

# **Disability Law**

**CASES, MATERIALS, AND PROBLEMS**

**SIXTH EDITION**

**2023 SUPPLEMENT**

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## **DISABILITY LAW Cases, Materials, Problems**

### **Supplemental Material (Summer 2023)**

Laura Rothstein, Ann C. McGinley, and D'Andra Millsap Shu © 2023

#### ***OVERVIEW OF THE SUPPLEMENT***

The Sixth Edition of *DISABILITY LAW* was published for first use in Fall 2017. While still current 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 these 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 the Covid pandemic and the relationship to disability discrimination law. The issues are wide ranging, and we address key Covid-related issues in each chapter.

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 in the existing casebook that relies on deference to agency interpretation may be subject to reassessment in light of the current regulatory trends. The 2024 Seventh Edition of the casebook itself will incorporate the regulatory framework in existence at that time. 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 Supreme Court since the Trump administration's addition of new members has also indicated that it will view regulatory frameworks with much scrutiny. Because disability rights statutes all have detailed and very specific regulations (and agency guidance), it is possible that some long-established regulatory precedent might change.

A major regulatory change is the Department of Transportation's 2020 regulations clarifying animal accommodations on airlines. These are discussed below. Attention to website issues is also on the radar screen of regulatory agencies, primarily the Department of Justice and the Department of Education. Design standards are under consideration, the Department of Education has issued a guidance document on this, and the Supreme Court will hear a case on websites during the 2023-2024 term.

Also, after the 2020 Presidential election, states began making changes to voting laws, and many of these are of significant concern to individuals with disabilities. These issues are discussed in Chapter 5.

There have been several Supreme Court decisions of direct application since the Sixth Edition was published. Six cases are in the context of education. One involved special education under the IDEA (*Andrew F. v. Douglas County School District RE-1*, 580 U.S. 386

(2017)), and another involved accommodations under the ADA and the intersection of the IDEA and ADA (*Fry v. Napoleon Community School*, 580 U.S. 154 (2017)). The Supreme Court again addressed the intersection of the IDEA and the ADA in the 2023 decision of *Perez v. Sturgis Public Schools*, 143 S. Ct. 859 (2023). The Court held that a student who is deaf and had settled his IDEA claim against the school district could bring a claim in damages under the ADA. Exhaustion of administrative remedies was not required. Two other cases arising in the education settings applied the ministerial exception to the ADA related to teachers at religious schools. These are *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), and *St. James School v. Biel*, 140 S. Ct. 680 (2020).

An important Supreme Court case was decided in 2022. The Court held that an individual on Medicaid cannot sue under the Rehabilitation Act of 1974 and the Affordable Care Act for emotional distress damages caused by disability discrimination. See *Cummings v Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562 (2022). For a description of the case, see <https://www.disabilitycoop.com/2022/05/09/supreme-court-decision-weakens-disability-rights-advocates-say/29843/>; <https://journals.stfm.org/familymedicine/2022/september/prescol-sept22/>.

In 2022, the Supreme Court revisited the issue of execution of inmates with disabilities. In *Hamm v. Reeves*, 142 S. Ct. 743 (2022), the Court allowed the execution of an inmate with cognitive disabilities without allowing him to choose a form of execution that had been added and was purportedly less painful.

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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 receiving 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 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 scholarly study from 2019, 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 GEO. J. ON 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 ADAAA 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 numerous 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. The issue of the frequent or vexatious litigant may be addressed to some extent during the 2023-2024 Supreme Court term. The Court took the case of *Laufer v. Acheson Hotels, L.L.C.*, 50 F.4th 259 (1st Cir. 2022), *cert. granted*, 143 S. Ct. 1053 (Mar. 27, 2023), which addresses whether a person who does not intend to visit a hotel (a tester) has standing to bring an action claiming that the website information did not provide sufficient detail about accessibility. This is not a case about whether the website itself was accessible, but rather about what content the website must include. This case might resolve a number of cases from 2022 where individuals complained that hotel websites do not adequately describe accessibility features. Thus far, the courts have generally found that indicating ADA compliance is sufficient and that websites are not required to provide additional information.

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. Chapter 7 includes those updates.

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 a disparate impact on individuals of color. Ann McGinley has written about the intersection of disability and race in police shootings and abuse. *See Ann C. McGinley, Enough!: Eliminating Police Abuse of Individuals of Color with Disabilities*, 21 NEV. L. J. 1081 (2021).

Courts have also given increased attention to the application of disability discrimination law to rideshare programs, the continued increase in cases applying zoning issues to group home settings, and 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, lower court cases are referenced to demonstrate the array of contexts in which these cases are being decided.

It is probable that not all of the case citations in this Letter Update will be incorporated into the Seventh Edition, but we provide them here to demonstrate the extensive number of cases on new and evolving issues as well as existing issues.

What is not apparent from the materials that follow is the impact of reduced federal agency enforcement from 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 changed congressional and Presidential leadership in 2021, the financial and regulatory support has changed. These important policy issues, however, are generally beyond the scope of this Letter Update.

We also welcome our co-author to the Seventh Edition. D'Andra Millsap Shu was invited to join because of her exemplary record of writing about disability law, particularly on topics that focus on some new and evolving issues. Her work has enhanced this casebook in many ways.

## Chapter 1 Introduction

*Add to end of Section A[1] on page 6:*

There has been a changing view on whether to use disability first or people first language in writing or talking about disability rights issues. The differences of opinion are in good faith, and the authors respect those differing points of view. For this Letter Update (and for the Seventh Edition of the Textbook), we have chosen to use both terms. For a discussion regarding terminology, see *Person First and Destigmatizing Language*, <https://www.nih.gov/nih-style-guide/person-first-destigmatizing-language>.

### C. The Laws and How They Developed

*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 a new subsection on page 27:*

#### ***Covid Issues and Disability Discrimination Law***

As a result of the Covid pandemic, many legal issues have arisen that concern persons with disabilities. A threshold issue is whether infection with Covid 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 who have long Covid or other conditions resulting from Covid infection might meet the requirements of proving that they have a disability. A more difficult issue may be whether a person with Covid 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, Inc.*, 538 F. Supp. 3d 1344 (M.D. Ga. 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 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 the question still remains whether an individual with Covid 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. These issues are discussed in more detail in Chapter 2.

Covid has impacted issues related to every chapter in this book, though some more than others. Each chapter discusses pertinent Covid issues to some extent.

## Chapter 2 Who Is Protected under the Laws?

### C. Defining Disability: Statutory Definitions and Judicial Interpretations

#### [2] Prong Two: A Physical or Mental Impairment That Substantially Limits a Major Life Activity

*Add to the end of Note 5 on page 56:*

Though the courts have, for the most part, interpreted the disability prong more broadly since the ADAAA, this is not always the case. One professor analyzed all federal cases addressing the definition of disability in the five years starting January 1, 2014, and out of nearly 1,000 cases, she found about 200 where the court erroneously held that the plaintiff was not disabled. She attributes these failures to ignorance (courts and litigants unaware of the ADAAA changes), incompetence (plaintiffs failed to adequately plead their cases using the new ADAAA standards), and “possibly, a little bit of animus” by the courts. *See Nicole Buonocore Porter, Explaining “Not Disabled” Cases Ten Years after the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEO. J. ON POVERTY L. & POL’Y 383 (2019).

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

*Add to the end of Note 1 on page 58:*

The statutory language says the “regarded as” prong does not apply to impairments that are “transitory *and* minor.” 42 U.S.C. § 12102(3)(B) (emphasis added). Though the statute defines “transitory” (it means “an actual or expected duration of 6 months or less”), it does not define or further elaborate on the word “minor.” Many courts have essentially read the terms together and focused on the timing aspect, analyzing the “regarded as” issue based solely on the time frame involved. Others have homed in on the “and” and have required separate analysis as to whether the condition is minor in addition to being transitory. For example, in *Eshleman v. Patrick Industries, Inc.*, 961 F.3d 242 (3d Cir. 2020), an employee was terminated purportedly for “performance issues” shortly after returning to work. He had been on leave for two months for lung surgery and then, after returning to work without restrictions, had a severe respiratory infection about six weeks later that required him to miss two days of work. He was fired when he returned from the respiratory infection, and he sued his employer, arguing that the employer regarded him as disabled and fired him for that reason. The district court had dismissed the employee’s claim based solely on the “transitory” issue, and the Third Circuit reversed, stating that the district court erred in not separately analyzing whether the impairment was also “minor.” *See also Matias v. Terrapin House, Inc.*, No. 5:21-cv-02288, 2021 WL 4206759 (E.D. Pa. Sept. 16, 2021) (separately analyzing “transitory” and “minor” aspects of “regarded as” claim based on Covid and comparing seasonal flu, swine flu, and Covid).

*Add to Note 2 on page 58:*

*Lewis v. City of Union City, Ga.*, 934 F.3d 1169 (10th Cir. 2020) (employee had small heart attack and returned to work with no restrictions; employer regarded her as disabled because it



feared for her safety in performing certain job tasks); *Shell v. Burlington N. Santa Fe Ry. Co.*, 941 F.3d 331 (7th Cir. 2019) (employer did not hire applicants with high body mass indexes for safety-sensitive positions due to fears they would develop disabilities in the future; “regarded as” prong covers only an employer’s belief that the employee currently has a disability, not an employer’s belief about the risk of future impairments); *EEOC v. Gulf Logistics Operating, Inc.*, 371 F. Supp. 3d 300 (E.D. La. 2019) (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); *Odysseos v. Rine Motors*, No. 3:16cv2462, 2017 WL 914252 (M.D. Pa. Mar. 8, 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.*, 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).

Many cases in the Covid context focus on whether the employer regarded an exposed or Covid-positive employee as disabled. See discussion below.

*Add to the end of Note 1 on page 60:*

Obtaining documentation to show disability and needed accommodations can be time-consuming, mentally stressful, and expensive. These hurdles sometimes cause accommodations to be delayed or not provided at all. Some disability advocates are calling for a change in medical documentation requirements. See, e.g., Katherine A. Macfarlane, *Disability without Documentation*, 90 *FORDHAM L. REV.* 59 (2021).

## **[5] Exemptions for Stated Conditions**

*Add a new paragraph to this section on page 62:*

An issue has arisen as to whether the exclusion of “gender identity disorders not resulting from physical impairments” includes gender dysphoria. In the first federal appellate court decision on the issue, the Fourth Circuit held in 2022 that gender dysphoria is a disability and is not included within the gender identity disorder exclusion. See *Williams v. Kincaid*, 45 F.4th 759 (4th Cir. 2022); see also Kevin M. Barry, *Challenging Transition-Related Care Exclusion Through Disability Rights Law*, 23 *U. D.C. L. REV.* 97 (2020) (arguing that gender dysphoria is a disability and not covered in the gender identity disorder exclusion). But see *Doe v. Northrop Grumman Sys. Corp.*, 418 F. Supp. 3d 921 (N.D. Ala. 2019) (“[T]he terms ‘gender identity disorder’ and ‘gender dysphoria’ are legally synonymous for purposes of the present motion.”). Some commentators critique using disability law to address gender identity discrimination, arguing that these attempts assume an inherently negative characterization of these issues. See Jeannette Cox, *Disability Law and Gender Identity Discrimination*, 81 *U. PITT. L. REV.* 315 (2019).

## [6] Special Situations

Add a new “Special Situation” on page 62 before “Substance Use and Abuse”:

### **Covid and Long Covid**

The pandemic has sparked a tremendous amount of litigation, much of it still unsettled. For disability-related claims, the threshold issue is whether the statutes even apply based on the actual disability or regarded as prongs.

Courts have not reached a consensus on how to treat Covid under the actual disability prong. Some courts have ruled that a mere allegation that the plaintiff was Covid positive is insufficient to state that they had a disability. *See, e.g., Baum v. Dunmire Prop. Mgmt., Inc.*, No. 21-cv-00964, 2022 WL 889097 (D. Colo. Mar. 25, 2022) (“If acute, short-term COVID-19 is considered a disability, then millions of Americans would suddenly qualify as disabled under the ADA.”); *McCone v. Elexa Techs., Inc.*, No. 6:21-cv-912, 2022 WL 801772 (M.D. Fla. Jan. 14, 2022) (“[B]eing infected with COVID-19, standing alone, does not meet the ADA’s definition of disability or impairment.”); *Champion v. Mannington Mills, Inc.*, 538 F. Supp. 1344 (M.D. Ga. 2021) (“The Court has little trouble disagreeing with Champion’s legally-flawed position that *anyone* alleged to have COVID-19 is ‘disabled’ as that term is defined by the ADA.”).

That is consistent with regulatory guidance, which emphasizes that Covid can be a disability, but the determination must be made on a case-by-case basis. *See* U.S. DEP’T OF HEALTH & HUM. SERVS., *Guidance on “Long COVID” as a Disability Under the ADA, Section 504, and Section 1557*, July 26, 2021, <https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/guidance-long-covid-disability/index.html>; U.S. EQUAL EMP. OPPORTUNITY COMM’N, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, updated May 15, 2023, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>. The guidance suggests that “asymptomatic” and “mild” cases would not qualify but that more severe cases could.

Some courts have allowed cases to go forward when plaintiffs allege not just that they had Covid but had specific, non-mild symptoms. *See, e.g., Brown v. Roanoke Rehab. & Healthcare Ctr.*, 586 F. Supp. 3d 1171 (M.D. Ala. 2022) (plaintiff’s allegations of Covid symptoms including “severe weakness, fatigue, brain fog, high blood pressure, cough, difficulty breathing, fever, and swollen eyes” sufficient to plead that she had actual disability); *see also Worrall v. River Shack LLC*, No. 3:22-CV-0392-B, 2023 WL 2604960 (N.D. Tex. Mar. 22, 2023) (man sufficiently pleaded that his wife’s Covid was a disability based on weeks of being in bed, unable to feed and care for herself, low oxygen, profuse coughing). *But see Knox-Colburn v. Daniel Healthcare, Inc.*, No. 1:22-CV-44-DMB-DAS, 2023 WL 150005 (N.D. Miss. Jan. 10, 2023) (plaintiff’s husband died of Covid two days after testing positive; plaintiff did not sufficiently allege a disability because, even though he died of Covid, plaintiff did not “describe any symptoms or effects before his death”).

Other courts seem to suggest that only long Covid, where symptom continue for months, will qualify as an actual disability. *See Whitebread v. Luzerne Cnty.*, No. 3:22-cv-00133, 2023

WL 349939 (M.D. Pa. Jan. 20, 2023) (“[T]he common theme in this regulatory guidance is that COVID-19 may be a disability when it is long-term—lasting for months—but not when it is acute.”). Though it may be unclear whether something short of long Covid could qualify as a disability, it is certainly more likely that long Covid will qualify. See Leslie P. Francis & Michael Ashley Stein, “*Long Covid,*” *Bodily Systems as ADAAA Major Life Activities, and the Social Model of Disability*, 2022 U. CHI. LEGAL F. 159.

As to the “regarded as” prong of disability, several distinct issues have arisen. First, is a positive Covid test or diagnosis sufficient to support a claim that the defendant regarded the plaintiff as disabled? Some courts have found that a bare-bones allegation of Covid positivity is insufficient. See, e.g., *Payne v. Woods Servs., Inc.*, 520 F. Supp. 3d 670 (E.D. Pa. 2021). Others have analyzed the transitory and minor standard and found that, unless the symptoms go on for more than six months, Covid is transitory and minor and thus cannot support a “regarded as” claim. Compare *Brown*, 586 F. Supp. 3d at 1179 (allowing “regarded as” claim to go forward in part because defendant attacked only the “transitory” and not the “minor” component), and *Booth v. GTE Fed. Credit Union*, No. 8:21-cv-1509, 2021 WL 5416690 (M.D. Fla. Nov. 20, 2021) (plaintiff plausibly alleged that her condition was not transitory and minor based on being tired, being absent from work for a month, and general allegations about the impacts of Covid and thus could go forward with her “regarded as” claim), with *Toney v. Ala. A&M Univ.*, No. 5:21-cv-689-LCB, 2023 WL 1973203 (N.D. Ala. Feb. 13, 2023) (claim rejected as being objectively transitory and minor impairment based on three-week symptoms that were “not severe,” including headaches, chills, fever, and loss of taste and smell). It is important to bear in mind, as discussed previously, that plaintiffs proceeding under the “regarded as” prong are not entitled to accommodations, and so some claims have fallen on this basis. See, e.g., *Brown*, 586 F. Supp. 3d at 1178.

A second issue on the “regarded as” prong relates to exposure: is exposure, as opposed to a positive Covid diagnosis, sufficient to support a claim? One court has said no, see *Parker v. Cenlar FSB*, Civil Action No. 20-02175, 2021 WL 22828 (E.D. Pa. Jan. 4, 2021), and another court has said it is sufficient at the pleadings stage because it is too difficult to separate the perception of exposure to Covid from the perception of someone having Covid, see *Moody v. MidMichigan Med. Ctr.-Midland*, 1:21-cv-12485, 2022 WL 2910182 (E.D. Mich. July 22, 2022); see also *EEOC v. STME, LLC*, 938 F.3d 1305 (11th Cir. 2019) (employee planned to travel to Ghana to visit her sister, and employer feared she would become infected with Ebola and fired her; employee did not state a plausible “regarded as” claim because the ADA does not cover the case “where an employer perceives a person to be presently healthy with only a potential to become ill and disabled in the future”).

A final “regarded as” issue is whether non-vaccinated or other employees who are subjected to public health protocols or being excluded from the workplace are regarded as disabled. Courts have thus far said they are not. See, e.g., *Cunningham v. Univ. of Haw.*, No. 22-cv-00504, 2023 WL 1991783 (D. Haw. Feb. 14, 2023), *appeal docketed*, No. 23-15345 (9th Cir. Mar. 10, 2023); *Chancey v. BASF Corp.*, No. 3:22-cv-34, 2022 WL 18438375 (S.D. Tex. Dec. 29, 2022), *appeal docketed*, No. 23-40032 (5th Cir. Jan. 23, 2023); *Speaks v. Health Sys. Mgmt., Inc.*, No. 5:22-CV-00077, 2022 WL 3448649 (W.D.N.C. Aug. 17, 2022); *Rice v.*

*Guardian Asset Mgmt., Inc.*, No. 3:21-cv-00693, 2021 WL 4354183 (N.D. Ala. Aug. 19, 2021); *Champion*, 538 F. Supp. 3d at 1350.

Many Covid-related claims involve an issue distinct from whether the plaintiff has a disability: whether the defendant has discriminated against the plaintiff for associating with someone with Covid. That issue will be discussed below in the section on “Associational Disabilities.”

### **Substance Use and Abuse**

*Add to the end of the section on page 63:*

The opioid crisis has led to many challenging issues regarding individuals with opioid use disorder who are in recovery, some of whom are taking legally prescribed medication to treat their condition. The Justice Department has issued guidance clarifying that individuals in treatment or recovery from opioid use disorder typically have a disability under the ADA unless they are currently engaged in illegal drug use and explaining how the ADA protects these individuals in context such as employment, housing, incarceration, and health care. *See U.S. DEP’T OF JUST., The Americans with Disabilities Act and the Opioid Crisis: Combating Discrimination Against People in Treatment or Recovery*, Apr. 5, 2022, [https://archive.ada.gov/opioid\\_guidance.pdf](https://archive.ada.gov/opioid_guidance.pdf).

### **Associational Disabilities**

*Add at the end of this section on page 65:*

*See also Graziadio v. Culinary Inst. of Am.*, 817 F.3d 415 (2d Cir. 2016) (right of accommodation limited to disabled employees and does not extend to a nondisabled associate of a disabled employee); *Milchak v. Carter*, No. 4:15-cv-00663-JAR, 2016 WL 6248074 (E.D. Mo. Oct. 26, 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 one case, the employer granted the employee the requested accommodations needed to care for his ailing grandfather, and the court determined he had no associational claim, even though he alleged that his supervisor began harassing him afterwards. *See Pierri v. Medline Indus., Inc.*, 970 F.3d 803 (7th Cir. 2020).

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 association caused the employer’s action. *See Kelleher v. Fred A. Cook, Inc.*, 939 F.3d 465 (2d Cir. 2019) (reaction to accommodation request to care for disabled associate can show the disability motivated the decision; associational claim sufficiently pleaded based on supervisor’s statement that plaintiff’s daughter’s medical conditions “were not the company’s problems” and plaintiff’s demotion after he missed work to care for her); *Wethington v. Sir Goony Golf of Chattanooga, Inc.*, 571 F. Supp. 3d 888 (E.D. Tenn. 2021) (plaintiff fired two days after requesting additional time off to care for wife with cancer; sufficient pleading to show inference of discrimination); *Reiter v. Maxi-Aids Inc.*, No. 14

CV 3712, 2018 WL 557864 (E.D.N.Y. Jan. 19, 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*, No. 15 C 3489, 2016 WL 4987469 (N.D. Ill. Sept. 19, 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). Many courts have dismissed associational claims where the plaintiff cannot demonstrate a link between the associated person's disability and the adverse action. *See Graziadio*, 817 F.3d at 432-33 (rejecting associational claim because plaintiff did not present evidence connecting her termination to her son's disability; employer fired her for taking too much leave from work, and she was not entitled to additional leave because reasonable accommodations are not required in associational cases); *Besser v. Tex. Gen. Land Off.*, 834 F. App'x 876 (5th Cir. 2020) (evidence that supervisor was frustrated with plaintiff's use of leave to care for his husband after a heart attack was insufficient to show that plaintiff's termination was based on the husband's disability).

Many people have requested accommodations of various sorts to enable them to care for a relative sick with Covid. Because these cases, as do all associational cases, require a threshold showing that the associate has a disability, these Covid cases often turn on whether the plaintiff has sufficiently pleaded or proven a disability. *See Baum v. Dunmire Prop. Mgmt., Inc.*, No. 21-cv-00964, 2022 WL 889097 (D. Colo. Mar. 25, 2022) (rejecting associational claim because plaintiff did not sufficiently allege that father's condition was a disability; complaint stated that father had a history of respiratory illness, tested positive for Covid, and died within 15 days of acute respiratory distress syndrome, bilateral pneumonia, and Covid); *Champion v. Mannington Mills, Inc.*, 538 F. Supp. 1344 (M.D. Ga. 2021) (pleading that someone is Covid positive, alone, is insufficient to establish disability; plaintiff did not plead any specific symptoms her brother had); *see also Worrall v. River Shack LLC*, No. 3:22-CV-0392-B, 2023 WL 2604960 (N.D. Tex. Mar. 22, 2023) (man sufficiently pleaded that his wife's Covid was a disability based on weeks of being in bed, unable to feed and care for herself, low oxygen, profuse coughing, but claim dismissed because he did not allege that employer knew of her condition's severity or a plausible connection between her condition and his firing).

Also, it is important to remember that only the disabled person is entitled to accommodations, so the ADA does not require an employer to provide any accommodations to allow an employee who is not sick to care for someone with Covid. However, if an employer allowed employees certain accommodations, such as unpaid leave, to attend to other personal responsibilities but not for caregiving to a disabled person, that could support a discrimination claim. *See U.S EQUAL EMP. OPPORTUNITY COMM'N, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, updated May 15, 2023, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>; U.S EQUAL EMP. OPPORTUNITY COMM'N, *The COVID-19 Pandemic and Caregiver Discrimination Under Federal Employment Discrimination Laws*, Mar. 14, 2022, <https://www.eeoc.gov/laws/guidance/covid-19-pandemic-and-caregiver-discrimination-under-federal-employment>.

## Other

- *Size, Obesity*

*Add at the end of the second full paragraph on page 68:*

The cases go both ways as to whether one must demonstrate an underlying physical condition causing obesity to prove that morbid obesity is a physical impairment, but the majority of courts require an underlying physical condition. *See Richardson v. Chi. Transit Auth.*, 926 F.3d 881 (7th Cir. 2019). Regardless of whether obesity must be linked to an underlying physical condition to qualify as a disability, the plaintiff must still show that their obesity substantially limited a major life activity. *See Scoggins v. Chi St. Luke’s Health-Brazosport*, No. H-19-2709, 2021 WL 2420170 (S.D. Tex. May 12, 2021) (granting summary judgment because plaintiff did not present evidence that her obesity substantially limited her in any major life activity); *Lumar v. Monsanto Co.*, 395 F. Supp. 3d 762 (E.D. La. 2019) (assuming obesity is an impairment, it is not an actual disability here where morbidly obese plaintiff “adamantly argues” that his weight does not impact his life or work function), *aff’d*, 795 F. App’x 293 (5th Cir. 2020).

Courts have rejected “regarded as” obesity claims when employers restricted obese employees’ work duties based on safety concerns. *See, e.g., Richardson v. Chi. Transit Auth.*, 926 F.3d 881 (7th Cir. 2019) (rejecting “regarded as” claim from severely obese man because employer perceived that his weight made it unsafe for him to do his job, not that his excessive weight was caused by a physiological disorder); *Lumar*, 395 F. Supp. 3d at 780 (employer did not regard morbidly obese employee as disabled when it restricted the employee’s use of the safety-rated ladders and harnesses when he weighed over 400 pounds); *see also Shell v. Burlington N. Santa Fe Ry., Co.*, 941 F.3d 331 (7th Cir. 2019) (employer did not regard applicants as disabled when it did not hire applicants with high body mass indexes for safety sensitive positions due to fears they would develop disabilities in the future because the ADA’s specific definition of “being regarded as having such an impairment” requires the impairment to exist at the time of the alleged discriminatory conduct).

For more discussion on this topic, see Kevin Farmer, *Denying Severely Obese Workers Unqualified Protection under the Americans with Disabilities Act Flouts Administrative Expertise, Medical Research, and Common Sense*, 31 MIDWEST L.J. 7 (2021) (arguing for greater protection of the rights of obese persons); Camille A Monahan, Tanya L. Goldman & Debra Oswald, *Establishing a Physical Impairment of Weight under the ADA/ADAAA: Problems of Bias in the Legal System*, 29 ABA J. LAB. & EMP. L. 537 (2014) (arguing plaintiffs should not be required to prove a physiological cause of severe obesity or weight beyond a “normal range”).

## Chapter 3 Employment

### Employment-Related Covid Issues

Numerous issues have arisen because of Covid 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. 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 created concern was employers' requirement that employees be vaccinated before returning to work. Courts and employers assumed that the employers had the right to mandate vaccines subject to reasonable accommodations for employees with disabilities who could not get vaccines because of their medical conditions or for employees who claimed that vaccinations (or even mask-wearing) violated their religions.

The following are summaries of representative Covid-related employment decisions and a law review article on remote work.

#### **Remote Work**

*Peeples 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 Ins. Co.*, 527 F. Supp. 3d 951 (M.D. Tenn. 2021) (denying both parties' motions for summary judgment on issues of (1) whether working in the office was an essential function of the plaintiff's claims adjustment job for which he estimated damage to automobiles from photographs; and (2) whether the defendant failed to grant the plaintiff a reasonable accommodation).

*Baum v. Metro Restoration Servs., Inc.*, No. 3:15-CV-00787-CRS, 2019 WL 6971369 (W.D. Ky. Dec. 19, 2019) (concluding that employer's policy that employees must work in person insufficient to support grant of summary judgment on issue of attendance as an essential function where there was undisputed evidence that the defendant had allowed plaintiff, a scheduler and dispatcher, to work from home when he had heart problems).

*Thomas v. Bridgeport Bd. of Educ.*, No. 3:20-CV-1487 (VLB), 2022 WL3646175 (D. Conn. Aug. 24, 2022) (holding that it was an essential function of high school Spanish teacher’s job to teach in person even though she had taught successfully online during Covid).

For analysis of how courts have dealt with requests for remote work by persons with disabilities both before and after Covid, see D’Andra Millsap Shu, *Remote Work Disability Accommodations in the Post-Pandemic Workplace: The Need for Evidence-Driven Analysis*, 95 TEMP. L. REV. 201 (2023) (explaining that courts have engaged in erroneous analysis, granted employers a presumption that remote work is improper, failed to do an individual analysis in most cases, and treated the employer’s view as more important than the employee’s testimony of how the work is done remotely, but also finding that after Covid plaintiffs have been successful in nearly 50% of cases they bring, a not insignificant positive change).

### **Masks**

*Perry v. Norton Hosps., Inc.*, No. 3:21-CV-00192, 2023 WL 2755306 (W.D. Ky. Mar. 23, 2023) (denying defendant’s motion for summary judgment of plaintiff’s case of disability discrimination and failure to reasonably accommodate where plaintiff, a sixty-seven-year-old immunosuppressed hospital nurse who prepared patients for surgery, was issued a hospital mask but not an N95 mask during Covid, and hospital refused her request to wear her own N95 mask at work).

### **Mandatory Vaccination Policies**

*Together Emps. v. Mass Gen. Brigham, Inc.*, 573 F. Supp. 3d 412 (D. Mass. 2021), *aff’d* 32 F.4th 82 (1st Cir. 2022) (denying motion for preliminary injunction of hospital employees who were denied medical exemptions; concluding they were not likely to succeed on the merits because they were unlikely to have disabilities under the ADA, unlikely to be qualified because failure to vaccinate would likely create direct threat to the health of others, unlikely to be a reasonable accommodation to excuse them from vaccination, and if so, employer likely to demonstrate undue hardship, given plaintiffs’ patient-contact jobs).

*Norman v. NYU Langone Health Sys.*, No. 20-3624-CV (L), 2021 WL 5986999 (2d Cir. Dec. 17, 2021) (healthcare database worker with no patient contact but record of allergy to flu vaccine was allowed to bypass traditional vaccine but was referred to an allergist for skin testing for an alternative vaccine made without egg products; because test was negative, she was administered the alternative vaccine and had an allergic reaction; she filed ADA claim alleging failure to reasonably accommodate, and court granted summary judgment to defendant, holding that it had granted a reasonable accommodation as a matter of law by referral, test, and alternative vaccine).

Numerous cases brought by former employees *pro se* alleged that their employers violated Title I for firing them for refusing to wear masks, be vaccinated, or be tested regularly before returning to work. The plaintiffs alleged that their employers discriminated against them because they regarded them as having a disability and/or because they have a record of a disability. Their theory is that the employers either thought they already had Covid or were likely to get it because they regarded the plaintiffs as immune suppressed. They alleged their “record” consists of the employers’ recording that they have not been vaccinated. The courts have uniformly rejected these claims because all employees were treated the same by employers with



vaccine mandates, and there was no evidence that the employers regarded the plaintiffs as having disabilities or that simply listing someone as unvaccinated creates a record of a disability for purposes of the statute. For examples of these arguments, see *Schneider v. Cnty. of Fairfax*, No. 1:22-cv-871, 2023 WL 2333305 (E.D. Va. Mar. 2, 2023), *appeal docketed*, No. 23-1303 (4th Cir. Mar. 21, 2023); *Johnson v. Mt. Sinai Hosp. Grp., Inc.*, No. 22-CV-2936, 2023 WL2163774 (E.D.N.Y. Feb. 22, 2023), *appeal docketed*, No. 23-466 (2d Cir. Mar. 30, 2023); *Cunningham v. Univ. of Haw.*, No. No. 22-CV-00504 HG-WRP, 2023 WL 1991783 (D. Haw. Feb. 14, 2023), *appeal docketed*, No. 23-15345 (9th Cir. Mar. 10, 2023).

### **Guidance of EEOC, OSHA, and Other Agencies**

The guidance from the EEOC, OSHA, and other agencies have been consistently updated in response to the CDC's changing recommendations, so it is important to check the updated materials with information found on the agency websites.

#### EEOC

On May 15, 2023, the EEOC created a webpage to consolidate information about Covid and answers to questions frequently asked by the public: *Coronavirus and COVID-19, U.S. EEOC* (May 13, 2023), <https://www.eeoc.gov/coronavirus> (including information about Covid and application of the EEO laws, a Covid Workplace Safety Plan, Covid and Caregiver Discrimination, and links to a Webinar on Covid and employment issues). These apply only to discrimination issues.

#### OSHA

In 2021, OSHA issued temporary emergency standards (“TES”) concerning workers’ safety in health care employment settings. See WebMD Editorial Contributors, *Coronavirus and COVID-19: What You Should Know*, WEBMD (Dec. 26, 2022), <https://www.webmd.com/lung/news/20210614/osha-sets-covid-safety-rules-for-health-care-workers>; <https://www.osha.gov/coronavirus/ets>. On November 5, 2021, OSHA issued TES that applied to all employers of 100 or more employees. It mandated that all employees of these employers either be vaccinated against Covid or test weekly and mask at their own expense. 86 Fed. Reg. 61402-01 (Nov. 5, 2021). Employer groups opposed this standard, and the Fifth Circuit granted a preliminary injunction concluding that OSHA did not have power to issue such a broad rule and staying the enforcement of the standards. *BST Holdings, L.L.C. v. Occupational Safety & Health Admin.*, 17 F.4th 604 (5th Cir. 2021). After consolidating cases related to the standards before the Sixth Circuit, the court lifted the stay, concluding that those challenging the ETS were not likely to succeed on the merits. *In re MCP No. 165*, 21 F.4th 357 (6th Cir. 2021).

On January 13, 2022, the U.S. Supreme Court reinstated the stay, concluding that those challenging the ETS were likely to succeed on the merits. *Nat’l Fed. of Indep. Bus. v. Dep’t Labor, Occupational Safety & Health*, 142 S. Ct. 661 (2022). In response, on January 25, 2022, OSHA withdrew the standards. See *Statement on the Status of the OSHA COVID-19 Vaccination and Testing ETS*, OSHA (Jan. 25, 2022), <https://www.osha.gov/coronavirus/ets2> (noting that OSHA is still committed to these standards in substance and is working on finalizing a permanent rule); see also *Coronavirus Disease (COVID-19)*, OSHA, <https://www.osha.gov/coronavirus> (last visited May 28, 2023) (OSHA-related information and Covid).

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

### **[1] Which Employers Are Covered?**

*Add at the end of Note 5 on page 85:*

*See also Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *St. James Sch. 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 Par., Calumet City*, 3 F.4th 968 (7th Cir. 2021) (en banc) (holding ministerial exception bars church choir director’s Title VII and ADA claims brought based on hostile work environment theory).

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

*Add a new Note after Note 2 on page 87:*

**3. Conditions Considered Disabilities that Would Not Have Been Recognized before the ADAAA:** Numerous 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 Env’t Conservation*, 297 F. Supp. 3d 297 (N.D.N.Y. 2018) (employee with type 1 diabetes is disabled even though diabetes did not interfere with work performance); *Mullenix v. Eastman Chem. Co.*, 237 F. Supp. 3d 695 (E.D. Tenn. 2017) (employee who suffered broken arm requiring two surgeries substantially limited); *Quidachay v. Kan. Dep’t of Corr.*, 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. Wash. 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 v. Entergy Nuclear Operations, Inc.*, 290 F. Supp. 3d 234 (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 on pages 89-90:*

*See also Rodríguez-Álvarez v. Mun. of Juana Diaz*, No. 14-01924-WGY, 2017 WL 666052 (D.P.R. Feb. 17, 2017) (HIV infection in “special category” entitled to broader ADA protection 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 on page 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, “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 GEO. J. ON 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**

#### **3. Conduct/Disability Distinction:**

*Add to end of Note 3 on pages 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 Szuszkiewicz 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 new Notes 5-7 on page 100:*

**5. Use of Legal Medical Marijuana:** A number of states have 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 (or refusal to hire an applicant) who tests positive for marijuana use even in states where marijuana use is legal have held that the employer has the right to discipline the employee and to refuse to hire an applicant who tests positive for marijuana use, a few newer cases hold that permitting an employee who uses medical marijuana is a possible reasonable accommodation to a disability. *See Barbuto v. Advantage Sales & Mktg., 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).

Other states have created explicit protection from employer discipline for use of medical marijuana with a state sponsored I.D. card. *See* ARIZ. REV. STAT. § 23-495.05; ARK. CONST. AMEND. 98, § 3(f)(3)(A); CONN. GEN. STAT. ANN. § 21a-408p; DEL. CODE ANN. tit. 16, § 4905A(a)(3); 410 ILL. COMP. STAT. ANN. 130/40; ME. REV. STAT. ANN. tit. 22, § 2430-C(3); MINN. STAT. § 152.32 subd. 3(C); N.J. STAT. ANN. 24:6I-6.1; N.M. STAT. ANN. § 26-2B-9; OKLA. STAT. ANN. tit. 63, § 425(B), 35 PA. CONS. STAT. ANN. § 10231.2103(b); R.I. GEN. LAWS § 21-28.6-4; W.VA. CODE ANN. § 16A-15-4(b)(1).

In Nevada, two supreme court cases have analyzed these issues and, based on two different Nevada statutes, have refused to protect an employee who was fired due to a positive drug test (for recreational marijuana) but have protected an employee in a medical marijuana case. In *Ceballos v. NP Palace, LLC.*, 514 P.3d 1074 (Nev. 2022), the court held that the statute creating a tortious discharge cause of action for employees who are dismissed for lawful use of a product in the state does not protect against employer discipline of an employee who tests positive for marijuana because although using cannabis is legal in Nevada, it is against federal law. The court construed the term “lawful” in the Nevada statute to require that the product be lawful under both state and federal law. But the same court held only a few months later that a separate Nevada statute, which was modeled on the Arizona statute above, implied a cause of action and required an employer to *attempt* a reasonable accommodation of an employee with a valid registry identification card. *Freeman Expositions LLC v. Eighth Jud. Dist. Ct. of Nev.*, 520 P.3d 803 (Nev. 2022). The limits of the statute are that the accommodation may not pose a threat to the person or others, may not impose an undue hardship on the employer, and may not prohibit the employee from fulfilling his job responsibilities. This statute grants, it appears, both greater and fewer rights than those granted by the state and federal disability discrimination statutes. While it does not require the employee to prove that he has a disability but only that he has a valid registry I.D., it requires the employer only to “attempt” a reasonable accommodation. Moreover, it appears to require more than the ADA in that the individual must fulfill “any and all” of his job responsibilities rather than only the “essential functions” of his job.

In *Wild v. Carriage Funeral Holdings, Inc.*, 227 A.3d 1206 (N.J. 2020), the New Jersey Supreme Court held that the New Jersey Compassionate Use Act, which permits the use of medical marijuana, should be read in context with the New Jersey Law Against Discrimination, and, depending on the facts in the case, may prohibit an employer from disciplining an employee for marijuana consumption outside of the workplace. The court noted that the plaintiff had alleged a cause of action and that it would not dismiss the case, but it also focused on limitations in the Compassionate Use Act that an employer did not have to tolerate either marijuana use at work or, if an employee's job included use of heavy equipment or operation of a vehicle, aircraft, or boat, working under the influence of cannabis.

For an interesting discussion of these issues, see Dale L. Deitchler & Wendy M. Krincek, *Are Marijuana Users the Newest Protected Class?* NEV. LAW., Feb. 2018, at 10.

For further analysis of state court decisions that deal with the issue of medical marijuana use as either a potential reasonable accommodation under either federal or state law or as protected in other ways under state law, see Gary Phelan & Janet Bond Arterton, *Disability Discrimination in the Workplace*, § 11:8 (Apr. 2023)

[https://1.next.westlaw.com/Document/I0eaf4feb5abd11daa401a8d942b3deb0/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=\(sc.Default\)](https://1.next.westlaw.com/Document/I0eaf4feb5abd11daa401a8d942b3deb0/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)).

6. *Worker's Compensation*: Another issue that has arisen is whether an injured employee can get workers' compensation coverage for the cost of medical marijuana. Given that increasing research demonstrates that cannabis helps alleviate pain and marijuana may be a safer substitute for opioid prescriptions, some states permit workers' compensation to pay for medical marijuana, but employers have significant concerns given that cannabis is still illegal under federal law. See Zach Love, Ohio State Legal Studies Research Paper No. 770, *Smoking Out the Old Ways: Why Federal Law Does Not Preempt Recent State Actions Extending Workers' Compensation Coverage to Medical Marijuana Costs*, 64 Drug Enforcement and Policy Center 1, (2023), <http://dx.doi.org/10.2139/ssrn.4439540>.

7. *President Biden's Pardon*: On October 22, 2022, President Biden issued a pardon to all of those convicted of simple marijuana possession under federal law. The pardon does not apply to future convictions or to convictions under state law. Neither does it protect individuals who were in the U.S. illegally. See *Presidential Proclamation on Marijuana Possession*, U.S. DEP'T OF JUST., <https://www.justice.gov/pardon/presidential-proclamation-marijuana-possession#:~:text=On%20October%206%2C%202022%2C%20President,for%20simple%20marijuana%20possession%20offenses> (last visited May 29, 2023). The President also urged state governors to follow suit and encouraged that marijuana be downgraded from a Schedule 1 drug under the federal Controlled Substances Act. See Rich Barlow, *Will Biden's Pot Pardons Make a Difference—or Will States Ignore the Policy Changes?*, BU TODAY, Oct. 12, 2022, <https://www.bu.edu/articles/2022/will-bidens-pot-pardons-make-a-difference/>. Although it is unclear what effect the Biden pardons will have, the biggest stumbling block to cannabis use is the federal government's continued classification of marijuana as a Schedule 1 drug.

*Delete the last sentence of Note 9 on page 107 and add the following:*

For a description of the states' responses to the issue of whether employers may enforce drug policies against users of medical marijuana, see note 5 above.

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

#### **[2] Preplacement Examinations**

*Add on page 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.*, 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 who misbehaved as children

had been hired, and even though five other police departments who employed the plaintiff had no problems with him).

### **[3] Posthiring**

*Add a new Note 4 on page 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 (GINA). *See Jackson v. Regal Beloit Am., Inc.*, No. CV 16-134-DLB-CJS, 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 v. Port Auth. of N.Y. & N.J.*, 283 F. Supp. 3d 72 (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**

*Add a new paragraph on page 134 after the first paragraph in the subsection “Proving Disparate Impact Under Title VII and the ADA”:*

The status of disparate impact claims in disability cases has become increasingly uncertain. In *Doe v. CVS Pharmacy, Inc.*, five plaintiffs who have HIV/AIDS brought disparate impact claims relating to changes in insurance coverage that required them to use a CVS pharmacy, rather than a community pharmacy, to obtain their specialty HIV medication. The Ninth Circuit allowed the disparate impact claim to proceed. The Supreme Court granted certiorari solely on the issue of whether a disparate impact claim was available. Before the Supreme Court could decide the case, CVS settled and agreed to work with disability groups to resolve this issue. *See Doe v. CVS Pharm., Inc.*, 982 F.3d 1204 (9th Cir. 2020), *cert. dismiss’d*, 142 S. Ct. 480 (2021). For a more detailed discussion of this case, see Chapter 9 below.

## **E. Qualifications**

### **[1] Fundamental and Essential Functions**

#### ***[a] Attendance Requirements***

##### **4. Other Cases Involving Attendance:**

*Add to end of Note 4 on pages 147-49:*

In *Mosby-Meachem v. Memphis Light, Gas & Water Div.*, 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, concluding that there was 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 Evans v. Coop. Response Ctr., Inc.*, 996 F.3d 539 (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); *Williams v. AT&T Mobility Serv.*, 847 F.3d 384 (6th Cir. 2017) (employee with frequent absences not qualified where employer has strict attendance policy and presented evidence that employee absences cause strain on workplace); *Whitaker v. Wis. Dep't of Health Servs.*, 849 F.3d 681 (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).

#### ***[b] Employer-Provided Leaves***

*Add at the end of page 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 Cnty. Constable Precinct One*, 851 F.3d 413 (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. Lipnic*, 300 F. Supp. 3d 175 (D.D.C. 2018) (request for indefinite paid leave not reasonable under Rehabilitation Act).

### ***[d] Coping with Stress***

*Add at end of first paragraph on page 159:*

*See also Yonemoto v. Shulkin*, 725 F. App'x 482 (9th Cir. 2018) (not qualified when unable to perform essential functions of handling stress and interacting with others).

*Add to page 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 Twp. Sch. Dist.* 209, 662 F. App'x 460 (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.*, 662 F. App'x 831 (11th Cir. 2016) (ability to work outdoors in hot and cold weather is essential function of city worker's job; 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 Note 2 on page 174:*

*See Reinacher v. Alton & S. Ry. Co.*, 203 F. Supp. 3d 958 (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 Note 4 on page 175:*

*Bey v. City of N.Y.*, 999 F.3d 157 (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); *Todd v. Fayette Cnty. Sch. Dist.*, 998 F.3d 1203 (11th Cir. 2021) (upholding lower court's grant of summary judgment to defendant; allegations that defendant school district violated Title I 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) 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**

*Add a new Note 3 on page 190:*

**3. Proof in the Ninth Circuit:** In *Dunlap v. Liberty Natural Products, Inc.*, 878 F.3d 794 (9th Cir. 2017), the Ninth 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**

*Add a new Note 8 on page 203:*

**8. Sign Language Interpreters:** Numerous 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., Smith v. Loudoun Cnty. Pub. Schs.*, 723 F. App'x 194 (mem) (4th Cir. 2018) (special education teacher fired for poor job performance not because she requested full time ASL interpreter); *Cadoret v. Sikorsky Aircraft Corp.*, 323 F. Supp. 3d 319 (D. Conn. 2018) (company unsuccessfully argued employee did not need sign interpreter to perform essential functions); *Vardon v. FCA US LLC*, No. CV 16-11807, 2018 WL 1185282 (E.D. Mich. Mar. 7, 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).

### **[5] Job Restructuring and Job Reassignment**

*Add to the end of Note 1 on page 214:*

*See EEOC v. St. Joseph's Hosp.*, 842 F.3d 1333 (11th Cir. 2016) (employer not required to undermine best qualified applicant policy to reassign employee with disability); *United States v. Woody, Jr., Sheriff, City of Richmond*, 220 F. Supp. 3d 682 (E.D. Va. 2016) (ADA does not require reassigning employee with disability to vacant position for which she is not most qualified candidate).

*Add a new Note 7 on page 215:*

**7. Animals as Accommodations:** Numerous cases address 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. Sch. Dist. Five of Lexington & Richland Cntys.*, 247 F. Supp. 3d 734 (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 on page 218:*

Many cases have dealt with the failure to engage in the interactive process. *See Dansie v. Union Pac. R.R. Co.*, 42 F.4th 1184 (10th Cir. 2022) (question of fact whether a reasonable accommodation existed and whether employer failed to engage in interactive process where a reasonable jury could conclude that the plaintiff, who was HIV positive and had cancer, requested five days off per month as an accommodation for a limited time period for treatment and employer failed to respond); *Burnett v. Ocean Props., Ltd.*, 987 F.3d 57 (1st Cir. 2021) (hotel's failure to engage in interactive process warrants punitive damages); *Fisher v. Nissan N. Am., Inc.*, 951 F.3d 409 (6th Cir. 2020) (question of fact whether employer violated its continuing duty to engage in interactive process in good faith where the plaintiff, after struggling with a kidney transplant and failing to adapt to two accommodations, requested a third accommodation of transferring him to an inspection position, or help in identifying another position, and employer took no action); *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*, 54 839 F.3d 742 (8th Cir. 2016) (employee's notification to employer, who knew 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).

## **G. Disability-Based Harassment and Retaliation**

### **[2] Retaliation**

*Add to the end of Note 1 on page 226:*

In a few cases teachers, school nurses or administrators have alleged or proven retaliation for protesting against violation of the rights of students with disabilities. *See Kirilenko-Ison v. Bd. of Educ. of Danville Indep. Sch.*, 974 F.3d 652 (6th Cir. 2020) (sufficient evidence to go to the jury of retaliation for school nurse's advocacy for students with disabilities' rights where school board members yelled at plaintiff, she was suspended without pay, and defendant asserted, legitimate, non-discriminatory reason); *Hamerski v. Belleville Area Special Servs. Coop.*, 302 F. Supp. 3d 992 (S.D. Ill. 2018) (principal who opposed arresting students with disabilities, who was given option to resign or be demoted, alleged a cause of action for retaliation under ADA); *Sahrle v. Greece Cent. Sch. Dist.*, No. 10-CV-6631-FPG, 2016 WL 4611243 (W.D.N.Y. Sept. 6, 2016) (disciplinary charges after advocacy for students with disabilities suggests retaliation); *Volpe v. N.Y.C. 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 Section 504). *But see Groening v. Glen Lake Cmty. Schs.*, 884 F.3d 626 (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**

*Add a new Note 10 on page 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 Cnty.*, 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.*, 843 F.3d 553 (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 Cnty. PUD No. 1*, 262 F. Supp. 3d 1089 (W.D. Wash. 2017), *aff'd*, 752 F. App'x 444 (9th Cir. 2018) (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 the end of this section on page 237:*

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 Am., Inc.*, No. CV 16-134-DLB-CJS, 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 Ortiz v. City of San Antonio Fire Dep't*, 806 F.3d 822 (5th Cir. 2015) (firefighter refused to take stress test as part of employer's mandatory wellness program and was disciplined; no cause of action under GINA because employer did not request, require, or purchase genetic information or discriminate against him because of his genetic information); *AARP v. EEOC*, 226 F. Supp. 3d 7 (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); *EEOC v. Orion Energy Sys.*, 208 F. Supp. 3d 989 (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* Mark A. Rothstein, Jessica Roberts & Tee L. 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 this new section on page 238 before the section on Enforcement:*

## **[6] The Pregnancy Discrimination Act and the Pregnant Workers Fairness 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. Although a routine pregnancy is not considered a disability, 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.*, 870 F.3d 1253 (11th Cir. 2017) (lactation is a medical condition related to pregnancy and therefore protected by PDA); *EEOC v. Bob Evans Farms, LLC*, 275 F. Supp. 3d 635 (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*, pages 85-86 in the textbook.

Congress passed The Pregnant Workers Fairness Act (PWFA) as part of the FY 2023 omnibus budget in December 2022, and President Biden signed it into law. The PWFA requires employers, employment agencies, and unions to grant reasonable accommodations to “known limitations” of pregnant workers unless the defendant can prove doing so is an undue hardship. The definitions of reasonable accommodation and undue hardship are incorporated by reference into the PWFA from the ADA. The PWFA, which went into effect in June 2023, is a significant improvement of rights for pregnant workers because it does not require comparison to the treatment of similarly situated non-pregnant workers. Pregnant workers do not have to prove that they are disabled by the pregnancy but merely that they have communicated a mental or physical limitation related to a pregnancy, childbirth, or related medical condition and a need for an accommodation to the employer.

Moreover, a worker is qualified for the position and therefore has a right to a reasonable accommodation under the PWFA if the worker can perform the essential functions of the position; the employee is considered qualified if any inability to perform the essential functions is temporary, the essential function can be performed in the near future, and the inability to perform the essential function can be reasonably accommodated. Besides requiring a covered entity to grant a reasonable accommodation after an interactive process, the PWFA makes it illegal for a covered entity to:

- require a pregnant employee to accept an accommodation other than one arrived at through the interactive process;
- deny employment opportunities to the employee based on the need to make a reasonable accommodation;
- require a qualified employee to take leave if another reasonable accommodation can be provided; or
- take adverse action in terms, conditions, or privileges of employment against a qualified employee because of the employee’s request for an accommodation or because the employee used a reasonable accommodation.

The PWFA also prohibits retaliation for opposing any illegal act under the statute or participating in any investigation or proceeding regarding the employer's behavior; it also prohibits coercion or intimidation or interference with any individual's exercise of rights because the individual has aided or encouraged another individual in the exercise of rights under the statute.

Remedies under the PWFA are drawn from Title VII of the 1964 Civil Rights Act and Title I of the ADA and appear in 42 U.S.C. §1981(a). These include compensatory and punitive damages capped depending on the size of the employer. An aggrieved party is also entitled to costs and attorneys' fees. As in the ADA, there are no compensatory or punitive damages for failure to grant a reasonable accommodation if the covered entity engages in an interactive process in good faith with the employee. For information about the Act, see *Pregnant Workers Fairness*, A BETTER BALANCE, <https://www.abetterbalance.org/our-issues/pregnant-workers-fairness/> (last visited May 30, 2023).

## **J. Enforcement**

### **[4] Title I of the Americans with Disabilities Act**

#### **Arbitration Clauses and the ADA**

*Add to the end of this section on page 242:*

In *Epic Systems Corp. v. Lewis*, 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, P.A.*, 283 F. Supp. 3d 595 (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.

Although employers move to compel arbitration of individual cases alleging discrimination, they often oppose employees' motions to arbitrate class actions, perhaps in part because of the limits on appealability of arbitrators' decisions. In *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019), the Supreme Court held that an employment arbitration provision that is ambiguous as to whether the parties must arbitrate class actions (as opposed to individual actions) is not arbitrable under the Federal Arbitration Act. Although this protects employers, they will likely try to put class waivers in their arbitration agreements with individual employees. Finally, as of the writing of this letter, another arbitration case is before the Supreme Court this session that will decide whether a denial by the lower court of a motion to compel arbitration should stay the litigation pending appeal of the denial order. *See Bielski v. Coinbase Inc.*, 2022 WL 3095991 (9th Cir. July 1, 2022), *cert. granted*, 143 S. Ct. 521 (Dec. 9, 2022).

## Chapter 4 Public Accommodations

### A. Introduction and Overview

*Add to Note 3 on pages 267-68:*

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 there are several lower court rulings on the issue. *See, e.g., Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000) (Title III limits places of accommodation to physical spaces; websites not included). The Supreme Court has granted certiorari to address whether a “tester” has standing to bring a case involving website accessibility. The Supreme Court will hear arguments in 2023 or 2024 regarding hotel website access. *See Laufer v. Acheson Hotels, L.L.C.*, 50 F.4th 259 (1st Cir. 2022), *cert. granted*, 143 S. Ct. 1053 (Mar. 27, 2023).

In addition to whether websites are covered by the ADA, another issue is what the design standards should be and other related issues. For example, in *Gomez v. Bang & Olufsen America, Inc.*, No. 1:16-cv-23801, 2017 WL 1957182 (S.D. Fla. Feb. 2, 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 settled. 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 raised 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, including live-streamed school-wide events, 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&eld=4cc687f3-ea3a-47c4-935f-19d1e5b56216>.

While at one point the Trump administration 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. Since the Biden administration took effect in January 2021, federal regulatory activity has resumed and revisited many issues that were on hold.

On May 19, 2023, the Justice Department and the Department of Education jointly issued a Dear Colleague Letter reminding colleges, universities, and other postsecondary institutions to ensure that their online services, programs, and activities are accessible to people with disabilities. Many higher education institutions increasingly rely on their websites and third-party

online platforms to provide services, programs, and activities to members of the public. This includes courses on learning platforms as well as podcasts and videos on social media and third-party platforms like YouTube, Spotify, and Apple Podcasts. This joint letter reiterates that Title II and Section 504 require these institutions to provide equal opportunities to people with disabilities in all their operations. The letter also highlights recent web accessibility enforcement activities and technical assistance from the Justice Department’s Civil Rights Division and the Department of Education’s Office for Civil Rights. <https://www.justice.gov/crt/case/dear-colleague-letter-online-accessibility-postsecondary-institutions>.

A number of cases have been brought by individuals claiming that the website did not provide adequate information about the details of access in hotel rooms. *See, e.g., Laufer v. Looper*, 22 F.4th 871 (10th Cir. 2022) (dismissing tester case against hotel; tester claimed online reservation system did not provide sufficient information about accessible features in the hotel); *Love v. FYI MC, LLC*, No. 21-cv-02845, 2021 WL 2913654 (N.D. Cal. July 12, 2021) (hotel’s website indicated that because of its historic nature it was not wheelchair accessible, and that access information could be obtained by contacting the innkeeper; satisfied the reservations expectations for hotels built before 1991); *Lammey v. Sunworld Dynasty US Holding LLC*, No. 2:21-cv-01302-VAP-SKx, 2021 WL 2642490 (C.D. Cal. May 7, 2021) (denying Title III claim by wheelchair user sought to book an accessible hotel room, but alleged that the third party website did not provide sufficiently detailed information about accessibility features; discussion of responsibility between website provider and hotel); *Arroyo v. AJU Hotel Silicon Valley LLC*, No. 20-cv-08218-JSW, 2021 WL 2350813 (N.D. Cal. Mar. 16, 2021) (website itself was accessible; no ADA violation when website provided sufficient information regarding accessible features of hotel and rooms and invited contact for more information); *Love v. Wildcats Owner LLC*, 532 F. Supp. 3d 872 (N.D. Cal. 2021) (granting defendant’s motion to discuss claim that website did not adequately describe hotel accessibility features); *Love v. Concord Hotel LLC*, 549 F. Supp. 3d 1047 (N.D. Cal. 2021) (dismissing claim by tester alleging online hotel website provided insufficient information about access; DOJ guidance on website information does not specify definitive list of precisely what information must be provided; noting, however that if there is something “quirky” about a room, that information should be provided). The number of these cases highlights the need for more specific regulatory guidance on this issue.

*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 DVD, LLC*, Civil Action No. 16-6296, 2017 WL 4864995 (E.D. Pa. Oct. 27, 2017).

## B. Nondiscrimination

Add a new Note 3 on page 277:

3. *Summer Camp*: See *Koester v. Young Men’s Christian Ass’n of Greater St. Louis*, 855 F.3d 908 (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 282-84:

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. *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171 (3d Cir. 2019) (remanding Title III claim by plasma donor using service animal for PTSD who was denied permission to donate because of use of service animal); *Smith v. Morgan*, 473 F. Supp. 3d 1266 (N.D. Ala. 2020) (granting summary judgment for store because it voluntarily amended its policy regarding service animals); *Drake v. Salt River Pima-Maricopa Indian Cmty.*, 411 F. Supp. 3d 513 (D. Ariz. 2019) (sovereign immunity applied in claim against casino and resort involving being allowed to bring her service dog); *Kao v. British Airways*, No. 17 Civ. 0231 (LGS), 2018 WL 501609 (S.D.N.Y. Jan. 19, 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 Cnty.*, No. 4:14-CV-063-JD, 2017 WL 4181143 (N.D. Ind. Sept. 21, 2017) (although the dog was trained to open doors and pull groceries, these tasks were unrelated to disability of PTSD); *Santiago Ortiz v. Caparra Ctr. Assocs.*, 261 F. Supp. 3d 240 (D.P.R. 2016) (shopping mall setting); *Johnson v. Or. Bureau of Lab. Indus.*, 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. 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> (summarizing proposed regulations); <https://www.govinfo.gov/content/pkg/FR-2020-02-05/pdf/2020-01546.pdf> (full proposal).

Add to Note 5 on pages 285-86:

In *McGann v. Cinemark*, 873 F.3d 218 (3d Cir. 2017), 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](https://www.ada.gov/regs2016/movie_captioning_rule_page.html).

The need for employee training is highlighted in *Thomas v. Kohl's Corp.*, No. 17 C 5857, 2018 WL 704691 (N.D. Ill. Feb. 5, 2018), in which the court denied summary judgment on a claim where department store patron sought accommodations for her mobility impairment. Another situation in which employee training was raised involved the alleged forcible removal of a moviegoer with Down syndrome. The parent's claim for failure to train failed. *See Estate of Saylor v. Regal Cinemas, Inc.*, Civil Action No. WMN-13-3089, 2016 WL 4721254 (D. Md. Sept. 9, 2016).

*Add new Note 7 on page 286:*

**7. Covid Issues:** During the height of the Covid pandemic, one of the key issues was whether a business could require or refuse to allow masking as a public health measure. *See, e.g., Witt v. Bristol Farms*, No. 21-cv-00411, 2021 WL 5203297 (S.D. Cal. Nov. 9, 2021) (dismissing claim by individual that medical center policy requiring visitors to wear face masks violated ADA; claim by individual whose health condition made wearing a mask difficult; entity not required to make individualized assessment); *Ames v. Wash. Health Sys. Foot & Ankle Specialists, Inc.*, No. 2:20-cv-887-NR, 2021 WL 4594673 (W.D. Pa. Oct. 6, 2021) (dismissing Title III, but allowing 504 claim to proceed, for patient seeking treatment for plantar warts who had skin condition seeking exemption from mask requirement during COVID; office offered telemedicine as accommodation); *Giles v. Sprouts Farmers Mkt., Inc.*, No. 20-cv-2131, 2021 WL 2072379 (S.D. Cal. May 24, 2021) (denying access to store because patron would not wear a face mask not an ADA violation in light of Covid concerns about direct threat; patron claimed medical condition that prevented wearing face mask but did not claim she could not wear optional face shield; store also offered to have store employee shop for her, but she claimed that was insufficient). Although the issue no longer receives as much attention, the possibility for ongoing concerns remains. Another interesting issue arose regarding wheelchair access for outdoor dining spaces. *See Whitaker v. 2008 Shattuck Ave, LLC*, No. 21-cv-03083-EMC, 2021 WL 3676967 (N.D. Cal. Aug. 19, 2021) (preliminary rulings in claim that outdoor dining table arrangements made in response to Covid had reduced access for wheelchair users).

## **D. Architectural Barriers**

### **[2] Accessibility Requirements**

*Add to text on pages 300-01:*

Although rarely raised as a design change, the case of *Magee v. Winn-Dixie Stores, Inc.*, Civil Action No. 17-8063, 2018 WL 501525 (E.D. La. Jan. 22, 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 no injury.

There are few cases involving historic buildings, but they do occasionally arise. In *Miraglia v. Board of Directors of the Louisiana State Museum*, Civil Action No. 15-4947, 2017

WL 4082100 (E.D. La. Sept. 14, 2017), *rev'd in part on other grounds*, 901 F.3d 565 (5th Cir. 2018), 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**

*Add after the last paragraph on page 318:*

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**

*Add to the end of the Note on page 331:*

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*, 887 F.3d 199 (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. Am. Airlines, Inc.*, 936 F.2d 796 (5th Cir. 1991). The following decisions find no private right of action: *Segalman v. Sw. Airlines Co.*, 895 F.3d 1219 (9th Cir. 2018); *Lopez v. Jet Blue Airways*, 662 F.3d 593 (2d Cir. 2011); *Boswell v. Skywest Airlines Inc.*, 361 F.3d 1263 (10th Cir. 2004); *Love v. Delta Air Lines*, 310 F.3d 1347 (11th Cir. 2002); *see also Perez-Ramos v. Spirit Airlines, Inc.*, No. 08-1574(SEC), 2009 WL 890484 (D.P.R. Mar. 25, 2009) (recognizing the trend to deny a private action and dismissing ACAA claims with prejudice because the plaintiff did not oppose the motion to dismiss). Two circuits have currently reserved decision on this issue. *See Gilstrap v. United Airlines, Inc.*, 709 F.3d 995 (9th Cir. 2013); *Elassaad v. Indep. Air, Inc.*, 613 F.3d 119 (3d Cir. 2010). 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, (8th Cir. 1989).

## **G. Telecommunications**

### **[3] Internet and Other Web-Based Communication**

*Add to the end of the Notes on page 340:*

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 & TRANSP. COMPLIANCE BD. (ACCESS BOARD), *Information and Communication Technology (ICT) Standards and Guidelines*, Jan. 18, 2017, <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 *Nat'l Ass'n of the Deaf v. Harvard Univ.*, 377 F. Supp. 3d 49 (D. Mass. 2019).

## H. Enforcement

Several bills have been introduced in Congress in recent years—including one in May 2023—that would amend the ADA to require notice and an opportunity for businesses to correct Title III violations before a plaintiff could sue. The proposed legislation responds to a handful of litigants who are viewed as abusing the ADA's current enforcement mechanisms. See <https://markgreen.house.gov/cache/files/2/0/205e7986-040a-49db-b8e5-7cd51d7af0c3/01845CDA79A6563C4DE177292A2CB90C.ada-improvement-act-of-2023-signed.pdf>; Mike DeBonis, *House Passes Change to Americans with Disabilities Act Over Activists Objections*, WASH. POST, Feb. 15, 2018, [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](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*, 378 NEW ENG. J. OF MED. 2065 (2018).

There are a large number of cases addressing the issue of frequent litigants and their standing. The following are some court decisions on this issue. See *Laufer v. Acheson Hotels, L.L.C.*, 50 F.4th 259 (1st Cir. 2022), *cert. granted*, 143 S. Ct. 1053 (Mar. 27, 2023), which addresses whether a person who does not intend to visit a hotel (a tester) has standing to bring an action claiming that the website information did not provide sufficient detail about accessibility. This was not a case about whether the website itself was accessible, but rather about what content the website must include. *Garcia v. Edelson*, No. CV 20-01891-MWF (Ex), 2022 WL 4587517 (C.D. Cal. Sept. 29, 2022) (individual showed no intent to return; extensive litigation history affects credibility; individual had filed 864 claims in California; individual lacked standing to sue); *Whitaker v. Nick the Greek Santa Clara LLC*, No. 21-cv-09338-BLF, 2022 WL 2343044 (N.D. Cal. June 29, 2022) (finding standing to sue by wheelchair user seeking access to restaurant; references submitting history of past litigation by individual); *Perius v. Aloha Petroleum, Ltd.*, No. 22-00021 SOM-WRP, 2022 WL 1471310 (D. Haw. May 10, 2022) (dismissing gas station patron claim that accessible parking was not as close to building entrance without providing any factual information); *Whitaker v. TJ Tech. LLC*, No. 21-cv-09655-WHO, 2022 WL 1427506 (N.D. Cal. May 5, 2022) (wheelchair user claimed cell phone repair shop was not accessible; allowing claim to go forward because demonstration of intent to return; court noted arguments that might go to credibility at a later point including numerous ADA cases filed by claimant; distance between his home and the shop; absence of allegations of previous visits); *Breeze v. Kabila Inc.*, 575 F. Supp. 3d 141 (D.D.C. 2021) (preliminary rulings on standing in case by wheelchair user that restaurant was inaccessible; installing doorbell and signage at entrances did not moot claim; portable wheelchair ramp at entrance did not moot claim; sufficiently demonstrated intent to return; plaintiff described as “no stranger to ADA litigation”); *Marradi v. Karoska Landing, Inc.*, 323 F. Supp. 3d 216 (D. Mass. 2018) (granting standing to wheelchair user; owner claimed plaintiff was serial litigant; patron had established standing through intent to return).

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.*, No. 16-81557-CV-MIDDLEBROOKS, 2016 WL 7324078 (S.D. Fla. Dec. 14, 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**

*Add this new paragraph at the end of this section on page 349:*

In an unusual case, the court in *American Council of the Blind v. Mnuchin*, 977 F.3d 1 (D.C. Cir. 2020) addressed the continuing litigation about redesigning paper currency to meet accessibility requirements for individuals with visual impairments. The Secretary of the Treasury is required to make various changes to ensure that currency is distinguishable to people with visual impairments. The timeframe and details of these changes are ongoing concerns.

### **C. Modification of Rules, Policies, and Practices**

*Add to Notes on pages 359-60:*

The issue of website accessibility has come up frequently in the Title III (public accommodations) context but is increasingly an issue under Title II. Many government services, programs, and services use websites to facilitate access to services. Examples include registering for an absentee ballot, paying a parking ticket, filing a police report, and applying for benefits. The Justice Department has taken the position that Title II applies in these situations and that the websites must be accessible. See U.S. DEP'T OF JUST., *Guidance on Web Accessibility and the ADA*, Mar. 18, 2022, <https://www.ada.gov/resources/web-guidance/>. Though the ADA's applicability to business websites is far from settled (see Chapter 4), most courts agree that Title II requires websites related to state and local government services, programs, and activities be accessible. See *Meyer v. Walthall*, 528 F. Supp. 3d 928 (S.D. Ind. 2021) (Title II and Section 504 suit alleging state website for public benefits programs administrator inaccessible to blind plaintiff; court found that Title II plainly applies to websites about vital government benefits programs and that fact issues exist regarding whether the websites here were sufficiently accessible to blind users); see also *Sierra v. City of Hallandale Beach, Fla.*, 996 F.3d 1110 (11th Cir. 2021) (deaf individual had stigmatic injury when he could not hear videos on city's official website that were not closed captioned and thus had standing to sue under Title II and Section 504); Eliza Guta, Comment, *Clicks, Bricks, and Politics: Website Accessibility Under Title II and Title III of the Americans with Disabilities Act*, 73 MERCER L. REV. 693 (2022).

### **E. Licensing Practices**

#### **[2] Professional Licensing**

##### **[a] Licensing Exam Accommodations**

*Add after the second full paragraph in the Notes on page 375:*

Law students often face difficulties in obtaining accommodations for the bar exam. This problem is especially acute for students with nonapparent disabilities such as ADHD, PTSD, depression, and dyslexia. Their accommodations requests are often denied based on insufficient documentation, which can be costly and time-consuming to obtain, or a history of prior academic achievement. See Stephanie Francis Ward, *Bar Examinees Have Little Success with Accommodation Requests and Say the Process is Stressful*, ABA J., June 30, 2022,

<https://www.abajournal.com/web/article/bar-examinees-have-little-success-with-accommodation-requests-and-say-the-process-is-stressful>; see also Haley Moss, *Raising the Bar on Accessibility: How the Bar Admissions Process Limits Disabled Law School Graduates*, 28 AM. U. J. GENDER SOC. POL'Y & L. 537 (2020).

Title II and Rehabilitation Act lawsuits against state bar licensing bodies face immunity hurdles. See *T.W. v. N.Y. State Bd. of Law Examiners*, 996 F.3d 87 (2d Cir. 2021) (finding immunity from Rehabilitation Act suit based on failure to accommodate on bar exam; state board did not receive federal financial assistance and was not arm of the state); *T.W. v. N.Y. State Bd. of Law Examiners*, No. 16-cv-3029, 2022 WL 2819092 (E.D.N.Y. July 19, 2022) (finding Title II waiver of immunity invalid for failure to provide bar exam accommodations, so state board entitled to immunity); *Kohn v. State Bar of Cal.*, 497 F. Supp. 3d 526 (N.D. Cal. Oct. 27, 2020) (claims for failure to provide bar exam accommodations dismissed on immunity grounds; Rehabilitation Act claim invalid because state board did not receive federal financial assistance; Title II claim invalid because there is no fundamental right to take the bar exam or practice law), *appeal docketed*, No. 20-17316 (9th Cir. Nov. 27, 2020).

Medical students also encounter difficulties in obtaining accommodations for medical licensing exams. See, e.g., *Sampson v. Nat'l Bd. of Med. Examiners*, No. 23-3, 2023 WL 3162129 (2d Cir. May 1, 2023) (litigation involving denial of medical student's seven requests for accommodations based on his learning disabilities); *Ramsay v. Nat'l Bd. of Med. Examiners*, 968 F.3d 251 (3d Cir. 2020) (medical student alleged ADA violation for failure to provide extra testing time to accommodate her dyslexia and ADHD; preliminary injunction in favor of student affirmed), *cert. denied*, 141 S. Ct. 1517 (2021).

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](https://www.ada.gov/regs2016/final_rule_adaaa.html); see also U.S. DEP'T OF JUST., *Testing Accommodations*, [https://archive.ada.gov/regs2014/testing\\_accommodations.html](https://archive.ada.gov/regs2014/testing_accommodations.html).

## **[b] Character and Fitness Inquiries**

*Add to the end of Note 1 on page 383:*

Research continues to demonstrate that mental health history and treatment questions are a deterrent to getting counseling and treatment for law students and that this has an adverse effect on mental health. David Jaffe, Katherine M. Bender & Jerome Organ, "It Is Okay to Not Be Okay": *The 2021 Survey of Law Student Well-Being*, 60 U. LOUISVILLE L. REV. 441 (2022).

## **F. Mass Transit**

*Add to text on pages 385-87:*

Title II requires that disabled people have meaningful access to public services, including transportation. Meaningful access need not be perfect, but it must be more than limited

participation. The access must afford disabled people an equal opportunity to gain the same benefit as non-disabled people. In the public transportation context, a few instances of failed service to disabled rider might not deny the rider meaningful access, but a substantial number could. *Compare Gustafson v. Bi-State Dev. Agency of the Mo.-Ill. Metro. Dist.*, 29 F.4th 406 (8th Cir. 2022) (blind bus rider who was passed by three times in eight months did not make out Title II or 504 case; no record that these were more than isolated incidents), *with Segal v. Metro. Council*, 29 F.4th 399 (8th Cir. 2022) (triable issues on whether Title II and Section 504 violated due to significant number of times bus did not stop and complaints by DeafBlind bus rider seemed to exceed those by nondisabled riders).

Another case involving mass transit issues is *Presmarita v. Metro-North Commuter Railroad Co.*, No. 17-cv-1118, 2017 WL 6542515 (S.D.N.Y. Dec. 21, 2017). The court held that a commuter railroad was not required to provide wheelchairs to passengers. The court recognized that airlines and ships have such affirmative requirements, but these are specifically required under applicable regulations.

As part of a class action settlement, the Metropolitan Transportation Authority of New York has agreed to add elevators or ramps to create a stair-free path of travel at 95% of the currently inaccessible subway stations by 2055. This will make the subway accessible to the more than half a million people who cannot use the stairs to access NYC subway system. *See* <https://dralegal.org/press/mta-settlement-approval/>. In 2022, the Biden administration announced the All Stations Accessibility Program, which will invest \$1.7 billion over five years to make hundreds of older subway and commuter rail stations more accessible through improvements such as wheelchair ramps and elevators. *See* <https://www.transit.dot.gov/about/news/biden-harris-administration-announces-686-million-grants-modernize-older-transit>.

## **G. Driving and Parking**

### **[1] The Driver's License**

*Add new Notes 4 and 5 on page 390:*

4. *Mandatory Training: Ivy v. Morath*, 781 F.3d 250 (5th Cir. 2015) involved a challenge to a state-required driver's education class for drivers younger than 25. The state did not provide the training but instead licensed schools to provide it. The plaintiffs are deaf, and the driving schools would not accommodate them. The Fifth Circuit held that Title II and Section 504 do not apply because driver education is not a state program, service, or activity, and the state's licensing and regulation of the driving schools is not a sufficient basis for liability. The Supreme Court later determined that the case was moot. 137 S. Ct. 414 (2016).

5. *Medical Certification*: When a wheelchair user in Louisiana went to renew her driver's license, the employee told her she must first have her doctor complete a medical form disclosing certain medical conditions and stating the doctor's opinion on whether it was safe for the applicant to drive. When she questioned why she was required to submit the form, she was told "it's our policy to give [the form] to everybody with a wheelchair, crutches, or a cane." The woman submitted the completed form and obtained her license renewal and then sued under Title II and Section 504, arguing that requiring additional screening solely because she used a wheelchair was discriminatory. The Fifth Circuit rejected her claim, stating that "[a]scertaining

that an individual with an apparent disability is capable of driving before issuing a license is a legitimate safety requirement.” See *Clark v. Dep’t of Pub. Safety*, 63 F.4th 466 (5th Cir. 2023). But see *Estate of Wobschall v. Ross*, 488 F. Supp. 3d 737 (E.D. Wis. 2020) (ad hoc physical exam imposed by drivers’ license agency on woman walking with a cane gave basis for claim to go forward under Title II).

## [2] The Automobile

*Add to Note 2 on page 390:*

In *Karczewski v. DCH Mission Valley*, 862 F.3d 1006 (9th Cir. 2017), the court allowed the Title III case against a car dealership 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

*Add a new paragraph at the end of this section on page 391:*

Though most parking litigation involves Title III private providers of public accommodations, such as parking at a hotel or restaurant, some parking cases involve government entities and therefore implicate Title II. See, e.g., *Karantsalis v. City of Miami Springs, Fla.*, 17 F.4th 1316 (11th Cir. 2021) (claim by individual with multiple sclerosis that city’s failure to provide accessible parking and sidewalks deprived him of access to public benefits including swimming pools and picnic areas; reversing dismissal based on limitations); *Fortyune v. City of Lomita*, 766 F.3d 1098 (9th Cir. 2014) (ADA requires local governments to maintain accessible on-street public parking); *Feltenstein v. City of New Rochelle*, No. 14-cv-5434, 2019 WL 3543246 (S.D.N.Y. Aug. 5, 2019) (Title II claim involving van accessible parking and dispersal of accessible parking spaces throughout a city-owned parking garage; spaces could all be on one level but must be dispersed near entrances; plaintiff did not have standing, even though city improperly distributed spaces, because she did not show that the city’s dispersal method hurt her in particular); *Bassilios v. City of Torrance*, 166 F. Supp. 3d 1061 (C.D. Cal. 2015) (suit involving failure to provide request for designated disabled parking space on street outside apartment; summary judgment granted for plaintiff; failure to provide meaningful access to curbside parking violates Title II and Rehabilitation Act); see also Max Birmingham, *Where the Sidewalk Ends: Are Sidewalks, Curbs, Parking Lots, and Other Infrastructure “Services, Programs, or Activities” under Title II of the American Disabilities Act?*, 48 W. ST. L. REV. 1 (2021).

## [4] Taxicab Service

*Add to the end of this section on page 391:*

Many suits, both individual and class actions, against Uber and Lyft have alleged discrimination regarding the availability of vehicles necessary to transport motorized wheelchairs. These are called wheelchair-accessible vehicles (WAVs). Some suits have involved markets where no WAV service is offered, with the plaintiffs seeking to have that service offered in their area. Other suits have challenged the adequacy of existing WAV service, arguing that the service is sporadic, unreliable, more expensive, has longer wait times, and is unavailable for advance scheduling. Most cases have yet to be resolved, but courts have found these suits plausible under Title III, and in two, courts have found that providing WAV services as the



plaintiffs' request would be unreasonably expensive and/or burdensome. *See Lowell v. Lyft, Inc.*, No. 17-CV-06251, 2023 WL 2622925 (S.D.N.Y. Mar. 24, 2023) (class action suit against Lyft regarding lack of adequate WAV services in New York; plausible Title III claims asserted; three classes certified); *Crawford v. Uber Techs., Inc.*, 616 F.3d 1001 (N.D. Cal. 2022), *appeal docketed*, No. 22-16292 (9th Cir. Aug. 24, 2022) (suit by motorized wheelchair users against Uber to force Uber to provide WAV service in New Orleans, Louisiana and Jackson, Mississippi; plaintiffs stated cognizable Title III claim; fundamental alteration defense failed because Uber offers WAV service in many other markets; anticipated cost of providing WAV "too high for the limited service that would result," making the plaintiffs' request unreasonable); *Indep. Living Res. Ctr. San Francisco v. Lyft, Inc.*, No. C 19-01438, 2021 WL 3910719 (N.D. Cal. Sept. 1, 2021) (class action suit by individual plaintiffs and disability advocacy group alleging discrimination based on failure to provide WAVs in the San Francisco Bay Area; class certification denied; fundamental alteration defense rejected; bench trial on reasonableness issue determined that plaintiffs' proposed alteration was unreasonable based on cost and administrative burden); *O'Hanlon v. Uber Techs., Inc.*, Civil Action No. 2:19-cv-00675, 2021 WL 2415073 (W.D. Pa. June 14, 2021) (class action against Uber alleging discrimination for failing to provide any WAVs in Allegheny County, Pennsylvania; plaintiffs have standing and have stated plausible Title III claim); *Equal Rts. Ctr. v. Uber Techs., Inc.*, 525 F. Supp. 3d 62 (D.D.C. 2021) (disability advocacy group suit against Uber alleging discrimination against Washington, D.C. area people who use non-foldable wheelchairs; alleges that services provided are far less reliable and predictable than non-wheelchair accessible offerings and that wheelchair users pay higher fares and have longer wait times; advocacy group has associational standing and stated plausible Title III claim); *Indep. Living Res. Ctr. San Francisco v. Uber Techs., Inc.*, No. 18-cv-06503-RS, 2019 WL 3430656 (N.D. Cal. July 30, 2019) (class action suit by individual plaintiffs and disability advocacy group alleging that Uber's WAV service in the San Francisco Bay Area is discriminatory because it has a longer wait time, is often unavailable, and cannot be booked in advance; motion to compel arbitration granted); *Access Living of Metro. Chi. v. Uber Techs., Inc.*, 351 F. Supp. 3d 1141 (N.D. Ill. 2018), *aff'd*, 958 F.3d 604 (7th Cir. 2020) (suit against Uber involving motorized wheelchair users in Chicago area; alleged that even though the Uber app contained an option to allow users to request a WAV, the supply was so low that the service was "virtually unavailable" and resulted in longer wait times and higher prices; two individual plaintiffs were found to have standing and to have stated plausible Title III claim; third individual plaintiff had no standing because her allegations were not rooted in personal knowledge; disability advocacy organization found to have standing but not to have stated a Title III claim because its injuries were indirect); *Ramos v. Uber Techs., Inc.*, Civil Action No. SA-14-CA-502-XR, 2015 WL 758087 (W.D. Tex. Feb. 20, 2015) (suit against Uber and Lyft regarding failure to provide WAVs in Houston and San Antonio, Texas; plaintiffs have standing and stated plausible Title III claim).

Uber and Lyft are taking steps to expand wheelchair accessibility, at least in some markets. A 2019 California law requires that companies provide accessible services, and they have begun to collect a ten-cent surcharge on every ride to go to an accessibility fund to meet this obligation. Lyft has piloted a WAV program in San Francisco and Los Angeles, and Uber has partnered with a major transportation company to provide quick and reliable WAV service in many major markets, including Boston, New York, Chicago, and Washington, D.C. *See* <https://www.disabilityscoop.com/2019/07/11/wheelchair-more-chances-lyft-uber/26880/>; <https://www.disabilityscoop.com/2018/11/27/uber-timely-accessible-rides/25753/>.

Uber and Lyft have both come under fire when some of their drivers refused to provide service to riders with service animals. Settlements involving both services have resulted in promises to educate drivers and enforce policies requiring all drivers to accommodate riders and their service animals. *See Nat'l Fed'n of the Blind of Cal. v. Uber Techs., Inc.*, No. 14-cv-04086, 2016 WL 9000699 (N.D. Cal. July 13, 2016) (class action against Uber on behalf of all blind or visually disabled individuals nationwide who use a service animal and were denied rides because of their service animals or deterred from using Uber's app; plausible Title III claim stated; class conditionally certified and settlement preliminarily approved; Uber to implement policies to inform drivers that they must provide rides to riders with service animals); DISABILITY RTS. ADVOCATES, *Lyft and the National Federation of the Blind Announce Comprehensive Accessibility Improvements for Lyft Riders Who Travel with Service Animals*, Apr. 3, 2017, <https://dralegal.org/press/lyft-national-federation-blind-announce-comprehensive-accessibility-improvements-lyft-riders-travel-service-animals/>.

The Justice Department has turned its attention to rideshare services and sued both Lyft and Uber. The Lyft suit involved allegations of drivers refusing to provide services to users with foldable wheelchairs and other collapsible mobility devices. That suit settled in 2020, with Lyft paying damages and promising to revise its policies and train its drivers. U.S. DEP'T OF JUST., Press Release, *Lyft Agrees to Resolve Allegations that It Violated Federal Law When Its Drivers Denied Rides to Individuals with Disabilities*, June 22, 2020, <https://www.justice.gov/usao-cdca/pr/lyft-agrees-resolve-allegations-it-violated-federal-law-when-its-drivers-denied-rides>. The Uber suit involved a policy to charge passengers' wait time fees if the trip did not begin within two minutes after the Uber arrived. The DOJ alleged that Uber violated the ADA by charging disabled passengers wait time fees because many disabled passengers need additional time to enter the car for reasons such as breaking down a walker to store in the car. That suit also settled, in 2022, with substantial damages payments and an Uber commitment to waive wait time fees for users who need additional time because of a disability. *See* U.S. DEP'T OF JUST., Press Release, *Uber Commits to Changes and Pays Millions to Resolve Justice Department Lawsuit for Overcharging People with Disabilities*, July 18, 2022, <https://www.justice.gov/opa/pr/uber-commits-changes-and-pays-millions-resolve-justice-department-lawsuit-overcharging-people>.

Rideshare companies have taken positive steps to aid the disability community. For example, Lyft has collaborated with a county in Minnesota for years to help provide transportation for disabled people, but politics over legislation regarding wages for rideshare drivers could derail the program. *See* Tim Harlow, *Gov. Walz Vetoes Rideshare Bill, His First Veto in Five Sessions*, STARTRIBUNE, May 25, 2023, [https://www.startribune.com/gov-walz-issues-his-first-veto-bill-would-have-boosted-pay-for-rideshare-drivers/600277811/?utm\\_source=newsletter&utm....](https://www.startribune.com/gov-walz-issues-his-first-veto-bill-would-have-boosted-pay-for-rideshare-drivers/600277811/?utm_source=newsletter&utm....)

## H. Access to Justice

### [1] Participation on Juries

*Add to the end of this section on page 397:*

*See also Crawford v. Hinds Cnty. Bd. of Supervisors*, 1 F.4th 371 (5th Cir. 2021) (wheelchair user called twice for jury duty and both times faced access obstacles in being able to serve; standing found based on systematic exclusion; individual had been called twice in five years and raised access issue the first time and access still no better the second time).

### [2] Criminal Justice System

*Add to Note 2 on page 401:*

At a time when there is serious concern about police abuse of individuals of color, significant evidence exists that people with disabilities suffer inordinately at the hands of police officers as well. Individuals of color with disabilities are particularly vulnerable to unbridled police authority. The most common cases of injuries and deaths of disabled individuals caused by police occur to individuals with behavioral health,<sup>1</sup> cognitive, emotional, and perception-based disabilities. *See* Ann C. McGinley, *Enough! Eliminating Police Abuse of Individuals of Color with Disabilities*, 21 NEV. L. J. 1081 (2021); *see also* Jamelia Morgan, *Disability, Policing, and Punishment: An Intersectional Approach*, 75 OKLA. L. REV. 169 (2022).

On May 25, 2022, President Biden issued Executive Order 14074, *Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety*. A year later, pursuant to the Executive Order, the Departments of Justice (“DOJ”) and Health and Human Services (“HHS”) issued *Guidelines for Emergency Responses to People with Behavioral Health or Other Disabilities*. [https://www.justice.gov/d9/2023-05/Sec.%2014%28a%29%20-%20DOJ%20and%20HHS%20Guidance%20on%20Emergency%20Responses%20to%20Individuals%20with%20Behavioral%20Health%20or%20Other%20Disabilities\\_FINAL.pdf](https://www.justice.gov/d9/2023-05/Sec.%2014%28a%29%20-%20DOJ%20and%20HHS%20Guidance%20on%20Emergency%20Responses%20to%20Individuals%20with%20Behavioral%20Health%20or%20Other%20Disabilities_FINAL.pdf).

Describing the prevalence and importance of the issue, the Guidelines explain:

Research has shown that as many as 10 percent of all police calls involve a person with a serious mental illness. Other estimates indicate that 17% of use of force cases involve a person with a serious mental illness, and such individuals face 11.6 times the risk of experiencing a police use of force faced by persons without a serious mental illness. Further, while representing only 22% of the population, individuals with disabilities may account for 30% to 50% of incidents of police use of force. In recent years, people with mental illness have accounted for between 20% and 25% of individuals killed by law enforcement.

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<sup>1</sup> The term “behavioral health” includes both mental health and substance abuse disabilities.

*Id.* at 2 (citations omitted).

Moreover, consistent with the research included in the DOJ and HHS guidelines is a report filed by the DOJ that investigated the police officers' killing of Breonna Taylor as she was sleeping in her own home in Louisville, Kentucky. The DOJ and the U.S. Attorney's Office of the Western District of Kentucky Civil Division launched an investigation of the Louisville Metro Police Department ("LMPD") and the Louisville Metro Government. The Report was published on March 8, 2023. See <https://www.justice.gov/crt/case-document/file/1572951/download>. The Report found that the LMPD and Louisville Metro "violate the Americans with Disabilities Act in their response to people with behavioral health disabilities." *Id.* at 59.

Specifically, the Report found that nearly 25% of the emergency calls police respond to involve people with behavioral disabilities; police are sent to deal with individuals with behavioral health disabilities with inadequate training or experience; when making calls police do not include trained health and behavioral experts; and police fail to grant these individuals reasonable accommodations. For example, police do not give disabled subjects space and time needed to respond to their inquiries, do not appoint one officer to speak for the group to render the encounter less threatening, and on occasion police unnecessarily approach mentally disabled persons with guns drawn. Finally, police regularly abuse these individuals both physically and verbally, causing physical and mental injury and death. *Id.* at 59-69.

The Report recommends the following reasonable modifications to avoid discriminatory treatment of people with behavioral health disabilities: modify policies, procedures, and training to deploy community-based responses such as mobile crisis teams to behavioral health calls; coordinate with crisis hotlines and other services; and modify the Crisis Intervention Team ("CIT") program to follow the recommended norms. Currently, the CIT program provides all officers with forty hours of training but does not assess which officers should be part of the CIT or the effectiveness of the training.

Although consistent with the DOJ Report on Louisville, the new DOJ and HHS guidelines go beyond the specific recommendations for LMPD. They state that under the ADA, people with behavioral health disabilities should receive a health response in circumstances where a person with a medical health issue would receive a health, rather than a law enforcement, response. That is, if an ambulance or a medic would be dispatched to a person with a heart attack rather than law enforcement, a similar health response, rather than police (or along with the police) should be sent to care for a person with a behavioral health disability.

Furthermore, the Guidelines state:

[E]mergency response systems and law enforcement agencies must ensure effective communication with people with disabilities, including those who are deaf or hard of hearing, those who are blind or have low vision, and those who use alternative and augmentative forms of communication, as required by the Americans with Disabilities Act. These entities must give primary consideration to providing the type of communication aid or service requested by a person who is deaf or hard of hearing. For example, when a sign language interpreter is needed, law enforcement agencies must provide interpreters who can interpret

effectively, accurately, and impartially. Emergency response systems must also provide effective communication for people with neurodevelopmental communication disorders, including people who are non-verbal; people with autism spectrum disorder; people with intellectual disability; people with traumatic brain injury and dementia; and people who use alternative communication devices and approaches.

*Id.* at 4 (citations omitted).

The Guidelines make specific recommendations for best practices that law enforcement agencies should adopt in compliance with Title II of the ADA. These recommendations are numerous, but the bottom line is that a health response rather than a law enforcement response should be prioritized. When police do respond, they should have been specially trained and be accompanied by co-responders who are mental health clinicians or peer support specialists. 911 call centers need to coordinate closely with 988, the Suicide Prevention and Crisis Lifeline system, as well. The document gives examples of jurisdictions that are having success with a variety of programs and training that emphasize treatment over arrest.

The number of persons with behavioral disabilities who are on the streets, arrested, and harmed raises serious concerns about who should help these individuals and how. One solution was announced recently by New York City Mayor Eric Adams, who has directed police and social service workers to round up individuals with behavioral disabilities and to commit them involuntarily to inpatient care. While Adams appears to want to help these individuals, there is a dearth of psychiatric beds available for them. Moreover, it appears that if New York follows the Guidelines recently promulgated by DOJ and HHS, there would be less focus on police and more on health care workers. For a description of the situation in New York, see Andy Neuman & Emma J. Fitzsimmons, *New York City to Involuntarily Remove Mentally Ill People from Its Streets*, N.Y. TIMES, Nov. 11, 2022, <https://www.nytimes.com/2022/11/29/nyregion/nyc-mentally-ill-involuntary-custody.html>.

### **Liability for Police Abuse**

Liability for violations of police abuse victims' fourth amendment rights is possible under 42 U.S.C. § 1983, but there are significant barriers to these lawsuits. First, scholars argue that it is very difficult to prove that a search or seizure is unreasonable using the Supreme Court's objective reasonableness standard. Second, even if the search is considered unreasonable, cities and counties are not liable for police abuse unless the offending officers are acting pursuant to a policy or custom. Third, although suits against individual police officers are possible, courts have made it fairly simple for police officers to claim qualified immunity: a right must be "clearly established" to impose liability, and the courts have interpreted this requirement narrowly. See Ann C. McGinley, *Enough! Eliminating Police Abuse of Individuals of Color with Disabilities*, 21NEV. L. J. 1081, 1094-97 (2021).

After *Yeskey*, Title II of the ADA is a potential source of law enforcement agency liability for police abuse of disabled individuals. Under Title II, law enforcement agencies can be responsible directly for failure to train officers and vicariously liable for police officers'

“wrongful arrest” of an individual with a disability and failure to grant a reasonable modification during an arrest or other contact with an individual with a disability. While plaintiffs have had some success, all types of cases have been difficult for them to prove. Failure to train is less recognized by the courts but should be a potential cause of action under Title II. The legislative history of Title II demonstrates that Congress contemplated that governments will be liable under the ADA if they fail properly to train the police. For example, in a congressional hearing describing the Act, Representative Steny Hoyer stated:

[T]itle II covers the range of services, benefits, and programs offered by State and local governments. It also includes providing training to public employees to ensure that discriminatory actions do not occur. For example, persons who have epilepsy are sometimes inappropriately arrested because police officers have not received proper training to recognize seizures and to respond to them. In my (sic) situations, appropriate training of officials will avert discriminatory actions.

101 Cong. Rec. E1913, E1916 (daily ed. June 13, 1990).

It may be that after the Executive Order 14074 and publication of the DOJ and HHS Guidelines, courts will permit more of these cases to go forward.

In lawsuits for “wrongful arrest,” the plaintiffs prove the officers “misperceived the effects of a disability as illegal conduct.” This necessarily involves determining the motivation for the arrest. *Gohier v. Enright*, 186 F.3d 1216, 1221 (10th Cir. 1999); *Lewis v. Truitt*, 960 F. Supp. 175 (S.D. Ind. 1997) (police mistake deaf man's inability to follow their commands for deliberate resistance); *Jackson v. Town of Sanford*, Civ. No. 94-12-P-H, 1994 WL 589617 (D. Me. Sept. 23, 1994) (police mistake effects of a stroke as public intoxication).

Lawsuits for failure to make reasonable modifications of police policies or behaviors when confronted with an individual with a disability are more common, but the courts have created significant barriers to success of Title II lawsuits under this theory. First, although the courts agree that a reasonable modification is required, they differ as to when the duty to accommodate arises.<sup>2</sup> A minority of courts holds that the duty to grant a reasonable modification arises only after arrest, while most courts conclude that the duty arises pre-arrest. The Supreme Court has not yet decided this issue. *See McGinley, supra*, at 1102-03, n.136.

Second, the courts disagree as to whether a plaintiff must prove intentional discrimination (discriminatory animus or deliberate indifference, depending on the court) to establish liability and/or to collect damages. Although Professor Mark Weber makes an excellent argument as to why the reasonable modification cases should not require a showing of discriminatory animus or deliberate indifference to collect compensatory damages under the ADA, only one court to date has agreed with him. *See Mark C. Weber, Accidentally on Purpose: Intent in Disability Discrimination Law*, 56 B.C. L. REV. 1417 (2015); *I.L. v. Knox Cnty. Bd. of Educ.*, 257 F. Supp. 3d 946 (E.D. Tenn. 2017) (concluding that no proof of intent required for damages because the reasonable modifications provision, unlike the unlawful discrimination provision, does not require intent to prove the underlying cause of action). Moreover, the courts have interpreted

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<sup>2</sup> Although Title II speaks of “reasonable modifications,” the courts use the terms “reasonable accommodations” and “reasonable modifications” interchangeably in this context.

“deliberate indifference” to be a very difficult standard to meet. *See Gray v. Cummings*, 917 F.3d 1 (1st Cir. 2019) (no deliberate indifference established where police officer tased a woman whom he knew had escaped from a hospital where she was involuntarily committed because plaintiff failed to show that the officer knew that her unwillingness to follow his commands resulted from her mental illness rather than from deliberate disobedience).

Third, and very connected to the second issue, there is disagreement as to whether the defendant government agency in a Title II suit is vicariously liable in respondeat superior for discriminatory acts by officers when they are engaged in arrests or investigations. Some courts hold that there is no respondeat superior liability at all. *See Jones v. City of Detroit*, 20 F.4th 1117 (6th Cir. 2021). *But see Rosen v. Montgomery Cnty.*, 121 F.3d 154 (4th Cir. 1997) (policy or custom not required for ADA liability); *Patton v. Dumpson*, 498 F. Supp. 933 (S.D.N.Y. 1980) (respondeat superior applies to Section 504 claims and distinguishing Section 504 from Section 1983).

Other courts require, as noted above, proof of discriminatory animus or deliberate indifference for liability to attach to the government agency. Others conclude that there is liability of the government agency under a respondeat superior theory but require a showing of deliberate indifference or discriminatory animus to collect damages. *See Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1141 (9th Cir. 2001) (holding that the county was vicariously liable in respondeat superior but that proof of deliberate indifference is required for the plaintiff to collect damages).

Finally, other courts require the deliberate indifference of the frontline employees but also evidence that their acts can be attributable to the government entity. *See Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 349 (11th Cir. 2012) (concluding that for vicarious liability to attach, there must be an official involved in the discriminatory practice who has the authority and knowledge to correct the discriminatory practice); *Gray v. Cummings*, 917 F.3d 1, 17 (1st Cir. 2019) (concluding that whether the government is liable under Title II of the ADA for actions of employees who are officials with power to change the situation or whether respondeat superior is the proper standard is an open question); *Ravenna v. Vill. of Skokie*, 388 F. Supp. 3d 999 (N.D. Ill. 2019) (concluding that sufficient evidence for reasonable jury to conclude that police department (not only arresting officer) had notice of plaintiff’s mental health disability and that her behavior resulted from her disability rather than criminal behavior and that it had failed to reasonably accommodate her during her arrest).

Following are examples of cases where Title II or Section 504 is invoked based on failure to train, arrests, interrogations, carceral conditions, and failure to provide medical care.

### **Failure to Train**

*Gardner v. Samaniego*, No. 2:18-cv-01336-AKK, 2019 WL 2161144 (N.D. Ala. May 17, 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 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).

## Arrests

*Windham v. Harris Cnty., Tex.*, 875 F.3d 229 (5th Cir. 2017) (affirming summary judgment and acknowledging a duty to accommodate but concluding no failure by county sheriff deputies to accommodate arrestee's neck disability in field sobriety test); *Roell v. Hamilton Cnty., Ohio*, 870 F.3d 471 (6th Cir. 2017) (affirming summary judgment; declining to decide whether a cause of action under Title II of the ADA exists for failure to accommodate pre-arrest, but concluding as a matter of law that even if it does, accommodations proposed by wife of mentally ill arrestee who died after encounter with deputies, namely, use of verbal de-escalation techniques, gathering of information from witnesses, and calling of emergency medical services before engaging with arrestee, were unreasonable in light of overriding public safety concerns, thus precluding Title II failure-to-accommodate claim); *Munroe v. City of Austin*, 300 F. Supp. 3d 915 (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 because in Fifth Circuit Title II reasonable accommodation right arises only after arrest and the scene is secured); *Flood v. City of Jacksonville*, 263 F. Supp. 3d 1213 (N.D. Ala. 2017) (dismissing Title II case by administrator of estate of individual shot and killed by police officer; did not establish that police officers should have known of mental health issues when they approached him); *Parrott v. City of Bellingham*, Civil Case No. C17-0044RSL, 2017 WL 3267696 (W.D. Wash. Aug 1, 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); *Martinez v. Salazar*, Civ. No. 14-534, 2017 WL 3601232 (D.N.M. Jan. 9, 2017) (denying defendant's summary judgment because question of fact whether exigent circumstances exception applied to justify the actions against paraplegic individual 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).

## Interrogations

*Montgomery v. Dist. of Columbia*, Civil Action No. 18-1928, 2022 WL 1618741 (D.D.C. May 23, 2022) (denying defendant's summary judgment motion where a jury could conclude that an individual with schizophrenia should have received an accommodation under Title II where Montgomery at times ranted and raved during the interrogation and experts testified to the necessity of an accommodation).

## Carceral Conditions

*J.S.X. v. Foxhoven*, 361 F. Supp. 3d 822 (S.D. Iowa 2019) (denying defense motions to dismiss in class action by students with significant mental illness placed in state institution for male juveniles adjudged delinquent who were isolated, restrained, and not given accommodations under Title II and Section 504; *Stokes v. City of Chi.*, 2No. 16 C 11298, 2018 WL 497365 (N.D. Jan. 22, 2018) (denying motion to dismiss Title II and Section 504 claims of arrestee with seizure disorder who requested observable cell as accommodation; placed in out of view area where he was sexually assaulted while unconscious); *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).

### **Failure to Provide Medical Care**

*Hammonds v. DeKalb Cnty.*, No. 4:16-BE-1558-M, 2017 WL 1407461 (N.D. Ala. Apr. 20, 2017) (on reconsideration, court granted motion to dismiss ADA/504 claims without prejudice and invited plaintiff to allege facts that would causally link his disabilities to his claims of medical mistreatment); *Latson v. Clarke*, 249 F. Supp. 3d (W.D. Va. 2017) (allowing claim by prisoner on autism spectrum to proceed with ADA and 504 claims alleging abusive treatment, isolation, and failure to provide medical care); *Earl v. Espejo*, No. 17 C 195, 2017 WL 3704826 (N.D. Ill., Aug. 28, 2017) (arrestee with schizophrenia causing disturbance on bus arrested and held for two days without medical attention may state ADA/504 claim); *Reaves v. Dep't of Corr.*, 195 F. Supp. 3d 383 (D. Mass. 2016) (granting preliminary injunction to state prisoner with mobility and hearing impairment because likely to succeed on merits of 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); *Reaves v. Dep't of Corr.*, No. 19-2089, 2021 WL 9541612 (1st Cir. Dec. 14, 2021) (on appeal, case dismissed as moot because the plaintiff no longer in custody of the Department of Correction); *Moore v. City of Berkeley*, No C14-00669 CRB, 2016 WL 6024530 (N.D. Cal., Oct. 14, 2016) (originally refusing to grant summary judgment and allowing case to go forward on whether arrest of individual with mental illness who was using illegal drugs at time of arrest that resulted in her death created causes of action for wrongful arrest and failure to reasonably accommodate under Title II); 2018 WL 1456628 (N.D. Cal. Mar. 23, 2018) (on reconsideration, court concluded that there was no genuine issue of material fact for the jury and granted summary judgment to the defendant), *aff'd*, 801 F. App'x 480 (9th Cir. 2020).

*Add to Note 5 on page 403:*

The Supreme Court has continued to address the issue of executing individuals with intellectual disabilities. In 2019 in *Moore v. Texas*, after twice concluding that the Texas Court of Criminal Appeals applied the wrong standard in determining that an individual with an intellectual disability was eligible for execution, the Court agreed with both the defendant and the prosecutor, that “on the basis of the trial court record, Moore has shown he is a person with intellectual disability.” *Moore v. Texas*, 139 S. Ct. 666 (2019). Based on that finding, the Texas Court of Criminal Appeals reformed Moore’s death sentence to life imprisonment. *Ex parte Moore*, 587 S.W.3d 787 (Tex. Crim. App. 2019). In 2022, the Court allowed the execution of an inmate with cognitive disabilities without permitting him to choose a form of execution that he believed is less painful. *See Hamm v. Reeves*, 142 S. Ct. 743 (2022) (Kagan, J., dissenting to granting of application to vacate injunction).

Add new Notes 6 and 7 to page 403:

**6. Accommodations Within Facilities:**

A number of cases have addressed whether inmates with disabilities can adequately access prison or jail facilities. *See, e.g., Bennett v. Dart*, 53 F.4th 419 (7th Cir. 2022) (certifying class of detainees with disabilities regarding lack of grab bars and other fixtures needed for safe access to toilets and showers in county jail under ADA and the Rehabilitation Act); *Shaw v. Kemper*, 52 F.4th 331 (7th Cir. 2022) (remanding case involving toilet access for prison inmate who used wheelchair; accessible toilet a prison service subject to ADA Title II and Section 504 coverage); *Williams v. Kincaid*, 45 F.4th 759 (4th Cir. 2022) (transgender inmate with gender dysphoria has a viable claim under the ADA where the prison refused to give her prescribed hormone medication, marked her as a male, and placed her in men's side of the prison); *Douglas v. Muzzin*, No. 21-2801, 2022 WL 3088240 (6th Cir. Aug. 3, 2022) (prison failed to reasonably accommodate inmate who demonstrated he was denied access to prison services because the prison did not allow him to use orthopedic shoes necessary for his physical movement); *Keller v. Chippewa Cnty., Mich. Bd. of Comm'rs.*, 860 F. App'x 381 (6th Cir. 2021) (summary judgment granted on Title II accommodations claim regarding jail detainee denied the use of prosthetic leg; plaintiff presented insufficiently detailed evidence about any difficulties accessing the toilet; no evidence plaintiff's limited mobility caused him to miss meals because cellmates and officers brought him food); *Walker v. City of N.Y.*, 367 F. Supp. 3d 39 (S.D.N.Y. 2019) (allowing claim to proceed by legally blind inmate seeking access to prison law library); *Cook v. Ill. Dep't of Corr.*, No. 3:15-cv-83-NJR-DGW, 2018 WL 294515 (S.D. Ill. Jan. 4, 2018) (fact issue as to whether wheelchair-using inmate was prevented from continuing necessary drug treatment program due to inaccessible facilities within the prison); *Bowers v. Dart*, No. 16 CV 2483, 2017 WL 4339799 (N.D. Ill. Sept. 29, 2017) (recognizing triable issues concerning whether jail inmate needed a wheelchair and, if so, whether the prison failed to provide reasonable accommodations to access the facilities); *Wright v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 242 F. Supp. 3d 126 (N.D.N.Y. 2017) (prison inmate denied meaningful access to facilities and various prison activities when it failed to provide him with only manual wheelchair instead of motorized wheelchair); *Golden v. Ill. Dep't of Corr.*, No. 12-cv-7743, 2016 WL 5373056 (N.D. Ill. Sept. 26, 2016) (denying summary judgment in claim by prison inmate under ADA/504 regarding accommodations to use 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. *See, e.g., Luke v. Texas*, 46 F.4th 301 (5th Cir. 2022) (deaf defendant was denied meaningful access to public services despite the criminal case ending in his favor when he was not given an ASL interpreter to communicate his legal rights, the charges against him, or the terms and conditions of his bail); *King v. Marian Cir. Ct.*, 868 F.3d 589 (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 Cnty.*, 870 F.3d 939 (9th Cir. 2017) (denial of ASL service to deaf inmate might be basis for damages under ADA and 504 against county).

Animal accommodations have received increasing attention within the justice system. *See, e.g., Sykes v. Cook Cnty. Cir. Ct. Prob. Div.*, 837 F.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); *Wehner v. City of Upland*, No. EDCV 19-1155-GW-Ex, 2020 WL 8028243 (C.D. Cal. July 10, 2020) (dismissing ADA claim by county jail detainee based on not being allowed to have his service dog because he did not plead that his dog was allowed to be there despite health and safety reasons and that detention centers cannot provide alternative accommodations to the service dog); *see also Pena v. Bexar County*, 726 F. Supp. 2d 675, 686-87 (W.D. Tex. 2010) (reasoning disabled man may have a Title II claim after he was denied the ability to use his service dog while conducting research in a county courthouse).

7. *Covid Issues Within Facilities*: 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. 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 stayed the injunction pending appeal. The plaintiffs petitioned the U.S. Supreme Court to vacate the stay, and the Court denied the petition, with Justices Sotomayor and Kagan dissenting. The Fifth Circuit rejected all claims and rendered judgment against the plaintiffs. 993 F.3d 270 (5th Cir. 2021).

## I. Voting

*Add after the first paragraph in this section on page 403:*

The Justice Department has focused attention on the issue of accessibility of polling locations. It has entered into more than three dozen settlements and other agreements since 2016 with cities and counties to force better access. But progress can be slow. For instance, in Chicago, fewer than half of the 600+ polling locations were fully ADA-compliant as of February 2023. *See* Ayanna Alexander, *Voters with Disabilities Often Overlooked in Voting Battles*, ASSOC. PRESS, Apr. 2, 2023, <https://apnews.com/article/voting-rights-elections-disabled-voters-ada-chicago-990141816396ebba59d9b13f3c7c7b59>.

More cases are being litigated to challenge various practices that impact disabled voters. For example, many cases have challenged absentee voting systems that depend exclusively on paper ballots and thus prevent blind voters from completing the ballots privately and independently. *See, e.g., Hindel v. Husted*, 875 F.3d 344 (6th Cir. 2017) (voters claiming that paper ballot absentee voting denied right to vote without assistance; reversing lower court's grant of summary judgment; public entity required to prove that ADA compliance would result in fundamental alteration); *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494 (4th Cir. 2016) (finding Title II and Section 504 violation based on impact of absentee voting system requirements on blind voters; held that online ballot marking tool is a reasonable modification and not a fundamental alteration); *Hernandez v. N.Y. State Bd. of Elections*, 479 F. Supp. 3d 1 (S.D.N.Y. 2020) (denying preliminary injunction in action by voters with visual impairments challenging paper-only absentee voting system because plaintiffs had not shown that the defendants' proposed alternative accommodations were not equally effective to the specific electronic ballot-marking system plaintiffs requested).

*Add a new Note on page 409 after the Problem:*

The Covid pandemic and the aftermath of the 2020 presidential election have brought even sharper focus on disability rights issue related to voting. During the pandemic, many disabled voters wanted to avoid voting in person because they faced higher risks of contracting Covid or severe outcomes if they did. This resulted in litigation over issues such as access to absentee voting, early voting, drop-box locations, and curbside voting.

In the wake of the voter fraud allegations in the 2020 presidential election, an unprecedented wave of voter restriction laws is arising around the country. These laws cover issues such as assistance in completing and mailing ballots, eligibility for absentee voting, bans on drive-through or curbside voting, limiting drop-box locations and other restrictions on early voting, and voter ID laws. These voting restrictions can substantially affect individuals with disabilities. For commentary on this see, Maggie Astor, *G.O.P. Bills Rattle Disabled Voters: “We Don’t Have A Voice Any More”*, N.Y. TIMES, June 15, 2021, <https://www.nytimes.com/2021/06/14/us/politics/disability-voting-rights.html>; <https://www.disabilitycoop.com/2022/04/19/voters-with-disabilities-face-new-ballot-restrictions-ahead-of-midterms/29808/>.

In *Carey v. Wisconsin Elections Commission*, \_\_\_ F. Supp. 3d \_\_\_, No. 22-cv-402, 2022 WL 3910457 (W.D. Wis. Aug. 31, 2022), four voters with disabilities that made in-person voting extremely difficult challenged a newly enacted Wisconsin law requiring voters to personally return their absentee ballots. These voters had previously consistently used third parties to help them return their ballots. The court held that this law violated the Voting Rights Act provision requiring that “[a]ny voter who requires assistance to vote by reason of . . . disability . . . be given assistance by a person of the voter’s choice.” Because the VRA violation finding gave the plaintiffs full relief, the court didn’t reach their Title II and Rehabilitation Act claims. *See also Fla. State Conf. of the NAACP v. Lee*, 576 F. Supp. 3d 974 (N.D. Fla. 2021) (allowing case to proceed on claims by voting rights organizations under Title II and Voting Rights Act challenging Florida’s restrictions on drop box locations, mail-in ballots, and ability to obtain help voting).

## **J. Enforcement**

### **[2] Section 504 of the Rehabilitation Act**

*Add to the end of the second paragraph in this section on page 410:*

In *Cummings v. Premier Rehab Keller*, 142 S. Ct. 1562 (2022), the Supreme Court held that emotional distress damages are not recoverable in private actions under the Rehabilitation Act.

## Chapter 6 Higher Education

### C. Admissions

#### [1] Determining Qualifications

*Add new Note 7 on page 442:*

7. *Qualifications:* In *Giraldo v. Miami-Dade College*, No. 16-21172-CV, 2017 WL 2856433 (S.D. Fla. Feb. 28, 2017), the court granted summary judgment to the college in a case where a wheelchair user was denied a tutorial position. The court found that she was rejected because her English was not very clear, and the job required excellent oral skills and ability to clearly articulate in the English language.

For more discussion of this issue, see Laura Rothstein, *Medical Education and Individuals with Disabilities: Revisiting Policies, Practices, and Procedures in Light of Lessons Learned from Litigation*, 46 J. COLL. & UNIV. L. 258 (2021) and Laura Rothstein, *A Primer on Disability Discrimination in Higher Education*, Conference Report (peer reviewed) published by *Laws* (ISSN 2075-471X) in a Special Issue, Volume 7, Issue 3 entitled “Law and Higher Education” (2018).

#### [3] Identifying and Documenting the Disability

*Add to new Note 5 on page 456:*

5. *Documentation:* 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). The cost of documentation is increasingly raised as a policy concern, but institutions of higher education must weigh that against the fairness to all and ensuring that only those eligible for accommodations, particularly costly accommodations, are eligible. See generally <https://www.disabilityrightsca.org/latest-news/disability-rights-californias-comments-on-potential-amendments-to-the-us-department-of-> Katherine A. Macfarlane, *Disability without Documentation*, 90 FORDHAM L. REV. 59 (2021).

### D. The Enrolled Student

#### [2] Modification of Requirements

*Add to the end of the Note on pages 477-78:*

In *Campbell v. Lamar Institute of Technology*, 842 F.3d 375 (5th Cir. 2016), the court affirmed summary judgment for a college in a claim of intentional discrimination against a 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.

The modification of attendance requirements became a more significant issue in light of the post-pandemic return to in person coursework after the March 2020 to April 2021 period of totally remote and gradual return, which included a range of hybrid teaching and learning methods. The judicial guidance on this issue is evolving.

Exceptions to pandemic-related requirements (masking, testing, and vaccinations) based on disability will be subject to evaluation regarding whether it is reasonable to make the accommodations. The issue of direct threat is likely to be addressed as courts look at these issues. The issue of mandating masks when there are students or others in a classroom or other space who are immunocompromised is being addressed in the context of K-12 education settings and will be likely be addressed in higher education with the return to in person activities, especially if exceptions to attendance or physical presence are denied.

Students from K-12 settings who are enrolled in dual enrollment courses on campus raise issues of responsibility for providing accommodations. *See, e.g., Bradley v. Jefferson Cnty. Pub. Schs.*, No. 3:20-CV-00450, 2022 WL 1138150 (W.D. Ky. Apr. 18, 2022), *appeal docketed*, No. 22-5438 (6th Cir. May 19, 2022), which holds that a postsecondary institution is not obligated to provide FAPE in dual credit and dual enrollment courses. This decision does not address whether and to what extent a postsecondary institution is obligated to provide reasonable accommodations under Section 504 or the ADA for high school students enrolled in a college provided dual enrollment course.

#### **E. Architectural Barrier and Facility Issues**

*Add to the end of this section on page 497:*

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 Univ. of N.Y.*, 211 F. Supp. 3d 518 (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).

Although architectural barrier issues are rarely litigated, when they are, the stakes can be high. This is apparent from the challenge to a renovation project at Wrigley Field in Chicago, when an alteration to a stadium built in 1914 moved disability seating to a much less desirable location. While accessible seating does not have to be the best seating, those making renovations must ensure that sight lines and choice of seating options are considered in such situations. *See United States v. Chicago Baseball Holdings*, filed in Northern District of Illinois in July 2022, <https://www.courthousenews.com/wp-content/uploads/2022/07/usa-chicago-baseball-complaint-usdc-illinois.pdf>. A private suit was also filed in the case. Because of the degree to which sports is important on campus, many institutions renovate or build new sports arenas. Key to such projects is inclusion of people with disabilities and those with knowledge of ADA design standards in the planning stage.

**G. Other Issues**

**[1] Direct Threat**

*Add as a new paragraph at the end of the “Self-Harm Situations” section on page 509:*

The issue of whether an institution can take action involving students where the threat is to self (not others) is in a state of flux. The United States Department of Education and Department of Justice have issued joint guidance, but it is not certain what deference courts will give it. See <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-students-self-harm-covid-19.pdf>.

## **Chapter 7 Education**

### **A. Introduction and Overview**

#### **Sequential Listing of Key Statutes and Supreme Court Decisions**

*Add to List on page 521:*

2015 Every Student Succeeds Act (replacing No Child Left Behind)

Responding to concerns that were raised with respect to students with disabilities under No Child Left Behind

2017 *Fry v. Napoleon Community Schools*

Exhaustion of administrative remedies not required for ADA/504 suit unless the gravamen of the suit is denial of FAPE

2017 *Andrew F. v. Douglas County School District*

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

2022 *Cummings v. Premier Rehab Keller*

Emotional distress damages not available in private actions to enforce Rehabilitation Act claims

2023 *Perez v. Sturgis Public Schools*

Exhaustion of administrative remedies not required for ADA/504 suit seeking remedy not available under the IDEA, even if the suit is premised on denial of FAPE.



## **Education-Related Covid Issues**

As with many other areas of the law, the pandemic raised many legal issues for students with disabilities in the education context. Legal fights have pitted mask wearers against mask opponents and distance learning advocates against those who prefer the classroom. Litigation is addressing topics such as (1) mask mandates and mask mandate bans, (2) the impact of school closures on educational and procedural requirements under the IDEA, (3) the right to compensatory education for pandemic-related education losses, (4) disparate treatment of disabled students in accessing pandemic-related education choices, (5) procedural issues such as exhaustion of administrative remedies, mootness, and standing. Results have been mixed, and it remains to be seen whether majority rules will eventually arise. The following are representative cases addressing some of these issues:

### **Masks**

*R.K. v. Lee*, 53 F.4th 995 (6th Cir. 2022): ADA/504 suit challenging state law prohibiting school mask mandates; no standing

*E.T. v. Paxton*, 41 F.4th 709 (5th Cir. 2022): ADA suit by disabled students challenging the Texas order banning school mask mandates; no standing

*Arc of Iowa v. Reynolds*, \_\_\_ F. Supp. 3d \_\_\_, No. 4:21-cv-00264, 2022 WL 16627483 (S.D. Iowa Nov. 1, 2022), *appeal docketed*, No. 22-3338 (8th Cir. Nov. 8, 2022): ADA/504 suit on behalf of disabled children challenging state law ban on mask mandates; injunctive relief granted; requiring masks is a reasonable accommodation to allow children meaningful access to education and is not a fundamental alteration

*G.S. v. Lee*, No. 2:21-cv-02552-SHL-aatc, 2022 WL 1560391 (W.D. Tenn. Mar. 28, 2022): TRO granted in ADA/504 case regarding state executive order allowing parents to opt out of mask mandate; case later dismissed as moot when state law and Covid circumstances changed

*Hayes v. DeSantis*, 561 F. Supp. 3d 1187 (S.D. Fla. 2021): ADA/504 suit challenging law allowing parents to opt out of masking requirement; plaintiffs required to exhaust administrative remedies

### **Remote Instruction**

*L.E. v. Superintendent of Cobb Cnty. Sch. Dist.*, 55 F.4th 1296 (11th Cir. 2022): parents removed disabled children from in-person schooling once Covid safeguards lifted; ADA/504 claim allowed to proceed based on the theory of unjustified isolation (through remote instruction because in-person instruction was made unsafe for them) under *Olmstead*

*Martinez v. Newsom*, 46 F.4th 965 (9th Cir. 2022): suit alleged denial of FAPE during Covid remotened instruction; suit dismissed for failure to exhaust administrative remedies

*Abigail P. v. Old Forge Sch. Dist.*, No. 3:21-CV-02033, 2023 WL 2505011 (M.D. Pa. Mar. 14, 2023): suit alleged denial of FAPE during pandemic remote instruction; complained that school allowed varsity basketball team to resume in-person practice but would not allow in-person instruction; school was required to provide FAPE, even during pandemic; upheld hearing officer's determination that FAPE was provided, even though the educational experience was not perfect; denying compensatory education award

*Aja N. v. Upper Merion Area Sch. Dist.*, Civil Action No. 21-4234, 2022 WL 3371612 (E.D. Pa. Aug. 16, 2022): upholding hearing officer’s award of compensatory education for the period of limited instruction due to Covid

*E.E. v. California*, No. 21-cv-07585-SI, 2022 WL 597035 (N.D. Cal. Feb. 28, 2022): suit by disabled children seeking increased access to remote learning opportunities after schools reopened; alleged discriminatory access to remote learning options; claims regarding state-imposed barriers to remote educational opportunities allowed to proceed

*Hernandez v. Grisham*, 494 F. Supp. 3d 1044, 508 F. Supp. 3d 893 (D.N.M. 2020), *aff’d*, No. 20-2176, 2022 WL 16941735 (10th Cir. Nov. 15, 2022): suit alleging state’s Covid prohibition on in-person schooling violated the IDEA; temporary relief granted on the theory that there was a likely FAPE violation because the student was not progressing under remote instruction, but suit later dismissed for failure to exhaust administrative remedies

*J.T. v. De Blasio*, 500 F. Supp. 3d 137 (S.D.N.Y. 2020), *aff’d sub nom. K.M. v. Adams*, No. 20-4128, 2022 WL 4352040 (2d Cir. Aug. 31, 2022), *cert. filed*, 2022 WL 4352040 (U.S. Mar. 3, 2023): suit alleged that remote learning is a *per se* violation of FAPE; preliminary injunction denied on the merits and suit dismissed for failure to exhaust administrative remedies; affirmed based on failure to exhaust

In addition, the Department of Education has issued guidance clarifying the rights of disabled students specifically in the Covid context. *See, e.g.*, <https://www2.ed.gov/about/offices/list/ocr/docs/qa-reopening-202105.pdf>; <https://sites.ed.gov/idea/files/rts-iep-09-30-2021.pdf>; <https://www2.ed.gov/documents/coronavirus/letter-to-educators-and-parents-regarding-new-cdc-recommendations-03-24-2022.pdf>.

### **C. Substantive Protections under the Individuals with Disabilities Act**

#### **[1] Appropriate Education**

*Add as a new Note immediately after Rowley on page 537:*

After *Rowley*, some courts latched onto the Supreme Court’s wording regarding “some educational benefit” to mean that *any* educational benefit at all—even a de minimis one—satisfied the statute. The Court clarified that misconception in 2017. In *Andrew F. v. Douglas County School District RE-1*, 580 U.S. 386 (2017), the Supreme Court held that the IDEA requires more than de minimis progress, although it does not go so far as to require equal opportunity or the best possible education. Rather, the IDEA requires that the educational agency provide programming that is “reasonably calculated to enable a child to make appropriate progress in light of the child’s circumstances.” For a child such as Amy Rowley in a fully integrated classroom, the IEP should be “reasonably calculated to permit advancement through the general curriculum” (*i.e.*, passing marks and advancing grade levels). For other children like Andrew F, a child with autism who was not fully integrated into a regular classroom, the IEP must be “appropriately ambitious in light of [the child’s] circumstances” and allow that child “the chance to meet challenging objectives.”

## [2] Related Services

### 1. Psychological Services

*Add to Note 1 on page 547:*

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 schools' obligations to address such behavior by other children. See D'Andra Millsap Shu, *Food Allergy Bullying as Disability Harassment: Holding Schools Accountable*, 92 U. COLO. L. REV. 1807 (2022) (discussing bullying as disability harassment, both generally and in the specific context of bullying based on food allergies).

The following are citations to some of the recent decisions on this issue: *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); *Doe v. Columbia-Brazoria Indep. Sch. Dist.*, 855 F.3d 681 (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); *Vargas v. Madison Metro. Sch. Dist.*, No. 18-cv-272-slc, 2019 WL 2173928 (W.D. Wis. May 20, 2019) (cognitively disabled high school student sexually assaulted at school; no evidence that she was targeted because of her disability; "The mere fact that plaintiff was vulnerable is not enough. The ADA and the Rehabilitation Act are not general protection statutes for vulnerable people with disabilities, they are anti-discrimination statutes."); *Wormuth v. Lammersville Union Sch. Dist.*, 305 F. Supp. 3d 1108 (E.D. Cal. 2018) (five-year-old boy with speech impediment kicked, spit on, and teased; summary judgment granted on claim based on school's failure to respond to known disability-based bullying because no link shown between his disability and the bullying given that the bully treated "virtually every classmate" similarly; summary judgment denied on claim that bullying denied him FAPE under Section 504 because that claim does not depend on disability-motivated bullying); *C.M. v. Pemberton Twp. High Sch.*, Civil No. 16-9456, 2017 WL 2815069 (D.N.J. June 29, 2017) (parent sufficiently pleaded 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); *J.M. v. Dep't of Educ., State of Haw.*, 224 F. Supp. 3d 1071 (D. Haw. 2016) (lack of promise in IEP that student would not be subjected to bullying did not constitute denial of FAPE); *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; 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 disciplined 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), *aff'd*, 655 F. App'x 25 (2d Cir. 2016); see also *Hamilton v. Hite*, Civil Action No. 16-

5602, 2017 WL 3675398 (E.D. Pa. Aug. 21, 2017) (student properly suspended where each suspension was result of student’s physical aggression such as hitting and choking students and school employees).

*Add new Note 6 on page 549:*

**6. Transition Services:** Transitioning from school to post-school activities such as employment and college can be challenging for all students and even more so for students with disabilities. To help prepare students with disabilities to face these challenges, the IDEA requires transition services to be made available to these students. Students may also have the opportunity to enroll in postsecondary education programs while still in high school, which can raise legal issues about providing FAPE. The Department of Education has addressed transition, dual enrollment, and other related issues. See U.S. DEP’T OF EDUC., OFF. OF SPECIAL EDUC. & REHAB. SERVS., *A Transition Guide to Postsecondary Education and Employment for Students and Youth with Disabilities*, Aug. 2020, <https://sites.ed.gov/idea/files/postsecondary-transition-guide-august-2020.pdf>; U.S. DEP’T OF EDUC., *Increasing Postsecondary Opportunities and Success for Students and Youth with Disabilities*, Sept. 17, 2019, <https://www2.ed.gov/policy/speced/guid/increasing-postsecondary-opportunities-and-success-09-17-2019.pdf>; see also *R.E.B. v. Haw. Dep’t of Educ.*, 770 F. App’x 796 (9th Cir. 2019) (IDEA requires school to address parent’s concerns about transition services when student exited private school to attend public schools but does not require that IEP list the specific school where the transition services will occur).

### **[3] Least Restrictive Environment — Mainstreaming**

*Add to Problem 2 on page 559:*

The increasing popularity of school choice programs, such as state-funded private school vouchers, may have significant implications for students with disabilities. Though some of these private schools may provide attractive options for parents who are frustrated with their public schools’ response to their disabled child’s needs, attending these schools usually means giving up any rights under the IDEA, which many parents do not understand. It will be important to monitor these developments. See NAT’L COUNCIL ON DISABILITY, *Choice & Vouchers—Implications for Students with Disabilities*, Nov. 15, 2018, [https://ncd.gov/sites/default/files/NCD\\_Choice-Vouchers\\_508\\_0.pdf](https://ncd.gov/sites/default/files/NCD_Choice-Vouchers_508_0.pdf); Dana Goldstein, *Special Ed School Vouchers May Come with Hidden Costs*, N.Y. TIMES, Apr. 11, 2017, <https://www.nytimes.com/2017/04/11/us/school-vouchers-disability.html>.

### **[4] Disciplinary Removal — Denial of Services**

*Add to the end of Notes on pages 567-68:*

Under the post-*Honig* IDEA amendments, a student with a disability cannot have a change in placement for disciplinary reasons if the manifestation determination process determines either that the student’s misconduct (1) was caused by the student’s disability or (2) was the direct result of failing to implement the student’s IEP. There is an exception for “special circumstances,” which means conduct related to drugs, weapons, or serious bodily injury to

another; if special circumstances exist, a student can be suspended for up to 45 days. If the student's misconduct is not linked to disability, the disabled student can be disciplined in the same manner as a non-disabled student would be. A suspension of fewer than 10 school days is not considered a change in placement and thus does not trigger a manifestation determination. *See* 34 C.F.R. §§ 300.530, .536.

The Department of Education has increasingly given attention to the issue of disciplining children with disabilities. It has highlighted schools' failure to follow the IDEA's procedural requirements and also disparity issues, with evidence showing that students with disabilities, and in particular Black students with disabilities, being disciplined at disproportionately higher rates. The disparity is especially acute in regard to disciplinary removal. Disciplinary removal can isolate these children and set back their education, increasing the likelihood of their not graduating. The ED is urging schools to refocus their efforts on supporting students' behavioral needs to minimize or prevent the need for disciplinary removals. The ED has also warned schools against using restraint or exclusion as a means of discipline except in situations in which the student's behavior poses an imminent danger of serious physical harm to the child or others, and the Department of Justice is also paying particular attention to extreme seclusion as discipline for disabled students. *See* U.S. DEP'T OF EDUC., *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Discipline Provisions*, July 19, 2022, <https://sites.ed.gov/idea/files/qa-addressing-the-needs-of-children-with-disabilities-and-idea-discipline-provisions.pdf>; U.S. DEP'T OF JUSTICE, *Combating Improper Seclusion in Schools*, [https://www.justice.gov/schoolseclusion?mc\\_cid=fd8882590f&mc\\_eid=3611072e06](https://www.justice.gov/schoolseclusion?mc_cid=fd8882590f&mc_eid=3611072e06).

States are increasingly requiring school districts to have threat assessment teams in an effort to identify problem students and prevent mass shootings in schools. There are some indications that these threat assessment protocols disproportionately target or impact disabled students. How these threat assessment protocols interact with IDEA's procedural disciplinary standards is a developing issue. *See* Steven Yoder, *Do Protocols for School Safety Infringe on Disability Rights?*, DISABILITY SCOOP, Feb. 8, 2023, <https://www.disabilityscoop.com/2023/02/08/do-protocols-for-school-safety-infringe-on-disability-rights/30234/>.

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

*Add to Note regarding Food Allergies on page 583:*

For a discussion about food allergies as a disability, see D'Andra Millsap Shu, *Food Allergy Bullying as Disability Harassment: Holding Schools Accountable*, 92 U. COLO. L. REV. 1807 (2022).

*Add a new Note to page 583:*

*Exhaustion of Administrative Remedies: Belleville* and several of the other decisions in this section refer to exhaustion of administrative remedies. That is an important procedural requirement under the IDEA. After the Supreme Court held in *Smith v. Robinson* (excerpted in

section B above) that the IDEA was the exclusive route for a disabled student to challenge the adequacy of education, Congress amended the statute in 1986. The amendment provided that the statute did not foreclose other avenues of relief, such as under Section 504 or the ADA, but required that before seeking relief that is also available under IDEA, the plaintiff must first undertake or “exhaust” the IDEA’s administrative procedures. *See* 20 U.S.C. § 1415(I). This exhaustion requirement has led to much litigation.

The Supreme Court has addressed the exhaustion issue twice. On February 22, 2017, the 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*, 580 U.S. 154 (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 sued the 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. 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.

The *Fry* Court reserved the question of whether exhaustion is required when the plaintiff’s complaint is for the denial of FAPE but the remedy being sought is not one that could be awarded in the administrative process. In 2023, in *Perez v. Sturgis Public Schools*, 143 S. Ct. 859 (2023), the Court unanimously answered that question and held that exhaustion was not required. *Perez* involved a deaf student who was being denied the right to graduate after the school provided him with unqualified interpreters and misrepresented his educational progress for years. He used the administrative process to some extent and settled with the school on his claims for forward-looking relief, including additional schooling. But then he sued under the ADA for backward-looking compensatory damages—something he did not raise in the administrative process because, as all parties agreed, compensatory damages are not available under the IDEA and thus could not have been awarded by the hearing officer. The Court held that failure to exhaust did not bar his ADA claim for compensatory damages because even though his claim was premised on the denial of FAPE, IDEA did not provide the remedy he sought.

*Add after the end of the Wolff on page 590:*

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.*, No. 2:17-CV-00396, 2018 WL 953162 (E.D. Cal. Feb. 20, 2018) (district failed to conduct fact-specific inquiry to determine whether student who had a diagnosis of emotional disturbance could participate in varsity basketball with reasonable accommodations); *Marshall v. N.Y. State Public High Sch. Athletic Ass’n*, 290 F. Supp. 3d 187 (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., Inc.*, 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. v. Ill. High Sch. Ass’n*, 263 F. Supp. 3d 705 (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 Cnty. Sch. Corp.*, 908 F.3d 225 (7th Cir. 2018) (museum where school held choir program was not a “service, program, or activity of” school district for purposes of parent’s ADA claim).

## **F. Enforcement**

*Add to the end of the fourth paragraph on page 601:*

There have been many new developments on the issue of exhaustion of administrative remedies. See notes above in section D.

*Add to the end of the sixth paragraph on page 601:*

In 2022, the Supreme Court ruled in *Cummings v. Premier Rehab Keller*, 142 S. Ct. 1562 (2022), that emotional distress damages are not available in private suits under Section 504. This ruling is significant because disability-based discrimination often primarily causes emotional-related damages such as humiliation, anxiety, and depression. Senators Murray and Durbin introduced legislation in December 2022 to overturn *Cummings*. *See* <https://www.help.senate.gov/chair/newsroom/press/murray-durbin-introduce-legislation-to-ensure-victims-of-discrimination-can-seek-damages-in-court-following-harmful-scotus-ruling>.

## Chapter 8 Housing

### C. Discrimination

*Add to Notes on page 618:*

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>; Mark A. Rothstein & Laura Rothstein, *How Genetics Might Affect Real Property Rights*, 41 J. L. MED. & ETHICS 44 (2016).

### D. Reasonable Accommodation

#### [1] Parking

*Add to Note 3 on page 628:*

In *Roque v. Seattle Housing Authority*, No. 2:20-cv-00658-RAJ, 2020 WL 2114329 (W.D. Wash. May 4, 2020), a caregiver during the Covid pandemic had difficulty in parking on the street, and the resident needing care did not have a parking space in the building. The court issued a preliminary order requiring the city housing authority to allow the caregiver to park in the garage. *See also* *Brown v. Perris Park Apartments P'ship*, Case No. EDCV 17-02487, 2018 WL 3740522 (C.D. Cal. July 17, 2018) (assigned parking space close to apartment might be a reasonable accommodation for individual with visual impairment even though she did not drive).

#### [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. *Geraci v. Union Square Condo. Ass'n*, 891 F.3d 274 (7th Cir. 2018) (condo association not violating retaliation provisions of FHA by sharing resident's lawsuit requesting elevator key for nonstop elevator ride to accommodate her PTSD to avoid riding elevator with dogs; her PTSD was public knowledge because of lawsuit and sharing information about litigation with residents was reasonable); *Bhogaita v. Altamonte Heights Condo. Ass'n*, 765 F.3d 1277 (11th Cir. 2014) (affirming jury's verdict that defendant violated FHA when it demanded the plaintiff, who suffered from PTSD, chronic anxiety, and depression, remove his emotional support dog from his condominium); *Sanders v. SWS Hilltop*, 309 F. Supp. 3d 877 (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); *Hintz v. Chase*, No. 17-cv-02198-JCS, 2017 WL 3421979 (N.D. Cal. Aug. 9, 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).

Add the following new section on page 634 before "Structural Barriers":

**[4] Other issues**

Recent decisions have highlighted the array of accommodations that might be requested in a variety of housing settings. See, e.g., *Schwarz v. Vills. Charter Sch., Inc.*, 165 F. Supp. 3d 1153 (M.D. Fla. 2016) (corporation not responsible for providing interpreter services for clubs formed in retirement community; program only facilitated formation and was not the provider), *aff'd*, 672 F. App'x 981 (11th Cir. 2017); *Kuhn v. McNary Ests. Homeowners' Ass'n*, 228 F. Supp. 3d 1142 (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 Human. of Citrus Cnty., 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*, No. 8:16-cv-1076-T-23TBM, 2017 WL 530348 (M.D. Fla. Feb. 9, 2017) (claim regarding 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. D.C. Hous. Auth.*, 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 new Note 4 on page 644:

4. *Fair Hous. Rts. Ctr. in Se. Pa. v. Post Goldtex GP, LLC*, 823 F.3d 209 (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-Am. Apartment Cmty., Inc.*, 247 F. Supp. 3d 30 (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 the end of Note 2 on page 657:

Other cases of interest include the following: *Wicomico Nursing Home v. Padilla*, 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 Hosp.*, 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. Florida*, 938 F.3d 1221 (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. Mich. Dep't of Health & Human Servs.*, 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); *Vaughn v. Wernert*, 326 F. Supp. 3d 624 (S.D. Ind. 2018) (preliminary injunctive granted requiring providing in-home care to woman with quadriplegia); *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); *Mitchell v. Cmty. Mental Health of Cent. Mich.*, 243 F. Supp. 3d 822 (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 to the end of the Notes on page 663:*

*Valencia v. City of Springfield, Ill.*, 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*, 4 J. OF L., PROP. & SOC'Y 1 (2018).

*Add to the end of the section on page 664:*

The issue of homelessness and mental illness has proven to be challenging to address. *See e.g.*, *Where Do We Go Berkeley v. Cal. Dep't of Transp.*, 32 F.4th 852 (9th Cir. 2022) (discussing Title II application to removal of occupants of high-risk homeless encampment along freeway and issues of notice). There has been much controversy over the New York plan in 2022 to forcibly provide mental health and other treatment to homeless individuals with severe mental illness. *See* <https://www.nyc.gov/office-of-the-mayor/news/870-22/mayor-adams-plan-provide-care-individuals-suffering-untreated-severe-mental#/0> (Nov. 29, 2022).

## Chapter 9 Health Care and Insurance

### B. Nondiscrimination in Health Care Services

*Add before first full paragraph on page 672:*

Even with these protections in place, disabled people often face substantial barriers in obtaining appropriate health care. People with disabilities are more likely to receive substandard care, which, unsurprisingly, is associated with negative health outcomes. This inadequate care is due in part to improper physician training and negative attitudes by physicians in treating disabled patients. Two studies reported in *Health Affairs* in 2022 documented these problems and included findings such as: (1) only 56% of the doctors surveyed welcomed people with disabilities into their practice, (2) many made strategic decisions to turn away disabled patients, such as saying they were not accepting new patients or telling the patient, “I am not the doctor for you,” (3) 41% said they could provide the same quality of care as they provided to non-disabled patients, (4) more than 1/3 had little or no knowledge of their legal obligations under the ADA, and (5) many had negative attitudes towards disabled people and the ADA. See Lisa I. Iezzoni et al., *Have Almost Fifty Years of Disability Civil Rights Laws Achieved Equitable Care?*, 41 HEALTH AFFS. 1371 (2022); <https://www.disabilitycoop.com/2022/10/24/doctors-open-up-about-turning-away-patients-with-disabilities/30096/>.

The results for disabled patients can be profound. Sometimes they are denied any agency, either treated as children when they are adults or being subjected to procedures without their consent. See, e.g., *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); Tony Leys, *Adults with Down Syndrome Face a Health Care System that Often Treats Them as Kids*, NBC NEWS, Apr. 16, 2023, <https://www.nbcnews.com/health/health-news/adults-syndrome-face-health-care-system-often-treats-kids-rcna79766>. Sometimes they are denied care, such as being refused an organ transplant. See <https://www.disabilitycoop.com/2023/05/16/despite-laws-people-with-idd-less-likely-to-receive-organ-transplants/30383/>; see also *D.W. v. Fresenius Med. Care N. Am.*, 534 F. Supp. 3d 1274 (D. Or. 2021) (preliminary rulings in claim that individual with intellectual disabilities was denied dialysis treatment because of his behavior caused by his disability).

The Covid pandemic brought this issue in sharp focus as health care providers struggled to allocate scarce resources. For example, hospitals wrote triage protocols that prioritized ventilator treatment in ways that adversely affected individuals with a wide array of disabilities. This led to an outcry from disability advocates and pointed guidance from the Department of Health and Human Services making clear that all disability discrimination laws applied, even during a public health emergency, and that health care rationing decisions “may not be based on stereotypes, pre-conceptions, prejudice, or generalizations about the relative worth or quality of life or value to society of the individual based on his or her disability.” U.S. DEP’T OF HEALTH & HUM. SERVS., *FAQs for Healthcare Providers During the COVID-19 Public Health Emergency: Federal Civil Rights Protections for Individuals with Disabilities Under Section 504 and Section 1557*, Feb. 4, 2022, <https://www.hhs.gov/civil-rights/for-providers/civil-rights->

[covid19/index.html](#); see also *Smith v. Ivey*, No. 20-14765, 2021 WL 3074120 (11th Cir. 2021) (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); Elizabeth Pendo, *COVID-19 and Disability-Based Discrimination in Health Care*, AM. BAR ASS'N, May 20, 2020, <https://www.americanbar.org/groups/diversity/disabilityrights/resources/covid19-disability-discrimination/>; Deborah Hellman & Kate M. Nicholson, *Rationing and Disability: The Civil Rights and Wrongs of State Triage Protocols*, 78 WASH. & LEE L. REV. 1207 (2021).

Another significant problem gaining recent attention is the exclusion of people with disabilities from clinical research studies. See Jennifer S. Bard, *Lifting the Barriers Excluding People Living with Disabilities from the Benefits of Inclusion in Research Studies*, 6 U. PA. J. L. & PUB. AFF. 489 (2021) ("This article therefore provides a framework to look at a very serious form of disability discrimination which until quite recently was almost invisible: the near total exclusion of people living with disabilities from research studies. Their exclusion, which mirrors that of much better known excluded populations such as women, children, and African Americans, causes significant harm at a population level because they must live in a world organized around research findings that do not include them.").

*Add after the first full paragraph on page 672:*

Recent cases dealing with complex funding issues have been decided after *Alexander v. Choate*. See, e.g., *Harrison v. Young*, 48 F.4th 331 (5th Cir. 2022) (suit of disabled Medicaid recipient alleging discrimination for refusal to use state general funds to pay for 24-hour nursing care to avoid institutionalization; district court erred in basing injunction decision only on slight increased cost of institutionalization over community-based care with a nurse always present; preliminary injunction vacated and remanded for further proceedings); *Brown v. District of Columbia*, 928 F.3d 1070 (D.C. Cir. 2019) (allegation that 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); *Carpenter-Barker v. Ohio Dep't of Medicaid*, No. 1:15-cv-41, 2017 WL 5572836 (S.D. Ohio Nov. 20, 2017) (reduction of Medicaid benefits not a denial of integration mandate); *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).

*Add to Note 3 on page 688:*

States have been considering and passing assisted suicide legislation at a rapid pace in recent years. See Thaddeus Mason Pope, *Medical Aid in Dying: Key Variations Among U.S. State Laws*, 14 J. HEALTH & LIFE SCI. L. 28 (2020). As of 2008, only two states had such laws. Currently, eleven jurisdictions have either passed legislation permitting assisted suicide or have it available by court decision. The following ten states or districts have legislation permitting assisted suicide: California, Colorado, Hawaii, Maine, New Jersey, New Mexico, 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>. Montana, along with nine other states, is currently considering death with dignity legislation. *See* <https://deathwithdignity.org/states/>. In May 2023, Vermont became the first state to lift the residency requirement, allowing qualifying people from other states to use the law. Oregon is currently considering a similar amendment.

The disability community is sharply divided over the desirability of such laws. Some say that these laws empower terminally ill patients and give them necessary options to manage their own health. Others view them as promoting fear and bias toward disability and containing inadequate procedural safeguards to ensure they are not abused. *See, e.g.,* DISABILITY RTS. EDUC. & DEF. FUND, *Why Assisted Suicide Must Not Be Legalized*, <https://dredf.org/public-policy/assisted-suicide/why-assisted-suicide-must-not-be-legalized/>; Kathryn L. Tucker, *Building Bridges Between the Civil Rights Movements of People with Disabilities and Those with Terminal Illness*, 78 U. PITT. L. REV. 329 (2017). A group called Not Dead Yet joined several others in filing suit in federal court in California, seeking a declaration that California’s End of Life Option Act is unconstitutional and violates the ADA and the Rehabilitation Act by discriminating against people with terminal disabilities. *See* <https://notdeadyet.org/2023/04/press-release-not-dead-yet-joins-anti-discrimination-lawsuit-to-oppose-assisted-suicide-law.html>. The California statute is also being challenged by advocates who say that its prohibition on doctors physically assisting patients who are incapable of ingesting the medicine (the law only allows doctors to prescribe the medicine) violates the ADA and Section 504. *See Shavelson v. Bonta*, 608 F. Supp. 3d 919 (N.D. Cal. 2022), *appeal docketed*, No. 23-15003 (9th Cir. Jan. 3, 2023).

*Add to Note 4 on page 688:*

*See also Thomas v. Mohawk Valley Health Sys.*, No. 6:20-cv-01347, 2020 WL 6504634 (N.D.N.Y. Nov. 5, 2020) (rejecting ADA and Rehabilitation Act claim of family of woman that hospital wanted to stop caring for after declaring her brain dead; “Defendants did not decide to withdraw life-sustaining care from [her] because of discriminatory animus toward [her] disability, but because they had determined her to be brain dead . . .”).

*Add to Note 5 after the first full paragraph on page 689:*

The ACA survived a third Supreme Court constitutional challenge in 2021 in *California v. Texas*, 141 S. Ct. 2104 (2021). President Trump had said that the ACA would be repealed and replaced with something better. That did not come to pass, but in 2017, the ACA was amended to reduce the penalty for failing to comply with the individual mandate to zero dollars. That sparked another challenge to the ACA, with the plaintiffs arguing that removing the individual mandate penalty destroyed the taxing power justification for the Act’s constitutionality (as established in *Sebelius*). The Court did not resolve that issue, instead ruling that because the plaintiffs were no longer required to pay anything for failing to comply with the individual mandate, they had no standing. *See also* Nina Totenberg, *Obamacare Wins for the 3rd Time at the Supreme Court*, NPR, June 17, 2021,

<https://www.npr.org/2021/06/17/988837265/obamacare-wins-for-the-3rd-time-at-the-supreme-court>.

In addition to these three Supreme Court existential challenges to the ACA, hundreds of suits have attacked other aspects of the law. The ACA has been called “the most challenged statute in American history.” Abbe R. Gluck et al., *The Affordable Care Act’s Litigation Decade*, 108 GEO. L.J. 1471 (2020). Many of these suits have focused on the preventative care aspect of the statute, which mandates zero out-of-pocket-cost service for preventative care. The statute does not specify what this includes, but under HHS regulations and procedures implementing the statute, all FDA-approved contraception is covered. Three suits that made it to the Supreme Court resulted in the Court’s reducing the scope of the contraception mandate when employers raise religious or moral objections. See *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); see also Adam Liptak, *Supreme Court Upholds Trump Administration Regulation Letting Employers Opt Out of Birth Control Coverage*, N.Y. TIMES, July 8, 2020, <https://www.nytimes.com/2020/07/08/us/supreme-court-birth-control-obamacare.html>.

A current suit poses an even greater risk to the preventive care services mandate. Pre-exposure prophylaxis (PrEP) drugs that prevent HIV transmission must currently be provided under the preventive care services mandate. A group has raised religious objections to covering these drugs, arguing that providing access to these drugs through their insurance policies “mak[es] them complicit in facilitating homosexual behavior, drug use, and sexual activity outside of marriage between one man and one woman.” A federal district judge in Texas—the same judge who declared the ACA unconstitutional and led to the ruling in *California v. Texas*—ruled that the process by which the specific preventative services and medications to be covered under the ACA is determined is unconstitutional. That ruling is now on appeal to the Fifth Circuit. If the case makes it to the Supreme Court and the Court accepts this theory, it will likely spell the end of the preventive care services mandate unless Congress changes the procedure for determining which specific services and medications are covered. See *Braidwood Mgmt. Inc. v. Becerra*, \_\_\_ F. Supp. 3d \_\_\_, Civil Action No. 4:20-cv-00283-O, 2023 WL 2703229 (N.D. Tex. Mar. 20, 2023), *appeal docketed*, No. 23-10326 (5th Cir. Apr. 3, 2023); see also Nicholas Bagley & A. Mark Fendrick, *A Texas Judge Just Invalidated the Preventive Services Mandate. What Happens Next?*, HEALTH AFFS., Mar. 20, 2023, <https://www.healthaffairs.org/content/forefront/texas-judge-just-invalidated-preventive-services-mandate-happens-next>.

Add new Note 6 on page 689:

**6. Reproductive Freedom:** America has a long history of controlling the reproductive choices of disabled people. In the twentieth century, thousands of women were subjected to compulsory sterilization, with the Supreme Court’s blessing. See *Buck v. Bell*, 274 U.S. 200 (1927) (see pages 37-38, note 4). Most states have now repealed their involuntary sterilization laws, but most still allow forced sterilization with judicial authority. Aside from forced sterilization, disabled people’s reproductive freedom is controlled and limited in other ways. They are coerced or subjected to involuntary decisions regarding marriage, birth control, and

abortion, often based on stereotypes about disabled people being uninterested in having sex or incapable of being parents. In 2021, Britney Spears made headlines when she begged a judge to end her 13-year conservatorship, in part because she wants to get married and have more children, but her conservators would not allow either the marriage or her to remove her birth control device (an IUD). *See Doe I v. Dist. of Columbia*, 206 F. Supp. 3d 583 (D.D.C. 2016) (involving claims that three women with intellectual disabilities were forced to have abortions); Robyn M. Powell, *From Carrie Buck to Britney Spears: Strategies for Disrupting the Ongoing Reproductive Oppression of Disabled People*, 107 VIRG. L. REV. ONLINE 246 (2021); Sonja Sharp, *How Modern Medicine Neglects Mothers-To-Be with Disabilities*, L.A. TIMES, Nov. 17, 2021, <https://www.disabilitycoop.com/2021/11/17/how-modern-medicine-neglects-mothers-to-be-with-disabilities/29600/>.

*Add to the end of Note 4 on page 698:*

In *United States v. Asare*, No. 15 Civ. 3556, 2018 WL 2465378 (S.D.N.Y. June 1, 2018), the court held that the defendant violated Title III of the ADA by refusing cosmetic surgery, without individualized inquiries, on individuals who are HIV positive; the policy screened out those with HIV taking antiretroviral medications.

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

*Add to the end of Note 1 on page 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, e.g., Basta v. Novant Health Inc.*, 56 F.4th 307 (4th Cir. 2022) (deaf husband and healthcare proxy of hospital patient stated a claim for disability discrimination; hospital failed to provide him with ASL interpreter or functioning video remote interpreting device, preventing him from meaningfully participating in his wife’s childbirth); *Bax v. Doctors Med. Ctr. of Modesto, Inc.*, 52 F.4th 858 (9th Cir. 2022) (hospital effectively communicated with two deaf patients through a combination of ASL and not-writing; use of video remote interpreter system with “occasional” technical difficulties did not render communication ineffective); *Francois v. Our Lady of the Lake Hosp., Inc.*, 8 F.4th 370 (5th Cir. 2021) (denying compensatory damages for not providing ASL interpreter when hospital did not know that communications services being provided were not adequate); *Durand v. Fairview Health Servs.*, 902 F.3d 836 (8th Cir. 2018) (affirming summary judgment for hospital in case claiming that interpreter service for parents of adult patient who died three days after entering hospital; decisions about treatment claimed to have been affected; services could have been better, but what was provided met the requirement of providing necessary services); *Silva v. Baptist Health So. Fla., Inc.*, 856 F.3d 824 (11th Cir. 2017) (deaf patients entitled to substantially equal communication); *Searls v. Johns Hopkins Hosp.*, 158 F. Supp. 3d 427(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)).

Similar issues arise with vision-impaired patients needing to access written medical and billing information. *See, e.g., Bone v. Univ. of N.C. Health Care Sys.*, No 1:18cv994, 2022 WL

138644 (M.D.N.C. Jan 14, 2022) (suit involving blind and low-vision patients' requesting access to large print or Braille medical communications document and limited website accessibility); *Meyer v. Walthall*, 528 F. Supp. 3d 928 (S.D. Ind. 2021) (fact issue as to whether state's Medicare website was sufficiently accessible to blind users).

This issue has become even more acute with the rise of telemedicine, which requires thoughtful measures to ensure that patients with a wide variety of disabilities can meaningfully access the service. In 2022, The Departments of Justice and Health & Human Services issued joint guidance to explain providers' obligations under the ADA, the Rehabilitation Act, and the Affordable Care Act regarding accessible telehealth services. See U.S. DEP'T OF HEALTH & HUM. SERVS. & U.S. DEP'T OF JUST., *Guidance on Nondiscrimination in Telehealth: Federal Protections to Ensure Accessibility to People with Disabilities and Limited English Proficient Persons*, July 29, 2022, [https://archive.ada.gov/telehealth\\_guidance.pdf](https://archive.ada.gov/telehealth_guidance.pdf).

*Add new Notes 5 and 6 to page 716:*

**5. Standards for Accessible Medical Diagnostic Equipment:** The lack of accessibility medical diagnostic equipment (MDE) such as adjustable examination tables and scales to accommodate patients with mobility impairments is a significant barrier to adequate health care. Many doctors' offices simply do not have this type of equipment. For example, in an anonymous focus group where doctors discussed their attitudes and practices regarding disabled patients, "[s]ome doctors said their office scales could not accommodate wheelchairs, so they told patients to go to a supermarket, a grain elevator, a cattle processing plant or a zoo to be weighed." Gina Kolata, *These Doctors Admit They Don't Want Patients with Disabilities*, N.Y. TIMES, Oct. 10, 2022, <https://www.nytimes.com/2022/10/19/health/doctors-patients-disabilities.html>. There are no uniform standards for accessibility of MDE. In 2017, the U.S. Access Board promulgated a final rule on the minimum standards for accessibility of MDE, and the DOJ issued interim guidance and issued a notice of proposed rulemaking. Before the regulations could be finalized, the proposed regulations and guidance document were withdrawn in response to executive orders issued by President Trump. See 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). The Access Board has since resumed rulemaking work on the issue. See <https://www.access-board.gov/mde/>.

**6. Service Animals:** Many courts are addressing issues regarding the right to have service animals in health care settings. See, e.g., *C. L. v. Del Amo Hosp., Inc.*, 992 F.3d 901 (9th Cir. 2021) (official certification of a dog as a service dog not required; ADA prohibits certification requirements; individual sought service dog during in-patient treatment at a hospital); *Borenstein v. Animal Found.*, 526 F. Supp. 3d 820 (D. Nev. 2021) (complex case involving individual with service dog who was hospitalized in an emergency; his dog taken to animal shelter and adopted out; preliminary rulings in the range of claims (including an ADA claim for failure to accommodate) against the hospital, the county, the nurse, the animal control officer, the animal shelter, and the animal shelter employee); *Gill v. Abington Mem'l Hosp.*, Civil Action No. 17-4678, 2019 WL 1212112 (E.D. Pa. Jan. 23, 2019) (denying standing because of lack of intent to return; individual sought to visit mother in common area and be accompanied by service dog;



hospital was concerned about adverse reactions of other patients in behavioral unit of hospital; visitation was allowed in another area of the hospital).

*Insert before E. Health Insurance on page 716:*

#### **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. *See generally* Laura Rothstein, *Medical Education and Individuals with Disabilities: Revisiting Policies, Practices, and Procedures in Light of Lessons Learned from Litigation*, 46 J. COLL. & UNIV. L. 258 (2021); Bonnielin Swenor & Lisa M. Meeks, *Disability Inclusion—Moving Beyond Mission Statements*, 380 NEW ENG. J. MED. 2089 (2019) (advocating for more proactive steps to include physicians with disabilities in medical education and in the profession); Nicole B. Porter, *The Difficulty Accommodating Health Care Workers*, 9 J. HEALTH L. & POL'Y 1 (2015) (reasons for difficulty include physical rigor, long hours, and safety sensitivity); Leslie Francis & Anita Silvers, *The Health Care Workforce: How to Understand Accommodations*, 9 ST. LOUIS U. J. HEALTH L. & POL'Y 57 (2015).

#### **[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, <https://whyy.org/articles/cooper-medical-students-with-disabilities-push-for-culture-change-in-medicine/>.

There are many cases where medical, nursing, and dental students argued that the university had subjected them to disability discrimination. *See Khan v. Midwestern Univ.*, 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 Wash. Univ.*, 847 F.3d 740 (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. Univ. of Tex. Health Sci. Ctr. at San Antonio*, 633 F. App'x 214 (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. Univ. of Haw.*, 304 F. Supp. 3d 956 (D. Haw. 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*, No. 6:16-CV-05566, 2017 WL 11317859

(N.D.N.Y. Mar. 27, 2017) (former nursing student with bipolar disorder raised plausible claim of 504 discrimination against county vocational school).

*See also* LAURA ROTHSTEIN & JULIA IRZYK, *DISABILITIES AND THE LAW* § 10:7 (collecting cases). Because of safety issues, plaintiffs rarely win these cases, but they highlight the importance of careful consideration of policies and practices that are exclusionary.

## **[2] Other Health Care Providers**

Many cases deal with employment and/or licensing issues of health care providers with disabilities. *See Rodrigo v. Carle Found. Hosp.*, 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.*, 851 F.3d 224 (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); *Jones v. Blue Cross Blue Shield of La.*, Cv. No. 16-340-JWD-RLB, 2018 WL 618599 (M.D. La. Jan. 29, 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); *Boyte v. Shulkin*, No. 3:16-cv-02799, 2018 WL 898680 (M.D. Tenn. Feb. 14, 2018) (finding triable issues on nurse's request for reassignment and engaging in interactive process for nurse with hearing impairment); *Drake v. Shulkin*, No. 1:16-cv-01097, 2018 WL 573095 (S.D. Ind. Jan. 26, 2018) (summary judgment to VA Department; nurse seeking ergonomic equipment; claiming hostile work environment but failed to notify agency to allow for interactive process); *Needham v. McDonald*, No. 14-cv-8230, 2017 WL 5171197 (N.D. Ill. Nov. 8, 2017) (nurse with depression expressed suicidal intentions; triable issues of whether she was otherwise qualified); *Singleton v. Pub. Health Trust of Miami-Dade Cnty.*, No. 16-20984-CIV-KING, 2017 WL 2712937 (S.D. Fla. Apr. 21, 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); *Crain v. Roseville Rehab. & Health Care*, No. 4:14-cv-04079, 2017 WL 1075070 (C.D. Ill. Mar. 21, 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); *Caez-Fermaint v. State Ins. Fund Corp.*, 286 F. Supp. 3d 302 (D.P.R. 2017) (nurse with generalized anxiety disorder was terminated for insubordination including failure to take patient vital signs; termination basis was not pretextual); *Diakow v. Oakwood Healthcare, Inc.*, No. 15-11411, 2017 WL 75968 (E.D. Mich. Jan. 9, 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).

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, Oct. 2, 2017, <https://newsnetwork.mayoclinic.org/discussion/physician-licensing-laws-keep-doctors-from-seeking-care/>.

Change **D. Health Insurance** to **E. Health Insurance** on page 716:

Add to the end of the second full paragraph on page 726:

Now all 50 states have some sort of mental health parity regulation. See <https://www.paritytrack.org/reports/>.

Add to the end of Note 2 on page 728:

Besides the gaps in the parity laws, another significant issue is enforcement. Insurers often employ a variety of tactics to avoid paying for mental health and substance use disorder benefits, and current penalties do not provide sufficient incentive for compliance compared with the cost savings from underpaying. See Katherine T. Vukadin, *Why Won't Private Health Insurance Pay Its Share of the Opioid Crisis?*, 71 SYRACUSE L. REV. 1383 (2020-21). This is but one of many obstacles people with opioid use disorder face in seeking treatment and recovery. See U.S. DEP'T OF JUST., *The Americans with Disabilities Act and the Opioid Crisis: Combating Discrimination Against People in Treatment or Recovery*, Apr. 5, 2022, <https://www.ada.gov/resources/opioid-use-disorder/>; Ryan Schmitz, *Substance Use as a Second-Class Disability: A Survey of the ADA's Disarmament of Individuals in Recovery*, 73 ME. L. REV. 93 (2021).

Add as a new Note 6 on page 729:

6. *The ACA and Disability Discrimination:*

*Doe v. CVS Pharm., Inc.*, 982 F.3d 1204 (9th Cir. 2020), cert. *dism'd*, 142 S. Ct. 480 (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 several 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; and (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.

CVS filed a certiorari petition with the Supreme Court, and the Court granted certiorari solely on the issue of whether the Rehabilitation Act, as incorporated into the ACA, imposes disparate impact liability. While the cert. petition was pending, CVS settled and withdrew its appeal, agreeing to work with disability groups to develop policy solutions. ACLU Press Release, *ACLU, Disability Rights Groups Applaud CVS for Settling Case that Threatened Disability Rights*, Nov. 10, 2021, <https://www.aclu.org/press-releases/aclu-disability-rights-groups-applaud-cvs-settling-case-threatened-disability-rights>. Thus, the issue of whether the Rehabilitation Act (and by extension, the ACA) allows for a disparate impact claim remains unsettled. *See also Doe v. BlueCross BlueShield of Tenn.*, 926 F.3d 23 (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).