse than other prisoners needing medical care); *Earl v. Espejo*, 55 Nat'l Disability L. Rep. ¶167 (N.D. Ill. 2017) (arrestee with schizophrenia causing disturbance on bus arrested and held for two days without medical attention; may state ADA/504 claim); *Latson v. Clarke*, 249 F. Supp. 3d (W.D. Va. 2017) (allowing claim by prisoner on autism spectrum to proceed with ADA and 504 involving failure to provide medical care); *Martinez v. Salazar*, 54 Nat'l Disability L. Rep. ¶ 96 (D.N.M. 2017) (denying summary judgment; whether exigent circumstances exception applied to justify the actions against paraplegic individual who told police officers of his condition who was pulled from car, beaten, dragged across asphalt and had stun gun used on him even though he was subdued; exception applies where individuals with mental disabilities exhibit unpredictable or erratic behavior or otherwise present dangers); *Flood v. City of Jacksonville*, 2017 WL 2963568 (N.D. Ala. 2017) (dismissing case by administrator of estate of individual shot and killed by police officer; did not establish that claim that police officers should have known of mental health issues when they approached him established an ADA or Rehabilitation Act claim); *Parrott v. City of Bellingham*, 55 Nat'l Disability L. Rep. ¶ 131 (W.D. Wash. 2017) (denying motion to dismiss ADA Title II claim by arrestee; plausible failure to accommodate individual who was handcuffed with arms in back when he requested front handcuffing due to shoulder injury); *Wainright v. Gay*, 55 Nat'l Disability L. Rep. ¶ 26 (S.D. Ga. 2017) (request for wheelchair by arrestee at traffic stop might be Title II claim against city when officers denied assistance to individual with mobility impairment who was subsequently injured after being partially carried and dragged; denial of motion to dismiss); *Reaves v. Department of Correction*, 195 F. Supp. 3d 383 (D. Mass. 2016) (state prisoner with mobility and hearing impairments allowed to proceed in claim that health care needs were disregarded in violation of Title II; issues included provision of outdoor recreation for 17 years based on claim that it was unsafe for him to sit up in a wheelchair); *Moore v. City of Berkeley*, 54 Nat'l Disability L. Rep. ¶ 29 (N.D. Cal. 2016) (allowing case to go forward on whether arrest of individual with mental illness who was currently using illegal drugs; arrest process ultimately resulted in death; issue was whether police officers acted on basis of drug use and not mental illness; was misperception of effects of disability involved); *Cleveland v. Gautreaux*, 198 F. Supp. 3d 7171 (M.D. La. 2016) (denying motion to dismiss claim by pretrial detainee who died while incarcerated; 504/ADA violations claimed for adverse treatment related to his psychiatric illness).

For an examination of issues dealing with police abuse of individuals with disabilities who are of color, see Ann C. McGinley, *Enough! Eliminating Police Abuse of Individuals of Color with Disabilities*, __ NEV. L. J. __ (forthcoming 2021).

5. *Accommodations Within Facilities*

A number of recent decisions have addressed access issues within the criminal justice system. Several are from Illinois. See e.g., *Cook v. Illinois Dept of Corrections*, 56 Nat'l Disability L. Rep. ¶ 109 (S.D. Ill 2018) (denying motion to dismiss wheelchair using inmate's case claiming inaccessible cells and substance abuse treatment center); *Roberts v. Dart*, 57 Nat'l Disability L. Rep. ¶ 11 (N.D. Ill. 2018) (preliminary orders involving claim that jail failed to

provide an accessible toilet); *Bowers v. Dart*, 56 Nat'l Disability L. Rep. ¶ 28 (N.D. Ill. 2017) (recognizing triable issues about jail inmates claimed leg paralysis was a disability; inmate sought wheelchair as accommodation); *Wright v. New York State Department of Corrections & Community Supervision*, 242 F. Supp. 3d 126 (N.D.N.Y. 2017) (prison that allowed only manual wheelchair should have allowed inmate to use motorized wheelchair as reasonable accommodation; would not unduly burden prison); *Golden v. Illinois Dept. of Corrections*, 54 Nat'l Disability L. Rep. ¶ 15 (N.D. Ill. 2016) (denying summary judgment in claim by prison inmate under ADA/504 re: accommodations to use of prosthetic leg; access required substantial walking causing pain).

Providing interpreters and other accommodations for individuals with hearing impairments is receiving attention by a few courts in some interesting cases. See e.g., *King v. Marian Circuit Court*, 55 Nat'l Disability L. Rep. ¶ 147 (7th Cir. 2017) (sovereign immunity not abrogated in case involving request for ASL interpreters for low-cost mediation program; fundamental right of access not denied because he was allowed to proceed through alternative methods; *Tennessee v. Lane* does not apply); *Updike v. Multnomah County*, 870 F.3d 939 (9th Cir. 2017) (denial of ASL service to inmate who is deaf might be basis for damages under ADA and 504 against county; could not receive injunctive relief against either party; triable issues of deliberate indifference).

Animal accommodations have received increasing attention in a range of settings. These settings include within the justice system. See e.g., *Sykes v. Cook County Circuit Court Probate Division*, 837 F. Supp. 3d 736 (7th Cir. 2016) (individual denied use of service dog during state probate court proceedings; affirming dismissal based on lack of jurisdiction; probate exception to diversity jurisdiction precludes federal courts from interfering in state probate court matters).

I. Voting

Add to text on page 403:

Public attention to voting generally only highlights the importance of considering accessibility issues in this context. A few courts have provided some guidance on these issues. See e.g., *Hindel v. Husted*, 875 F.3d 344 (6th Cir. 2017) (reversing lower court's grant of summary judgment in claim by group of voters with visual impairments; public entity required to prove that compliance with ADA would result in fundamental alteration, voters claiming that paper ballot absentee voting denied right to vote without assistance); *Michigan State A. Philip Randolph Institute v. Johnson*, 209 F. Supp. 3d 935 (E.D. Mich. 2016) (plaintiffs lacked standing under ADA to challenge Michigan law abolishing straight-party voting by filling in a single bubble because none of the plaintiffs had a nexus to individuals with disabilities).

Add Note on page 409:

The section above about Covid and disability issues references the issues that arose during the Covid pandemic that are leading to voting restrictions that affect individuals with disabilities. For a commentary on this see, Maggie Astor, *G.O.P. Bills Rattle Disabled Voters: "We Don't Have A Voice Any More"*, <https://www.nytimes.com/2021/06/14/us/politics/disability-voting-rights.html> and new cases in section on Covid in Chapter 1 *supra*.

Chapter 6 Higher Education

B. Nondiscrimination in Higher Education

[2] Modification of Requirements

Add to Notes in the section:

In *Campbell v. Lamar Institute of Technology*, 2016 WL 6915527 (5th Cir. 2016) the court affirmed summary judgment for college in claim of intentional discrimination against student with brain injury. Accommodations of extended time and note-taking assistance had been provided, but the request for separate individually prepared exams was denied because of burden to faculty and that it would provide an unfair advantage.

C. Admissions

[1] Determining Qualifications

Add Note 7 on page 442:

In *Giraldo v. Miami-Dade College*, 54 Nat'l Disability L. Rep. ¶ 161 (S.D. Fla. 2017) the court issued a summary judgment order to the college in a case where a wheelchair user was denied a tutorial position. The court found that she was rejected because the applicant's English was not very clear and the job required excellent oral skills and ability to clearly articulate in the English language.

[3] Identifying and Documenting the Disability

Page 456, add note Notes:

Some clarifications to documentation requirements for examinations under Title II and Title III were issued in 2016. See 81 Fed. Reg. at 53,225-53,240 (August 11, 2016).

E. Architectural Barrier and Facility Issues

It is noteworthy that it is not only students who are affected by facility access. Staff and faculty and visitors to campus are also to be provided access. Alums may also be protected. See e.g., *Ross v. City University of New York*, 2016 WL 5678560 (E.D.N.Y. 2016) (denying motion to dismiss former student's ADA/504 claim alleging barriers to accessing campus; standing issue raised because she was an alum, not a current student; close proximity to campus and issue of intent to return raised).

Chapter 7 Education

A. Introduction and Overview

The Trump administration philosophy of supporting school choice may have significant implications for students with disabilities. It will be important to monitor these developments. Dana Goldstein, *Special Ed School Vouchers May Come with Hidden Costs*, N.Y. Times, Apr. 11, 2017, available at, <https://www.nytimes.com/2017/04/11/us/school-vouchers-disability.html>.

Sequential Listing of Key Statutes and Supreme Court Decisions

Add the following:

2015 Every Student Succeeds Act (replacing No Child Left Behind) and responding to the concerns that were raised with respect to students with disabilities under NCLB

2017 *Endrew F. v. Douglas County School Dist. RE-1*

IEP for child not fully integrated in regular classroom, and not able to achieve at grade level, must be appropriately ambitious in light of his circumstances

2017 *Fry v. Napoleon Community Schools*

Addressing whether parents must exhaust administrative remedies under IDEA before pursuing ADA/504 remedies in case where school had refused to allow student with cerebral palsy to be accompanied by her assistance dog.

2020 *Our Lady of Guadalupe v. Morrissey Berru*, S. Ct. (2020) and *St. James School v. Biel*, S. Ct. (2020)

Applying ministerial exception to ADA for teachers at religious schools.

C. Substantive Protections under the Individuals with Disabilities Act

[1] Appropriate Education

In *Endrew F. v. Douglas County School District*, S. Ct. (2017), the Supreme Court held that IDEA requires more than de minimis progress. It requires that the educational agency provide

programming that is reasonably calculated to enable a child to make appropriate progress based on an individualized assessment. It does not require equal opportunity, however.

[2] Related Services

The impact of proposed policy changes that might replace the Affordable Care Act could cut Medicaid significantly. Radical cuts could have significant budget implications for school districts who rely on this funding for special education services and equipment, including physical and speech therapists and vision/hearing screenings. See Erica L. Green, *A Little-Noticed Target in the House Health Bill: Special Education*, NEW YORK TIMES, May 3, 2017, available at <https://www.nytimes.com/2017/05/03/us/politics/health-bill-medicare-special-education-affordable-care-act.html>.

1. Psychological Services

Add to Note:

There has been increasing attention to the issue of bullying and students with disabilities. In addition to possible need for counseling, this issue raises concerns about the obligation of the school to address such behavior by other children. The following are citations to some of the recent decisions on this issue.

Doe v. Columbia-Brazoria Indep. Sch. Dist., 55 Nat'l Disability L. Rep. ¶ 49 (5th Cir. 2017) (former elementary school student who claims he was assaulted by another child fails to connect assault to accommodations and show intentional discrimination by district); *Estate of Barnwell v. Watson*, 880 F.3d 998 (8th Cir. 2018) (although mother told IEP team she was worried about bullying, she did not describe any incidents or identify any students causing problems; generalized concerns not enough to alert district); *J.M. v. Dep't of Educ., State of Haw.*, 2016 WL 7029825 (D. Hawaii 2016) (lack of promise in IEP that student would not be subjected to bullying did not constitute denial of FAPE); *C.M. v. Pemberton Township High Sch.*, 54 Nat'l Disability L. Rep. ¶ 117 (D.N.J. 2017) (parent failed to show that district's deliberate indifference to peer harassment in form of tripping and biting precluded student from participating in or receiving benefits from services, programs, and activities); *Doe v. Torrington Bd. of Educ.*, 179 F. Supp. 3d 179 (D. Conn. 2016) (officials' purported failure to adequately protect student from bullying and harassment by other students did not violate ADA where there was no allegation that he was harassed because of his disability rather than some other reason, such as personal animus); *Doe v. Torrington Bd. of Educ.*, 179 F. Supp. 3d 179 (D. Conn. 2016) (school officials' reactions to student's reports of assault by fellow students not sufficiently egregious to support student's substantive due process claims, where student did not report every incident, officials did discipline students when he reported incidents, officials offered student counseling and allowed him to leave class early to avoid certain students, and provided tutoring at school board's offices); *Spring v. Allegany-Limestone Cent. Sch. Dist.*, 138 F. Supp. 3d 282 (W.D.N.Y. 2015) (allegations district and officials failed to adequately discipline or supervise students who bullied and harassed special education student, resulting in special education student's suicide, insufficient to state claim). See also *Hamilton v. Hite*, 55 Nat'l Disability L. Rep. ¶ 168 (E.D. Pa. 2017) (student properly suspended

where each suspension was result of student's physical aggression such as hitting and choking students and school employees).

4. *Providing Services in Private School Settings*

There have been a number of recent decisions involving parents seeking reimbursement for private school placements. The decisions are fact intensive and reach different outcomes depending on the facts. The following is one of the circuit court decisions on the issue. *M.C. v. Antelope Valley Union High Sch. Dist.*, 2017 WL 1131821 (9th Cir. 2017) (student's parents would not have accepted district's referral to private school that accepted student for admission, thus student did not suffer any lost educational opportunity when district failed to inform parents of acceptance to the school).

Add Note 5 on page 549:

5. *Transition Services*

This issue has received recent attention by the Department of Education Office of Special Education and Rehabilitative Services, "A Transition Guide to Postsecondary Education and Employment for Students and Youth with Disabilities," Jan. 2017, available at <https://www2.ed.gov/about/offices/list/osers/transition/products/postsecondary-transition-guide-2017.pdf>. *See also* *R.E.B. v. State of Hawaii Dep't of Educ.*, 870 F.3d 1025 (9th Cir. 2017) (IDEA requires student's IEP to provide transition services when he exited private school to attend public schools).

D. Nondiscrimination and Reasonable Accommodation under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act

On February 22, 2017, the Supreme Court unanimously ruled that when not seeking a "free appropriate public education" (FAPE) under the IDEA, a plaintiff is not required to exhaust administrative remedies. The case of *Fry v. Napoleon Community School*, 197 L. Ed.2d 46 (2017), involved a twelve-year-old girl with cerebral palsy who was told that she could not bring her service dog, Wonder, to her elementary school. Her family brought suit against the Napoleon Community School under the ADA and the Rehabilitation Act for damages for the social and emotional harm caused by not being allowed to bring Wonder to school. Overruling the District Court and the Sixth Circuit Court of Appeals, the Supreme Court found that when students are not alleging a failure to provide a FAPE, but are alleging discrimination under the ADA, they need not pursue burdensome process by exhausting their administrative remedies. *But see* *Doucette v. Jacobs*, 2018 WL 457173 (D. Mass. 2018) (parents' claim that school officials' refusal to permit severely disabled child access to service dog was denial of FAPE and parents required to exhaust administrative remedies).

Page 590, add after the end of the decision.

The value of sports and extracurricular activities is demonstrated by decisions in several recent cases. See e.g., *Brown v. Elk Grove Unified Sch. Dist.*, 56 Nat'l Disability L. Rep. ¶ 162 (E.D. Cal. 2018) (district failed to conduct fact-specific inquiry to determine whether student with ED could participate in varsity basketball with reasonable accommodations); *Marshall v. N.Y. State Public High Sch. Athletic Ass'n, Inc.*, 2017 WL 6003228 (W.D.N.Y. 2017) (while student was returning for fifth year of high school because of disability, rule prohibiting fifth year of basketball had nothing to do with disability and ADA could not put student in better position than peers); *G. v. Fay Sch. Bd. of Trustees*, 282 F. Supp. 3d 381 (D. Mass. 2017) (even if school believes student does not have disability and denies parents' request for accommodations, school's inability to explain why student's move to home-based schooling made him ineligible for afterschool athletics raises questions about reason for school's decision); *A.H. by Holzmuehler v. Illinois High Sch. Ass'n*, 55 Nat'l Disability L. Rep. ¶ 112 (N.D. Ill. 2017) (while districts must ensure that students with disabilities have equal opportunity to participate in extracurricular athletic events, they need not provide accommodations that would give those students a competitive edge).

See also *Ashby v. Warrick County Sch. Corp.*, 56 Nat'l Disability L. Rep. ¶ 145 (S.D. Ind. 2018) (museum where school choir program held not a "service, program, or activity of school district" for purposes of parent's ADA claim).

F. Enforcement

As noted in Chapter 6, the Department of Education in early 2018 issued guidance that it would dismiss complaints that would pose an undue hardship on the office or a pattern of complaints against many people and would deny the right to appeal such dismissals. These kinds of complaints are more likely in a higher education context but could affect the commitment to enforcement for K-12 education as well. This policy has been challenged by advocates and should be watched to determine its impact. See Hannah Lang, *New Rules Let Ed Department Ignore Disability-Related Complaints*, Disability Scoop, Apr. 2, 2018, available at <https://www.disabilityscoop.com/2018/04/02/new-ignore-disability-complaints/24924/>.

Chapter 8 Housing and Independent Living

C. Discrimination

Page 618, add to notes the following:

While not yet a common practice, the prospect of using genetic information in housing situations raises potential disability discrimination issues. See Mark A. Rothstein and Laura Rothstein, *The Use of Genetic Information in Real Property Transactions*, 31 PROBATE & PROPERTY (ABA) No. 17 (2017), <https://ssrn.com/abstract=2973255> and Mark A. Rothstein and Laura Rothstein, *How Genetics Might Affect Real Property Rights*, 41 J. LAW MEDICINE & ETHICS 44 (2016).

D. Reasonable Accommodation

[3] Accommodations for Assistance or Service Animals

Add to Notes on Page 634:

The following are some of the most recent and interesting decisions involving animal accommodations in housing. *Sanders v. SWS Hilltop*, 56 Nat'l Disability L. Rep. ¶ 148 (D. Or. 2018) (granting summary judgment to prospective tenant with service dog in training where she was "regarded" as disabled and where landlord admitted only willingness to rent to applicants with service dogs who would keep old carpet and pay inflated deposit); *Geraci v. Union Square Condo. Ass'n*, 54 Nat'l Disability L. Rep. ¶ 115 (N.D. Ill. 2017) (allowing claim to proceed involving request of condo association to accommodate with PTSD re: dogs and request for key for nonstop elevator to avoid her riding elevator with dogs); *Hintz v. Chase*, 55 Nat'l Disability L. Rep. ¶ 150 (N.D. Cal. 2017) (denying real estate agency motion to dismiss FHA claim; assisting owner in discriminatory act might result in liability; case involved prospective tenant requesting service dog in rental property; owner declined due to allergies; agent knowingly assisted in denial); *Castellano v. Access Premier Realty, Inc.*, 181 F. Supp. 3d 798 (E.D. Cal. 2016) (granting partial summary judgment in claim involving denial of request to keep a cat as an emotional support animal; owner was vicariously liable for managers' violations of FHA); *United States v. NALS Apartment Homes*, consent decree (D. Utah No. 2:16CV1005BSJ Sept. 28, 2016) (settlement of claim against multi-family apartment complexes that required doctors prescribing emotional support animals to accept responsibility).

Page 634, add the following new section:

[4] Other issues

Recent decisions have highlighted the array of accommodations that might be requested in a variety of housing settings. See, e.g., *Kuhn v. McNary Estates Homeowners Association*, 54 Nat'l Disability L. Rep. ¶ 99 (D. Or. 2017) (HOA's denial of reasonable accommodation request to park RV in front of house in violation of restrictive covenants to accommodate adult daughter's need to be close to a toilet); *Schaw v. Habitat for Humanity of Citrus County, Inc.*, 272 F. Supp. 3d

1319 (M.D. Fla. 2017) (granting motion for summary judgment to organization that denied applicant for Habitat home based on income requirements; not required to make reasonable accommodations because sole source of income was Social Security disability benefits); Johnson v. Jennings, 54 Nat'l Disability L. Rep. ¶ 134 (M.D. Fla. 2017) (denying summary judgment to renter re: failure to provide reasonable accommodation for 10 year old child with developmental disabilities; requested permission to change locks to ensure daughter did not run away; no response was considered denial of reasonable modification); Hardaway v. District of Columbia Housing Authority, 843 F.3d 973 (D.C. Cir. 2016) (allowing case to proceed involving housing authority denial of approval for live-in aide to care for tenant).

E. Structural Barriers

Add to Notes on page 644:

4. Fair Housing Rights Center v. Post Goldtex, 53 Nat'l Disability L. Rep. ¶ 67 (3d Cir. 2016) (FHA accessibility requirements do not apply to factory building converted into housing; addressing deference to be given to HUD regulations; commercial building's first occupancy was before applicable date, but use as housing was after the applicable accessibility date); United States v. Mid-American Apartment Communities, Inc., 247 F. Supp. 3d 36 (D.D.C. 2017) (granting and denying motions regarding pattern or practice of disability discrimination in design and purchase of multifamily dwellings in several states).

F. Least Restrictive Environment and Independent Living

Add to Notes on page 657:

Other recent cases of interest include the following: Wicomico Nursing Home, 910 F.3d 739 (4th Cir. 2018) (preliminary rulings regarding claims that Medicaid eligible individuals were denied services including access to financial information); Reed v. Columbia St. Mary's Hospital, 915 F.3d 473 (7th Cir. 2019) (preliminary rulings in claim by patient; abuse of discretion to allow hospital to raise religious exemption as a defense late in the process); United States v. State of Florida, 938 F.3d 1221 (11th Cir. 2019) (preliminary motions in claims involving providing community based services to children with medically complex or fragile conditions instead of in nursing facilities); EEOC v. State of Florida, 60 Nat'l Disability L. Rep. ¶ 19 (11th Cir. 2019) (remand to district court in claim about whether Florida's Medicaid program discriminates against children who have medically complex or fragile conditions; issue of relationship between Title II and Section 504; DOJ has authority to enforce Title II); K.B. v. Michigan Department of Health & Human Services, 367 F. Supp. 3d 647 (E.D. Mich. 2019) (preliminary rulings in class action of Michigan Medicaid beneficiaries who are children regarding inadequate community-based mental health services); Thomas v. Kent, 385 F. Supp. 3d 1048 (C.D. Cal. 2017) (preliminary motions in integrated setting mandate for providing nursing and attendant care services in homes instead of institutions); Vaughn v. Wernert, 326 F. Supp. 3d 624 (S.D. Ind. 2018) (preliminary injunctive granted requiring providing in-home care to woman with quadriplegia); Mitchell v. Community Mental Health of Central Michigan, 2017 WL 1077894 (E.D. Mich. 2017) (unavailability of nighttime services in community living settings under Medicaid plan risked institutionalization in violation of least restrictive expectations of ADA/504); Ball v. Kasich, 244 F. Supp. 3d 662 (S.D.

Ohio 2017) (class action regarding service system that allegedly creates serious risk of segregation and institutionalization).

Add the following Note on page 664:

Valencia v. City of Springfield, Illinois, 883 F.3d 959 (7th Cir. 2018) (affirming lower court decision to grant preliminary injunction for group home residents who had been evicted when city denied special use permit application; residents already living in home; city claimed spacing requirements required eviction).

See also Robin Paul Malloy, *A Primer on Disability for Land Use and Zoning Law*, JOURNAL OF LAW, PROPERTY & SOCIETY, 1, pp. 1-45 (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3160829.

Chapter 9 Health Care and Insurance

B. Nondiscrimination in Health Care Services

Add after the first full paragraph on p. 672:

Recent cases dealing with complex funding issues have been decided after *Alexander v. Choate*. See, e.g., *Carpenter-Barker v. Ohio Dep't of Medicaid*, 56 Nat'l Disability L. Rep. ¶ 72 (S.D. Ohio 2017) (reduction of Medicaid benefits not a denial of integration mandate); *Brown v. District of Columbia*, 2017 WL 4081891 (D.D.C. 2017) (District of Columbia lacked reasonable transition assistance for individuals with disabilities receiving Medicaid long term care; class action seeking transition from nursing facilities to community-based care); *K.W. v. Armstrong*, 180 F. Supp. 3d 703 (D. Idaho 2016) (rulings on due process rights of individuals with developmentally disabled adults to obtain Medicaid payments under Idaho law). See also Mary Crossley, *Threats to Medicaid and Health Equity Intersections*, 12 ST. LOUIS U. J. OF HEALTH L. & POL'Y 311 (2019).

Notes

Add at the end of note 3, p. 688:

More states have passed legislation permitting assisted suicide and one has done so by court decision. Currently, the following states or districts have legislation permitting assisted suicide: California, Colorado, Hawaii, Oregon, Vermont, Washington and the District of Columbia. Montana's Supreme Court has recognized a right to assisted suicide in Montana. See <https://euthanasia.procon.org/view.resource.php?resourceID=000132>. The California End of Life Options Act was enjoined in May, but then reinstated in June 2018, and the issue is still before the courts.

Add at the end of notes, p. 689:

6. Forced sterilizations of women with intellectual disabilities. While it seems incredible that forced sterilizations of women with intellectual disabilities continue to take place ninety years after *Buck v. Bell* (see pp. 37-38, note 4), at least one case in the courts alleges nonconsensual sterilizations. See *Doe I v. District of Columbia*, 206 F. Supp. 3d 583 (D.D.C. 2016) (allowing due process claims to proceed in claims that three women with intellectual disabilities were forced to have elective surgeries, including abortions, without their consent).

Add at end of note 4, p. 698

In *United States v. Asare*, 291 F. Supp. 3d 476 (S.D.N.Y. 2017), the court held that the defendant violated Title III of the ADA by refusing surgery on individuals who are HIV positive without individualized inquiries; the policy screened out those with HIV taking antiretroviral medications.

C. Architectural Barriers, Auxiliary Aids and Services, and Reasonable Accommodation

Notes

Add to the end of note 1, p. 714

A number of courts have decided cases alleging that defendant health care facilities have discriminated against plaintiffs by failing to provide sign language interpreters. These cases have been decided on fact-based inquiries. See *Wilson v. Baptist Health So. Fla. Inc.*, 55 Nat'l Disability L. Rep. ¶ (11th Cir. 2017) (patients who are deaf entitled to substantially equal communication); *Durand v. Fairview Health Services*, 54 Nat'l Disability L. Rep. ¶ 98 (D. Minn. 2017) (hospital had provided effective communication with deaf parents of a hospital patient; patient was an adult and parents played no role in health care; *Sunderland v. Bethesda Health, Inc.*, 184 F. Supp. 3d 1344 (S.D. Fla. 2016) (granting summary judgment for hospital in case seeking on-site ASL interpreting services; intent to return not proven); *Labouliere v. Our Lady of the Lake Foundation*, 56 Nat'l Disability L. Rep. ¶ 31 (M.D. La. 2017) (associational status claim under ADA and Rehab Act; claim that deaf mother denied an interpreter who died in hospital caused daughter who served as interpreter to have nightmares, difficult sleeping, depression, anxiety and panic attacks; declining to extend coverage because individual must demonstrate personal exclusion, denial of benefits or discrimination); *Bates v. Delmar Gardens North Inc.*, 56 Nat'l Disability L. Rep. ¶ 14 (E.D. Mo. 2017) (denying injunctive relief but allowing claims to go forward where patient in nursing facility claimed Title III and Section 504 violations in claim of deliberate indifference in request by 81 year-old deaf individual for ASL interpreter); *Searls v. Johns Hopkins Hospital*, 52 Nat'l Disability L. Rep. ¶ 158 (D. Md. 2016) (undue financial hardship should consider overall budget, not amount budgeted for accommodations; case involved cost of interpreter service for a deaf nurse (\$120,000)); *Viera v. City of New York*, 55 Nat'l Disability L. Rep. ¶ 116 (S.D.N.Y. 2017) (granting summary judgment to hospital; no indifference to mother of minor patient in not providing American Sign Language interpreter; she had not requested an interpreter).

Add to end of notes, p. 716

5. Standards for Accessible Medical Diagnostic Equipment. The U.S. Access Board has promulgated a final rule on the minimum standards for accessibility of medical diagnostic equipment such as examination tables, examination chairs, and imaging equipment. The MDE standards permit the independent entry to, use of, and exit from the diagnostic equipment of persons with disabilities to the extent possible. The standards, which became law on February 8, 2017, are not mandatory on hospitals, health care providers, or manufacturers of equipment, but appropriate agencies with enforcement authority may issue regulations or adopt policies that make the standards mandatory for medical providers. 36 C.F.R. part 1195. See <https://www.access-board.gov/guidelines-and-standards/health-care/about-this-rulemaking/final-standards>. See also Elizabeth Pendo, *The Costs of Uncertainty: The DOJ's Stalled Progress on Accessible Medical Equipment Under the Americans with Disabilities Act*, 12 ST. LOUIS U. J. OF HEALTH L. & POL'Y 351 (2019).

Insert before E. Health Insurance

D. Legal Issues of Health Care Providers with Disabilities

There has been significant activity in the area of rights of medical students with disabilities and of doctors and other health care providers with disabilities.

[1] Students

Students at Cooper Medical School of Rowan University (CMSRU) are working to increase support for medical students with disabilities. Nationwide only three percent of medical students disclose their disability and receive accommodations. This may be caused by the stigma attached to disability. Students formed a group to promote disability awareness. Over a fifth of the student body has joined the group. The group has worked to connect with other medical students with disabilities across the country. A leader of the group believes that doctors with disabilities have a greater level of empathy and understanding. This can make them better doctors. See Elana Gordon, *Cooper Medical Students with Disabilities Push for Culture Change in Medicine*, *WHYY*, Apr. 2, 2018, available at <https://whyy.org/articles/cooper-medical-students-with-disabilities-push-for-culture-change-in-medicine/>.

There are a number of cases of students of medicine, nursing, and other medical schools who argue that the university had subjected them to disability discrimination. See *Khan v. Midwestern University*, 879 F.3d 838 (7th Cir. 2018) (affirming lower court holding that pregnant medical student who failed multiple exams was not otherwise qualified; must meet essential requirements and pass tests within set timeframe); *Chenari v. George Washington University*, 2017 WL 541012 (D.C. Cir. 2017) (no Rehabilitation Act violation; medical school provided sufficient accommodation information to student with ADHD; student expelled for taking additional time for exam which had not been requested); *Choi v. University of Texas Health Science Center at San Antonio*, (5th Cir. 2015) (dental student with ADD dismissed after failures in clinical courses; informed university after diagnosis; court determined that the university should not necessarily have known of his disabilities; student had duty to timely inform and request accommodation and did not do so); *Toma v. University of Hawaii*, 2018 WL 443439 (D. HI 2018) (applying 4 year statute of limitations in case by former medical student with anxiety and depression who was dismissed based on academic performance); *Yennard v. Herkimer*, 2017 WL 1011490 (N.D.N.Y. 2017) (former nursing student with bipolar disorder raised plausible claim of 504 discrimination against county vocational school).

[2] Other Health Care Providers

A number of cases deal with employment and/or licensing issues of health care providers with disabilities. See *Rodrigo v. Carle Foundation Hospital*, 879 F.3d 236 (7th Cir. 2018) (medical resident who failed step-three licensing test two times and was subsequently diagnosed with a sleep disorder, then failed a third time; hospital policy limiting to three attempts resulted in ineligibility; resident was not a qualified individual); *Stevens v. Rite Aid Corp.*, 54 Nat'l Disability

L. Rep. ¶ 154 (2d Cir. 2017) (employer may change job description to add new essential function; pharmacist with needle phobia no longer qualified when new job description required pharmacists to provide immunizations); *Crain v. Roseville Rehabilitation & Health Care*, 54 Nat'l Disability L. Rep. ¶ 164 (C.D. Ill. 2017) (triable issues about whether nursing assistant essential functions included lifting; employee with shoulder surgery had 35 pound lifting limitation; job description required 50 pounds although actual experience was that had never been needed); *Drake v. Department of Veterans Affairs*, 56 Nat'l Disability L. Rep. ¶ 120 (S.D. Ind. 2018) (summary judgment to VA Department; nurse seeking ergonomic equipment; claiming hostile work environment but failed to notify agency to allow for interactive process); *James v. Blue Cross Blue Shield of Louisiana*, 56 Nat'l Disability L. Rep. ¶ 121 (M.D. La. 2018) (medical review nurse who had stroke sought accommodations to production standards; employer's advising that she must determine what accommodations were needed herself did not engage in interactive process, denying summary judgment); *Caiez-Fermaint v. State Insurance Fund Corporation*, 2017 WL 7452411 (D. Puerto Rico 2018) (nurse with generalized anxiety disorder was terminated for insubordination including failure to take patient vital signs; termination basis was not pretextual); *Boyte v. Department of Veterans Affairs*, 56 Nat'l Disability L. Rep. ¶ 159 (M.D. Tenn. 2018) (finding triable issues on nurse's request for reassignment and engaging in interactive process for nurse with hearing impairment); *Diakov v. Oakwood Healthcare, Inc.*, 54 Nat'l Disability L. Rep. ¶ 108 (E.D. Mich. 2017) (85 year- old on-call doctor in OB/GYN department had calf injury, which raised issue of whether she was able to perform essential functions of the job and whether employer had justification to request medical exam; use of wheelchair claimed by hospital to prevent doctor from being able to respond to emergency situations and handle them completely herself); *Needham v. Department of Veterans Affairs*, 56 Nat'l Disability L. Rep. ¶ 76 (N.D. Ill. 2017) (nurse with depression expressed suicidal intentions; triable issues of whether she was otherwise qualified); *Singleton v. Public Health Trust of Miami-Dade County*, 55 Nat'l Disability L. Rep. ¶ 39 (S.D. Fla. 2017) (granting summary judgment to hospital in Title I claim by doctor who claimed that requirement to see minimum number of patients a day to keep hospital open may be an essential function; doctor with ADD could not meet requirement, was provided some accommodation but could still not meet minimum).

One concern is that doctors with mental health disabilities may avoid care for fear of losing their licenses. See Bob Nellis, *Physician Licensing Laws Keep Doctors from Seeking Care*, Mayo Clinic News Network <https://newsnetwork.mayoclinic.org/discussion/physician-licensing-laws-keep-doctors-from-seeking-care/>.

Change D. Health Insurance to E. Health Insurance

Add after the first paragraph on p. 717

Tax Reform Fails to Expand ABLE Act

The tax reform bill signed on December 20, 2017 weakened the Affordable Care Act by no longer requiring that most Americans have health insurance. Moreover, it failed to amend a provision in the Achieving a Better Life Experience (ABLE) Act of 2014 that would have allowed more people

with disabilities to utilize this resource. The ABLE Act allows people with disabilities to save money in ABLE Accounts without affecting their needs-based, federal-funded benefits.

See Michael Morris, *Millions of Americans with Disabilities Left Out in the Cold: No Expansion of Eligibility for ABLE Accounts in Final Tax Reform Bill*, HUFFPOST, Dec. 19, 2017, available at https://www.huffingtonpost.com/entry/millions-of-americans-with-disabilities-left-out-in-us_5a397ff5e4b0df0de8b06083; See Also: Judson Berger, *Congress Approves Final Tax Reform Bill, Handing Trump Year-End Victory*, Fox News, Dec. 21, 2017, available at <http://www.foxnews.com/politics/2017/12/20/house-gives-final-approval-to-tax-reform-bill-handing-trump-year-end-victory.html/>.

Page 729, add the following note:

6. The ACA and Disability Discrimination

Doe v. CVS Pharmacy, Inc., 982 F.3d 1204 (9th Cir. 2020), cert. pet. filed Mar. 26, 2021.

Plaintiffs, five Does, are insured patients who have HIV/AIDS. They are enrolled through their employer in a health plan that provides their prescription medication. Before a recent change to the rules, they obtained all of their prescriptions from community-based pharmacies where the pharmacists were personally aware of the plaintiffs' health conditions, and potential drug contraindications and engaged in confidential counseling of plaintiffs about their health and drug regimens. After the change, plaintiffs must buy all of their HIV "specialty" drugs from CVS and non-specialty drugs from community pharmacies. This change means that the plaintiffs receive their specialty HIV drugs in the mail or pick them up at a CVS pharmacy, resulting in a significant change from previous situation: now, there is a lack of counseling by pharmacists who know the plaintiffs' medical situations, who know all of the prescriptions they are taking and the dangerous possibility of drug contraindications. Moreover, when the plaintiffs go to CVS stores to pick up their prescriptions, there is a lack of privacy as to their HIV status. If plaintiffs were to choose to continue to buy their HIV drugs from their community pharmacies as before, copays for the drugs would cost thousands of dollars more than the drugs purchased on the new program. The plaintiffs alleged that this change led to a disparate impact based on their disability in violation of the ACA (which incorporates the Rehabilitation Act and other disability discrimination acts) as well as separate violations of the ADA, ERISA, and California state law.

The lower court granted the defendants' motion to dismiss on all counts. On appeal, the Ninth Circuit affirmed in part and reversed in part the lower court's decision, concluding that the plaintiffs had plausibly alleged a violation of the ACA but affirming the dismissal of the separate ADA cause of action. The court made a number of important determinations:

1. Section 1557 of the ACA incorporates the anti-discrimination protections of a number of other U.S. civil rights statutes, including those of Section 504 of the Rehabilitation Act. The standard for determining whether there is an ACA violation of Section 1557 is

determined by the type of discrimination alleged. Here, because the plaintiffs allege disability discrimination under the ACA, the standards governing this case are those of Section 504 of the Rehabilitation Act, which means that *Alexander v. Choate*'s definition of "meaningful access" is the applicable standard.

2. Applying the "meaningful access" standard under *Choate*, the court held that the plaintiffs had plausibly alleged a cause of action under the ACA because: 1. The fact that the policy is neutral on its face does not matter in a disparate impact cause of action; 2. The plaintiffs alleged that their entire set of health benefits were affected by the change and that counseling by knowledgeable pharmacists is critical to their healthcare; 3. Under *Choate*, the lower court should have looked to the ACA to determine the adequacy of the complaint; "Does adequately alleged that they were denied meaningful access to their prescription benefit, including medically appropriate dispensing of their medications and access to necessary counseling." Because of the structure of the program, the plaintiffs alleged that they were denied access to effective treatment because of their disability; 4. The ACA regulations require that the design or its implementation of the program not discriminate, and the plaintiffs plausibly alleged that the program denied them equal benefits to the non-HIV patients on the basis of their disability.
3. The court addressed the claim alleged under the ADA and confirmed its earlier holding that the content of insurance policies are not public accommodations for purposes of the ADA but explained that the public accommodation is the physical building that sells insurance. It therefore affirmed the lower court's dismissal of the ADA claim.

See also *Doe v. BlueCross BlueShield of Tennessee*, 926 F.3d 235, 59 Nat'l Disability L. Rep. ¶ 98 (6th Cir. 2019) (Section 504 does not prohibit disparate impact claims against health insurers; suit claimed medicine for HIV treatment was affected by pricing and means of obtaining).