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Primary Accommodations for Students

April 2023

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Housekeeping

- **Recording is not permitted**
- Change Zoom name to match registration
- Please list your institution with your name
- Raise hand or use chat function to ask questions

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Agenda –

Module 1: The Foundations of Accommodations – The Big Picture

Module 2: Breaking Down the Student Accommodation Process

Module 3: Student Mental Health

Module 4: Unique Accommodation Issues

Module 5: Pregnancy Accommodations

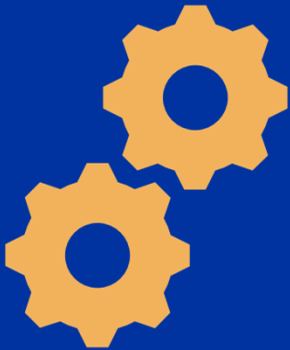
Module 6: Recent Case – Best Practices

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Group
Scenario



Breakout Groups

• 5 Scenarios discussed in Breakout Groups

• First group – time to introduce yourselves and select a spokesperson; this will be your group for today’s training

• Scenario and questions for each Group Scenario will be posted in the Chat Box

• Presenters will randomly call on Breakout Groups to provide your responses – be ready!

• Add your institution to your displayed name

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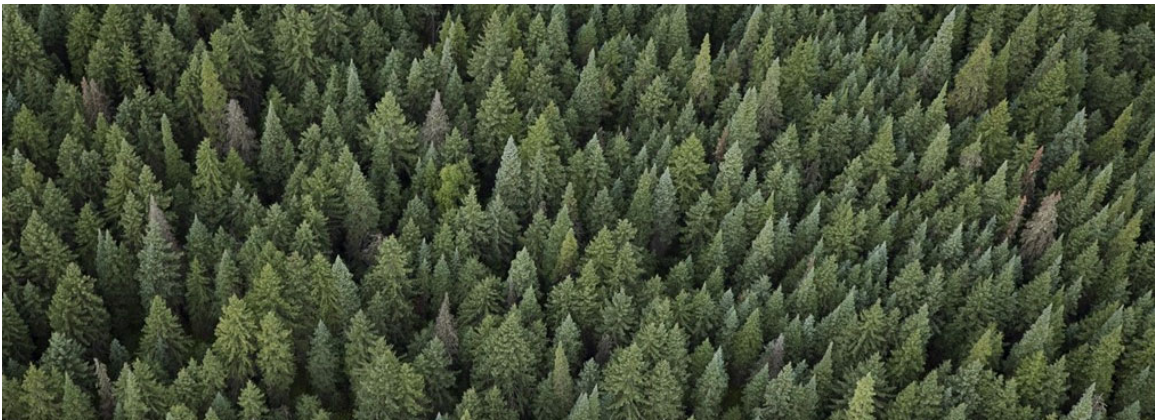


A word on terminology . . .

Vocabulary concerning gender identity and sexual orientation continues to evolve. There is no universal agreement on the meaning of all terms or the best terms to use to refer to certain concepts. We strive to utilize language and examples that are respectful and appropriate, but we welcome your feedback on how we can improve. Please be patient with your colleagues today and assume their good faith even if they use language or terms that you would not.

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Module 1: The Foundations of Accommodation Law

The Big Picture

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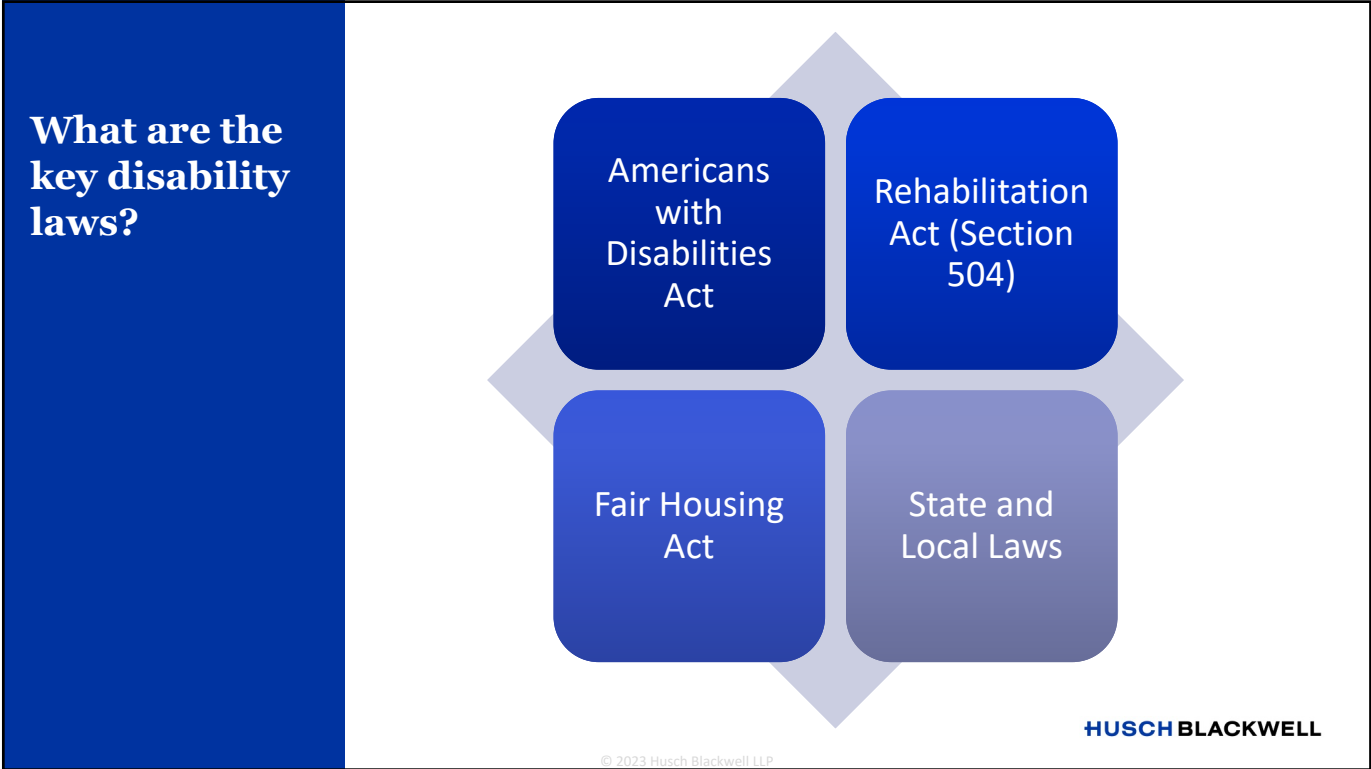


Differences between K-12 and Post-Secondary Disability Services – Success vs. Access

Post-Secondary

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Section 504 of the Rehabilitation Act

- The first statute to require disability accommodation (1973)
- Makes it illegal for the federal government, federal contractors, and any entity receiving federal assistance to discriminate on the basis of disability
- “No otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity”

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What is the ADA?

- The Americans with Disabilities Act of 1990
- The ADA Amendments Act of 2008
- The ADA “signals the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life.” – Pres. George H.W. Bush
- Applies to organizations with 15 or more employees (state law might apply if <15)
- Covers employees and applicants

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ADA—Title I

- Title I: Prohibits private employers from discriminating against qualified individuals with a disability in regard to employment
- Qualified individuals are those who can perform the essential functions of the job with or without reasonable accommodation
- Employers are required to provide reasonable accommodations to qualified individuals with a disability who can perform the essential functions of the job with or without accommodation, but not if such an accommodation would constitute an undue hardship

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ADA—Title II

- Title II: Prohibits disability discrimination by public entities
- “No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by such entity”
- A public entity’s programs, activities, and services, viewed in their entirety, must be readily accessible to, and usable by, persons with disabilities

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ADA—Title III

- Title III: Prohibits “places of public accommodation” from discriminating “on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation”
- Colleges and universities are places of public accommodation
- Must make reasonable accommodations in policies, practices, and procedures

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Fair Housing Act

- Reasonable accommodations to afford persons with disabilities an equal opportunity to use and enjoy a dwelling
- “Dwelling” is “any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families . . .”
- Department of Housing and Development and Department of Justice consider dormitories to be dwellings
- District court decisions are in agreement (U. Nebraska-Kearney)

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State and Local Laws

- Most states and major cities have anti-discrimination laws that mirror, or in some cases are more stringent than, Section 504, the ADA, and the FHA
- Statutes generally prohibit discrimination on the basis of disability or perceived disability
- Generally, require some manner of reasonable accommodation
- May set a lower threshold for establishing the existence of a disability or its effect on a major life activity

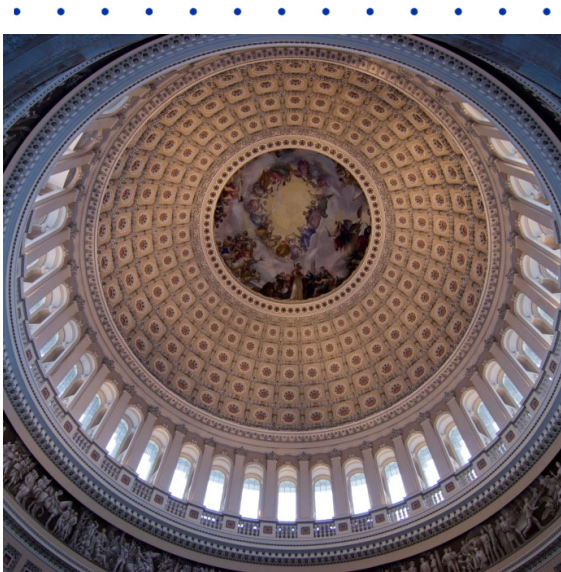
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On the Horizon

- ADA and 504 mirrored language in 2008
- May 6, 2022– Notice from DOE of the intent to issue 504 regulations
- Proposed regulations expected this summer
- Expected to focus on remote learning and mental health



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What are their general principles?

No disability
discrimination in
employment

No disability
discrimination in
programs and
activities

No disability
discrimination by
places of public
accommodation

Accessibility for
facilities and
services

Reasonable
accommodations/
modifications

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What is covered?

- Programs, Benefits, Services
 - Admissions/recruitment
 - Academics
 - Financial Aid
 - Housing
 - Counseling
 - Athletics
 - Transportation
 - Employment assistance
- Communications
- Facilities



What is a disability?

A physical or mental impairment that substantially limits one or more major life activities

A record of having an impairment that is substantially limiting to a major life activity

Being regarded as having an impairment that is substantially limiting to a major life activity

What is an impairment?

Physical

Mental: includes any physiological disorder or condition, or any mental or psychological disorder

An impairment, alone, is insufficient to qualify an individual as disabled under either 504 or the ADA

What is a substantial limitation?

- Construed broadly in light of ADAAA amendments
- Needs only to substantially limit one major life activity
- An impairment that is episodic or in remission should be assessed in its active state
- Cannot consider ameliorative effects of mitigating measures
- Consider whether individual’s ability to perform the major life activity is limited when compared to “most people in the general population”

What are examples of major life activities?

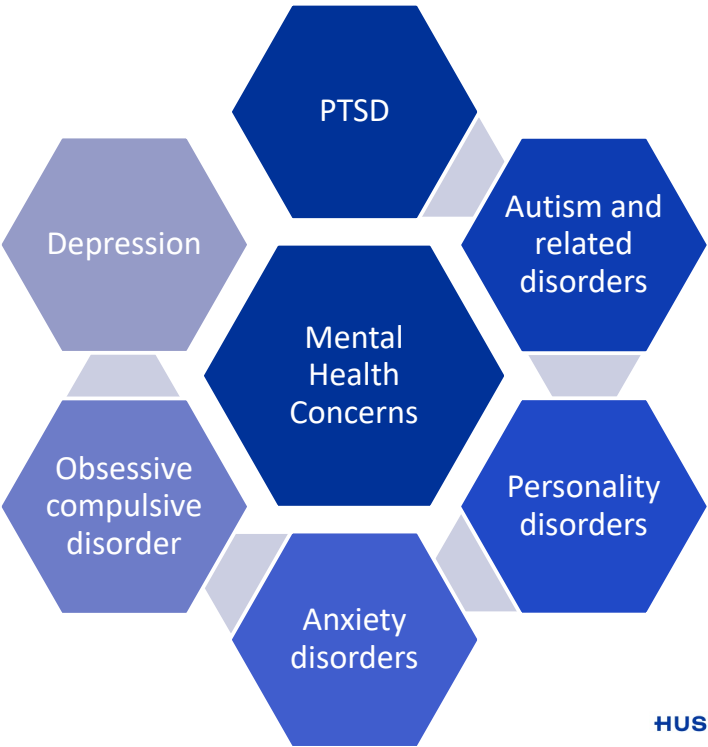
Caring for oneself	Performing manual tasks	Walking	Seeing
Hearing	Speaking	Breathing	Learning
Working	Sitting	Reaching	Reading
Concentrating	Communicating	Major bodily functions	Mental health concerns

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What are some examples of mental health disabilities?



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What is the process?

Self-identification of disability and need for accommodations

Review of medical documentation

Interactive process to determine whether and to what extent accommodations are made

Accommodations are provided on a case-by-case basis, based on the outcome of an individualized interactive process

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What is a “reasonable” accommodation?

- Depends on the nature of the disability, how the disability limits the person, and the fundamental requirements of the program/activity at issue
- Common accommodations include extension of deadlines, more time for work and tests, time for medical appointments, recorded lectures, and note takers

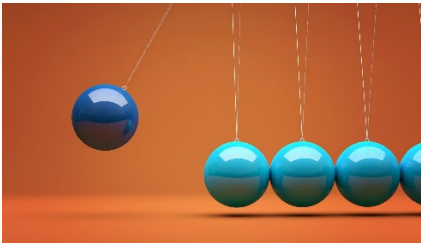


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Interactive Process



- Students and employees are required to self-identify a disability and the need for accommodations
- Institutions must have policies and procedures for centralized handling of such requests
- Interactive process to determine whether and to what extent accommodation will be made
- Includes evaluation of the particular nature of the claimed disability and the particular nature of the requested accommodation
- No magic words; no magic outcomes

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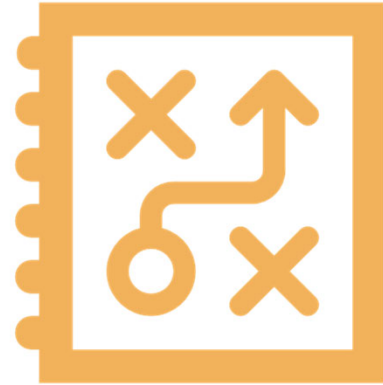
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What about temporary disabilities?

- A temporary impairment does not constitute a disability unless its severity is such that it results in a substantial limitation of one or more major life activities for an extended period
- Must be resolved on a case-by-case basis, taking into consideration both the duration of the impairment and the extent to which it limits a major life activity
- Rule of thumb: an individual is not “regarded as” disabled if the impairment has an actual or expected duration of six months or less

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The faculty member contacts DRC and provides the information submitted by Taylor, including an IEP for her dyslexia from her high school. The faculty member asks about whether Taylor should receive additional time for a test being given the next day. The DCR responds no to the question of additional time. The faculty member goes ahead and gives Taylor additional time for the test and never hears back from the DRC after the referral and initial conversation. Later, the DRC contacts the faculty member to say Taylor never followed up after they sent her multiple emails. The faculty member who has been giving Taylor more time on tests informs her that she will no longer be receiving additional time for tests in an email.

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Questions

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Module 2: Breaking Down the Student Accommodation Process

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How does an institution determine the student is a qualified individual with a disability?

- Must self-identify
- Institution determines:
 - Does the student have a disability that impacts one or more major life actives?
 - If so, what are reasonable accommodations for the student?

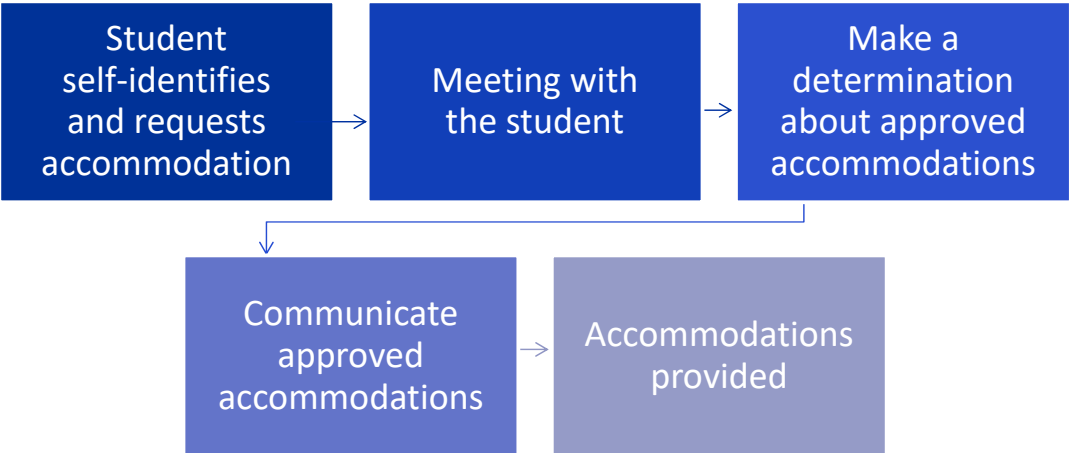
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How does the interactive process start?



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What information should be requested from the student?

1. Identify the physical or mental disability
2. Explain the impact of the disability
3. Identify the major life activity impacted
4. Identify past accommodations and how they assisted the student
5. Identify requested accommodations
6. List documentation you are providing

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What documentation may be requested?

1. Primary Documentation—Student's self-report
2. Secondary Documentation—Observations and interactions
3. External Documentation — Medical information necessary to evaluate the student's condition and help shape the accommodations
 1. Individualized Assessment

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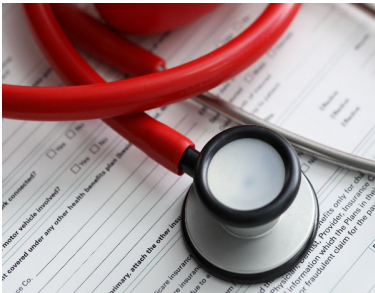
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What type of documentation may be requested?

- Current (generally within the past 3 years)
- Completed by a licensed treating professional
- Includes a current diagnosis, tests and assessments, identification of limitations, and suggestions for accommodations
 - “description of disability-related impairments as they relate to your ability to learn and participate in your academic program.”
- Document requests for additional information
- Maintain confidentiality during the process/release of information



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What documentation may *not* be requested?

- A general medical release giving complete access to all health records
- Health records not related to the request for accommodations
- Direct requests to counseling center on campus

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How do you execute the interactive process?

- Individualized, fact-based determinations
- Document everything
 - Nature of disability
 - Nature of requested accommodations
 - Dates of meetings and persons in attendance
 - Medical records establishing disability and extent of limitations
 - Correspondence
- Don't let the process break down—follow up with communication

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Are provisional/temporary accommodations required?

- No
- However, the institution may want to provide provisional or temporary accommodations on a case-by-case basis:
 - Identify the accommodations to be provided
 - Identify the duration of the accommodations, if the interactive process has not been completed
 - Do not make promises regarding the outcome of the interactive process

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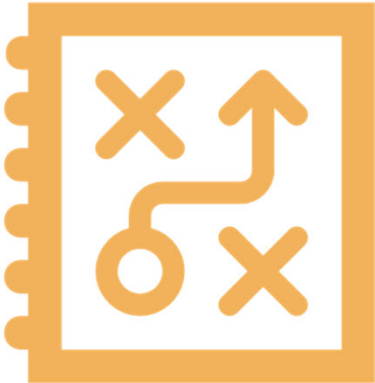
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Example

Student self-identifies as having ADHD and provides an IEP and documentation from a physician from 5 years ago. The student has an appointment with the treating physician in two weeks but is requesting additional time for testing and a note-taker.



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What types of accommodation must be made?

- Accommodations must be reasonable in nature
- Institutions are not required to provide the requested or “best” accommodation if another accommodation is reasonable
- Institutions are not required to provide accommodations that
 - Fundamentally alter a program
 - Lower their academic standards
 - Conflict with the essential functions of a job
 - Constitute personal assistance
 - Create undue financial hardship (Caution!)

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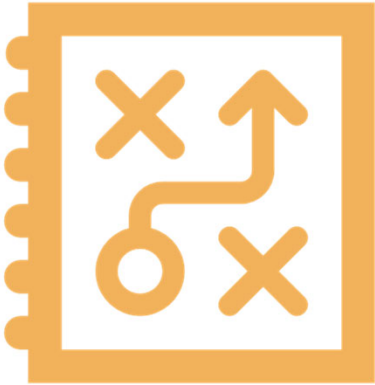
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Example

Syllabus requires attendance at 90% of class sessions or student will automatically fail. Student is undergoing treatment for chronic cancer and has essential medical appointments that conflict with 15% of class dates.



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What are examples of reasonable accommodations?

Priority registration	Reduced course load	Extra time	Distraction reduced environment
Alternative formats	Note-takers	Readers	Recording devices
Interpreters	Screen readers	Software programs	Assistance with faculty contact
Use of equipment or furniture	Closed-captioning	Remote learning	Housing modifications

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When is an accommodation not reasonable?

- A fundamental alteration of the program or education being provided
- An undue hardship on the institution
- Considered a direct threat to others
- Imminent risk to student's health and safety

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Are fundamental educational alterations required?

- No
- The ADAA reaffirmed:

“Nothing in this Act alters the provision of section 302(b)(2)(A)(ii), specifying that reasonable modifications in policies, practices, or procedures shall be required, unless and entity can demonstrate that making modification in policies, practices, or procedures, including academic requirements *in postsecondary education*, would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved.”

ADAAA, sec. 6(a)(1)

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What are some examples of a fundamental alteration?

- Students requesting a class or clinical be waived from the program
- Student requesting an essential component or task be waived (e.g., CPR certification)
- Student requesting to change the type of testing or assessment by the faculty in a program

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What are essential functions?

“Academic requirements that the recipient can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section”

34 CFR 104.44 (a)

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How to define what is essential to the program?

- Faculty driven process with administrative input
- Stay away from basic functions (e.g., standing, lifting)
- Separate general expectations from essential course objectives or learning outcomes
- Degree requirements are useful but must be mindful of exceptions that have been made
- Separate school versus program specific essential functions

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How will essential functions be assessed by OCR?

- In reviewing the process that a postsecondary institution utilizes to determine whether an academic requirement is an essential requirement, OCR considers whether the process has the following elements:
 1. The decision is made by a group of people who are trained, knowledgeable and experienced in the area;
 2. The decision-makers consider a series of alternatives as essential requirements; and
 3. The decision follows a careful, thoughtful and rational review of the academic program and its requirements.

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Notification of Determination

- Provide to student in writing
- If approving the request: (1) specify the disability to be accommodated and (2) the reasonable accommodations provided to the student
 - Detail how faculty will be notified
 - Identify how to request revisions or to report if accommodations are not being provided
- If denying the request: (1) provide the detailed rationale and (2) explain the grievance process

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Who should be consulted?

Treating providers

- Where necessary
- Documentation may or may not be needed
- If needed, may be sufficient
- May consult treaters (and request appropriate release) to explain

Faculty/staff

- Sharing only information needed to make determination
- E.g., questions about whether a certain accommodation would truly alter fundamental nature of program; questions about whether certain housing is available
- Rarely necessary to share specific information about disability

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Are accommodations confidential?



Yes



Documentation of student accommodations is subject to FERPA



Family Educational Rights and Privacy Act (FERPA)

Gives college students:

- Right to access education records
- Right to have errors in education records corrected
- Right to have personally identifiable information in records kept confidential

Keep in mind:

- “Whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of, and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.”

20 U.S.C. §1232g(d)



What are Student Records?



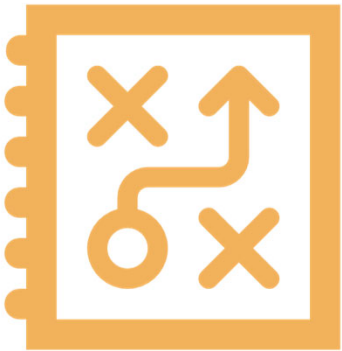
- Directly related to a student (contains personally identifiable information)
- Maintained by the college or a party acting on its behalf
- Physical or electronic (records, files, documents and other materials)
- Free-standing files or information in a larger data compilation
- *FERPA also prohibits the oral disclosure of information that was learned from protected records!

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Example

- Student receiving University counseling services as part of student’s accommodations expresses intent to engage in self-harm but refuses counselor’s advice to seek in-patient treatment.
- Concerned student acts imminently to harm themselves; counselor contacts the student’s parents.



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Are student accommodation records subject to HIPAA?

- No
- HIPAA provides patient access to medical records and right to request corrections
- HIPAA Prohibits a “covered entity” from disclosing health records or protected health information without patient authorization except in certain circumstances
 - Excludes from coverage “education records” and/or student “treatment records”

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What are Treatment Records?

- Treatment Records
 - Medical/psychological records made, maintained, and used solely in connection with treatment of the student
 - Disclosed only to individuals providing the treatment
- Treatment records are *not* educational records, thus not covered by FERPA . . . **Unless:**
 - If the treatment record is used for purposes other than “treatment,” then FERPA **applies**.
 - Thus, student may inspect, request amendment, etc.
 - Limitations to disclosure still apply, e.g., written consent or another FERPA exception

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Records from a Student Health Clinic

- HIPAA does not apply
- FERPA does: such records deemed “education records” or “treatment records,” both of which are excluded from the HIPAA privacy rules.
- Includes:
 - Records from student health clinic
 - Records from university counselor or psychologist

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What should faculty and others be told about granted accommodations?

- What they need to know to implement the accommodations (legitimate education interest)
- E.g.,
 - Please ensure any videos shown in class or assigned are available with closed captioning
 - Please ensure that the student is given extra time on assignments
 - Please excuse student from class once a week, provided student notifies you in advance of the absence

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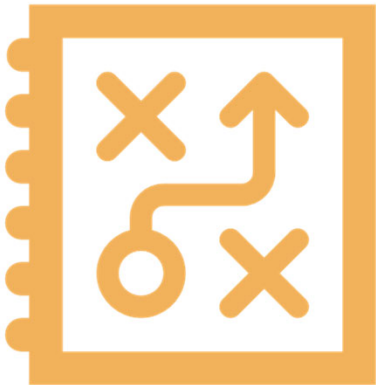
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Example

On the first day of orientation, student presents a member of the Office of Student Experience with a note from their personal physician stating that “student must be excused from Title IX training to attend mental health counseling related to PTSD.”



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Must the institution grant retroactive accommodations?

- No
- The law does not require the institution to grant retroactive accommodations
- Limited retroactive accommodations may be granted at the institution’s discretion



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When can/should the accommodations be modified?

- Policy must provide a process for modification
- Student may make a request
- Institution may initiate the interactive process (e.g., at the end of didactic course work and at the beginning of the clinical course work)



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What rights do students have to challenge the decision of the institution?

Students have the right to file a grievance/complaint:

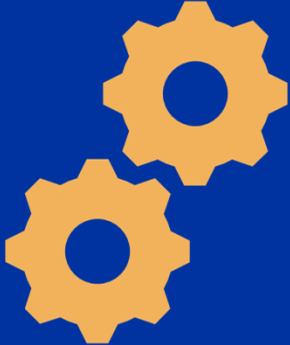
1. When the student believes reasonable accommodations should be granted but were denied
2. When the student believes accommodations have not been implemented properly
3. When the student believes he/she/they have been discriminated against based on his/her/their disability

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Group Scenario



College University received an accommodation request from Rick. Rick is a transgender male who suffers from PTSD and severe depression. Rick identified multiple accommodation requests including priority access to counseling, referring to him by his preferred pronouns in all classes, allowing hybrid class attendance when he is struggling with depression, and providing notes from any classes he may miss.

The Disability Resource Center engages in the interactive process with Rick and determines he is a qualified individual with a disability impacting one or more major life activities. The reasonable accommodations provided are: (1) access to the counseling center, (2) referring to Rick by his preferred pronouns, (3) hybrid class attendance if allowed by the professor.

Rick filed a grievance regarding the accommodations he requested that were denied. The Provost at CU denied Rick’s grievance with an email. Rick was not given the opportunity to present any information to the Provost during the grievance process.

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Questions





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Module 3: Student Mental Health

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The Rise of Accommodation Requests

Pre-Pandemic numbers indicate approximately 19.5% of undergraduates reported some type of disability:

Visual 4.2%	Learning disabilities 3.5%
Hearing 3.9%	ADD/ADHD 26.4%
Speech 1.3%	Mental Health 40.1%
Orthopedic 5.9%	Other 14.7%

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Disability Accommodations after 2020

- Survey Data revealed:
 - 59.4% of all disability resource officers noted a significant increase in requests
 - Mental Health requests have increased in the greatest percentage
 - The most common mental health disabilities are depression and anxiety

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What should an institution's policy be for mental health accommodations?

- The same as for any accommodation request
 - Self-identification
 - Interactive process
 - Determine whether the student is a qualified individual with a disability impacting one or more major life activities
 - Assess and provide reasonable accommodations

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Are institutions required to provide mental health services?

- No
- However, most institutions provide student counseling centers for all students
- If an institutions does provide mental health services, it must comply with all professional codes of conduct, standards for practice, and state and federal laws

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What is a direct threat assessment for a student with a disability?



Public School Standard —
Student must pose a significant risk to the health and safety of others

Private School Standard —
Student poses a significant risk to the health or safety of *self* or others

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How does OCR define a significant risk?

OCR states “a significant risk constitutes a high probability of substantial harm, not just a slightly increased, speculative or remote risk.”

The institution must:

Make an individualized and objective assessment of the student’s ability to safely participate in programs and activities based on reasonable medical judgment, relying on the most current medical knowledge

What factors should the institution consider?

- Nature, duration and severity of the risk
- Probability that the risky behavior will actually occur
- Whether reasonable accommodation or mitigation measures will sufficiently reduce the risk





May a student with a disability be disciplined or placed on leave?

- Yes
- A student with a disability must comply with all essential academic standards and requirements of the student code of conduct
- However, students with disabilities must not face adverse action based on unfounded fear, prejudice, or stereotypes
- Cannot be a pretext for discrimination

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What questions should be assessed?

- Would you tolerate the same behavior from a student who does not have a disability?
- Has the institution provided a reasonable accommodation for the disability?
- Should the institution consider mitigating factors?
 - Whether the student could meet the essential requirements in the future with reasonable accommodations
 - Whether the student is or would be willing to participate in treatment

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What procedures should be used for placing a student on an involuntary leave?

Policy should provide:

1. An individualized assessment of the behavior
2. A determination the student poses a direct threat
3. The opportunity for the student to be heard and respond to the allegations
4. Hearing and right to appeal

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Are zero tolerance policies for self-harm recommended?

- No
- Requiring automatic discipline or dismissal is legally problematic
- Discourages students from seeking treatment
- Students likely know more about fellow students than faculty, staff or administrators and will be hesitant to come forward

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What information may an institution require about a student's mental health treatment?

- May require documentation that the student is attending counseling/treatment
- May not require treatment records be disclosed
- May not require a blanket authorization
- Release of information must be limited in scope and duration

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Issues associated with mandating treatment

- Mental health professional must serve a dual role of treating the student and judging the student's fitness to be on campus
- Use of off-campus mental health resources may address the issue
- Mental health professionals are not willing to provide "fitness" information or assessment

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What are the different types of contracts?

No-harm/No-suicide contract: Verbal or written agreements not to harm or threaten to harm her/him/their self (no longer recommended for clinical use)

Safety plans: Developed jointly with the student to outline the plan if the student is feeling distressed or suicidal

Behavioral contracts: Contracts typically list the conditions the students must meet to stay at the institution

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What is the appropriate follow-up when a student has been discharged from the hospital?

- When a student has been discharged from the hospital, the healthcare professional has deemed him/her/them safe to return to the community
- The institution may consider requiring a mental health assessment to return to campus
- The purpose is to determine if there are supports and services available to help the student remain at the institution

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Best Practice

Establish a Case Management Team

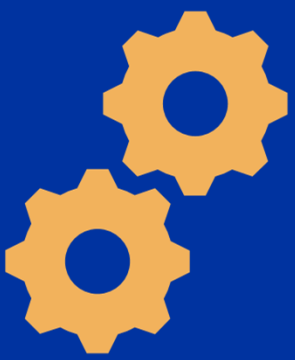
- Create protocols for referring and assessing students
- Direct threat analysis must be done on an individual basis
- Determine who will respond and the process for emergency situations when the team may not be able to convene
- Must ensure highly qualified professionals are part of process

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Group Scenario



Angela is a sophomore at CU and lives on campus in apartments. She receives academic accommodations for severe depression and anxiety. While in high school, Angela attempted suicide. She continues to see a community therapist for her disability. Ashley, Lori, and Carla are Angela’s suite mates. They report to their RA that Angela has confided that she is having suicidal thoughts and plans.

Carla and Lori report Angela’s behavior has been interfering with their ability to go to class and participate in activities. They both are so concerned that if they leave Angela alone, she will harm herself. Ashley reported that Angela threatened to kill herself if she did not take her to an event. All three roommates state the situation with Angela is more than they can handle but they don’t want to request a roommate change for fear of what she might do to harm herself.

The RA referred Angela to CU’s Care Team. The Care Team assessed the situation and determined Angela is not a direct threat under CU’s policy. The Care Team asked Angela to provide documentation that she is attending counseling sessions and provide a behavior contract.

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Questions

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Module 4: Unique Accommodation Issues

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Digital Accessibility



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Section 508 of the Rehabilitation Act

- Requires Federal departments and agencies that develop, procure, maintain, or use Information and Communication Technology (ICT) to assure that these technologies provide access to information and data for people with disabilities
- Final Rule effective March 21, 2017; compliance with the Section 508-based standards began January 2018

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Applicability to the web?

- Questions about precise requirements under the law
- Whether websites are places of public accommodation depends on circuit



Applicability to the web? (cont.)

- Online Accessibility Act (H.R. 1100) – Title VI?



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Applicability to the web? (cont.)

- Circuit split related to places of public accommodation

websites are not places of public accommodation

websites are places of public accommodation

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Courts Differ on ADA Website Applicability

Mejico v. Alba Web Designs (W.D. Va. 2021)

Nat’l Ascs’n of the Deaf v. Netflix, Inc. (D. Mass. 2012)

Gil v. Winn-Dixie Stores, Inc. (11th Cir. 2021)

Carroll v. Northwest Federal Credit Union (E.D. Va. 2018)

Robles v. Domino’s Pizza, LLC (9th Cir. 2019) (“Robles I”)

Mahoney v. Herr Foods Inc. (E.D. Pa. 2020)

NO

YES

“nexus” between website and brick-and-mortar

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Courts Differ on ADA Website Applicability

- Websites are not places of public accommodation under Title III of the ADA:
 - *Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266, 1277 (11th Cir. 2021)
 - *Carroll v. Northwest Federal Credit Union*, No. 1:17-CV-01205, 2018 WL 2933407 (E.D. Va. Jan. 26, 2018)

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Courts Differ on ADA Website Applicability

- Websites can be places of public accommodation under Title III of the ADA:
 - *Mahoney v. Herr Foods Inc.*, No. 19-CV-5759, 2020 WL 1979153, at *2 (E.D. Pa. Apr. 24, 2020)
 - *Robles v. Domino's Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019) ("Robles I")

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Courts Differ on ADA Website Applicability

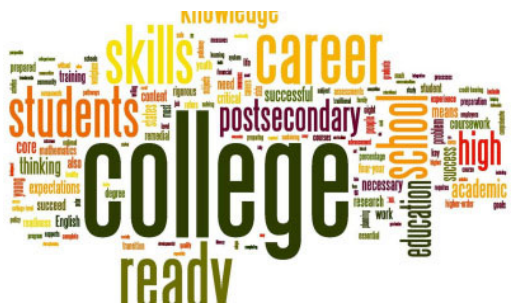
- Websites are places of public accommodation under Title III of the ADA:
 - *Nat’l Ass’n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196 (D. Mass. 2012)
 - *Mejico v. Alba Web Designs, LLC*, 515 F. Supp. 3d 424 (W.D. Va. 2021)



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Increase in complaints and lawsuits in higher education



- Harvard and MIT suits
- Several colleges in NY sued
- Demand letters
- Federal agency enforcement
- Multiple OCR complaints across regions

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OCR Guidance re: COVID-19

- May 2020 – OCR issued “Questions and Answers for Postsecondary Institutions Regarding the COVID-19 National Emergency”
- Clarified institutions moving to virtual/online education still must comply with Section 504, Title II of ADA, and other federal disability statutes
- Students may require academic adjustments, auxiliary aids and services and reasonable modifications of policies, practices and procedures.

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Other Areas: Academic Technology

- Remember, non-discrimination and accommodation requirements apply to virtually all aspects of an institution’s programs and activities
- That includes technology-based programs and activities and the use of technology in a traditional setting
- Institutions cannot overlook the non-discrimination and accommodation requirements as they adopt new classroom technologies
- **TIP:** Establish internal controls to ensure accessibility is considered at the procurement stage

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June 2010 DCL

- *Requiring the use of an emerging technology in a classroom environment when the technology is inaccessible to an entire population of individuals with disabilities . . . is discrimination prohibited by the Americans With Disabilities Act of 1990 (ADA) and Section 504 of the Rehabilitation Act of 1973 (Section 504) unless those individuals are provided accommodations or modifications that permit them to receive all the educational benefits provided by the technology in an equally effective and equally integrated manner. . . It is unacceptable for universities to use emerging technology without insisting that this technology is accessible to all students*

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Definitions of EIT

“Electronic and information technology” or “EIT” includes information technology and any equipment or interconnected system or subsystem of equipment that is used in the creation, conversion, or duplication of data or information. The term electronic and information technology includes, but is not limited to, the **internet and intranet websites**, content delivered in digital form, **electronic books** and electronic book reading systems, search engines and databases, **learning management systems, classroom technology and multimedia**, personal response systems (“clickers”), and office equipment such as classroom podiums, copiers and fax machines. It also includes any equipment or interconnected system or subsystem of equipment that is used in the automatic acquisition, creation, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information. This term includes **telecommunications products** (such as telephones), information kiosks, **Automated Teller Machines** (ATMs) transaction machines, computers, ancillary equipment, software, firmware and similar procedures, services (including support services), and related resources.

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WCAG 2.0 Overview & Accessibility Barriers



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WCAG 2.1 and ARIA

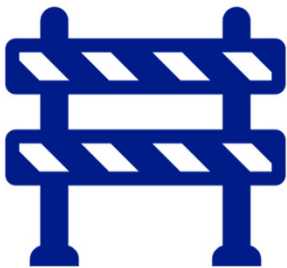
- WCAG 2.0 addressed potential accessibility issues through guidelines divided into four principles:
 - Perceivable
 - Operable
 - Understandable
 - Robust
- Testable success criteria at three levels: A, AA, and AAA
- WCAG 2.1 published as recommendation in June 2018
 - Includes all success criteria from 2.0, plus 17 additional criteria to address mobile accessibility, people with low vision, and people with cognitive and learning disabilities
- Accessible Rich Internet Applications

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Accessibility Barriers

- Consider the importance of your institution’s websites
- Information may be inaccessible to individuals with:
 - visual impairments (blindness, low vision, color-blindness)
 - hearing impairments (deafness or being hard of hearing), or
 - mobility impairments (inability to use a mouse, limited fine motor control)



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Clear Visuals

- Images include alt text
- Color should not be used as a navigational tool
- Contrast issues
 - Resist “design” counter-arguments



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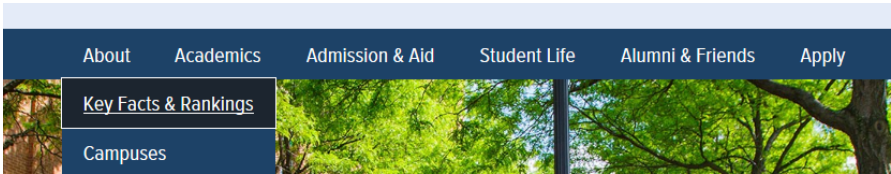
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Supplemented audio and video

- Captioning for video
- Transcripts for audio
- Varying levels of compliance included in WCAG
- Can be a daunting task, especially for legacy content (e.g., UC Berkley)
- **TIP:** Look for assurances from vendors and be aware of captioning resources

Navigation

- Keyboard navigation
- Titles, headings, and labels
- **TIP:** “Skip navigation” allows users to skip repetitive elements and get to main content



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Compliance Points



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Compliance Points

- Assess web presence
 - How many websites do you have?
 - Links to third-party websites?
 - Activity on social media?
 - What information is provided through the websites?
 - What functions are offered through the websites?



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Compliance Points

- Gather information from internal team and external partners
 - Internal talent to address this compliance issue?
 - How decentralized is the operation of your websites?

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Compliance Points

- Establish a policy and internal procedures
 - Establish a website accessibility policy
 - Establish internal controls to maintain accessible features

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Compliance Points

- Evaluate web content
 - Include manual checks
 - Consider a consultant
 - Look for template fixes and trends



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Compliance Points

- Prioritize remedial efforts
 - Consider high-traffic websites
 - Disability services websites
 - Focus on individual complaints
 - Address “low-hanging fruit”



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Compliance Points

- Train content editors
 - Systems controls can only go so far
 - Build on knowledge base of web team
 - “Train the trainer”



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Compliance Points

- Establish reporting mechanism
 - Identify coordinator and provide complaint mechanism
 - Make notice of process and forms accessible



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Service and Emotional Support Animals



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Service Animals and the ADA

- Requires reasonable accommodations for students and employees
- The use of service animals is a recognized accommodation
- ADA regulations for Titles II and III define “service animal” as:
Any dog or miniature horse that is individually trained to do work or perform tasks for the benefit of an individual with a disability



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What can service animals do?

- Assist those with low vision
- Alert individuals who are deaf or hard of hearing
- Pull a wheelchair
- Retrieve medicine and other items
- Alert to medical conditions (seizures; passing out)

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What questions can you ask about service animals under Title II and Title III?

1. Is the animal required because of a disability?
2. What work or task has the animal been trained to perform?

Cannot ask about the extent of the person's disability, require documentation of training, or insist that the animal demonstrate its ability.

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Emotional Support Animals

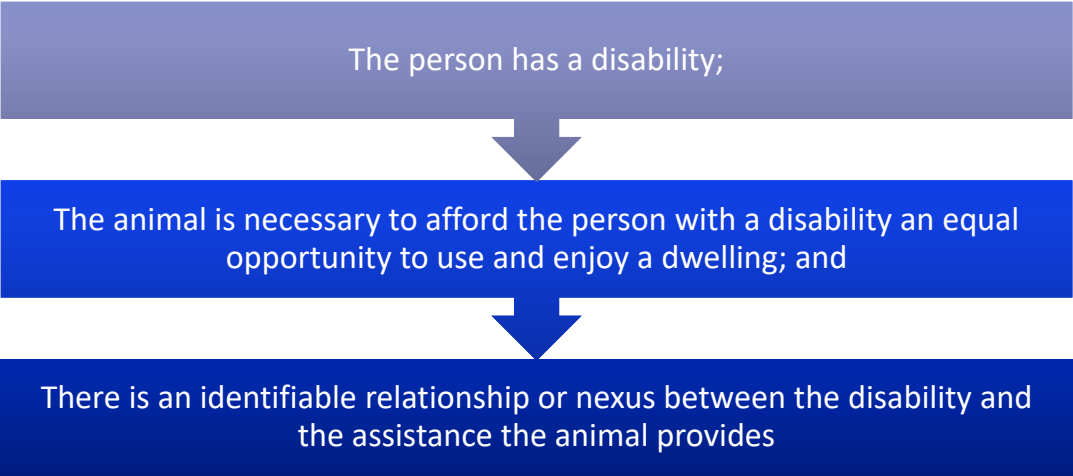
- May be a reasonable accommodation required by FHA for campus housing
- Not limited to dogs/miniature horses
- Must be requested through interactive process



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When may a person keep an assistance animal?



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How should schools approach demands for emotional assistance animals under the FHA?

- Through the Disability accommodation process
- I.e., is the animal a “reasonable accommodation” for a “disability” that has been appropriately documented?

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What about animals and employees?

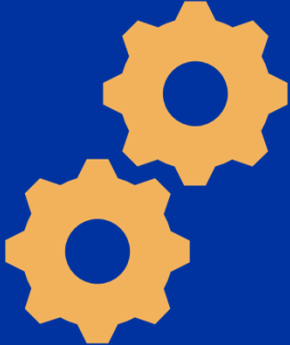
- Title I of the ADA does not define “service animal” and does not require employers to automatically permit a service animal outside public accommodation
- Request for service animal is treated as any other request for reasonable accommodation
- Documentation can be requested
- Because “service animal” is not limited to dogs (and miniature horses) under Title I, employees might request other types of species as a reasonable accommodation

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Group Scenario



Sebastian is an incoming freshman with a substantial visual impairment. Sebastian is a high achiever and reaches out before the start of Fall classes to ask for accommodations to ensure his continued academic success. Sebastian provides his IEP and medical documentation, along with a list of formatting requirements for materials in each of his classes. He requests that all written materials be delivered via Dropbox 1 week prior to the class in which those materials will be assigned. He requests that all quizzes, exams, and class handouts also be prepared in accordance with the formatting requirements and be ready in advance of the class.

Sebastian’s formatting requirements allow him to review course content on his personal Ipad, where he utilizes his low vision through magnification tools. His requirements include the following specifications:

- Written text converted to Optical Character Recognition (“OCR-text”)
- Google doc or WORD
- 8.5 x 11 portrait document size and layout
- Arial font
- 14-point font size
- Black font color on white background
- 1.0-inch margins top/bottom
- 1.5-inch margins left/right
- Single spacing
- Page numbers in the right bottom with original document page number in parenthesis
- Clear images, diagrams, and maps in color
- Websites, Apps, or other online content to be reviewed for accessibility
- For math/science work:
 - o .5 margins to better illustrate equations
 - o Include blank space to “show work” after equations
 - o Ensure that equations are not “screenshotted” but retyped to ensure clarity and avoid pixilation upon magnification

In the past, your institution has made accessible PDFs available to allow visually impaired users to rely on their screen readers and has facilitated access to accessible course materials, through your library, where available.

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Questions





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Module 5: Pregnancy Accommodations

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Pregnancy discrimination

- Pregnancy discrimination is a form of sex discrimination because only women can become pregnant
- Explicitly included in regulations
- Pregnant women must be treated the same as other students with temporary medical conditions that require treatment
- Institutions cannot unilaterally presume what limitations (if any) should be placed on a pregnant woman's participation



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Title IX & Pregnancy Discrimination

- Title IX prevents discrimination on the basis of sex
- Prohibits pregnancy discrimination in higher education with respect to:
 - Admissions
 - Hiring
 - Leave policies
 - Coursework accommodations
 - Degree completion



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Federal Law

Recipients of federal funds “shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex...[and] shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.”

34 C.F.R. § 106.40

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Department of Education Guidance

- Department of Education, Office for Civil Rights, *Supporting the Academic Success of Pregnant and Parenting Students*
 - Released in June 2013
 - Geared toward K-12
 - Also applies to institutions of higher education

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Department of Education Guidance (cont.)

- Addresses issues of assistance, program progression, and leave
 - Adjustments may be required to ensure access to the educational program (i.e., restroom breaks, larger desks)
 - A student must be reinstated to the status she held when leave related to pregnancy began
 - Absences that are medically necessary must be excused
 - Exceptions must be made for late work and class attendance or participation credit

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Why Compliance Matters

- Consequences of noncompliance include:
 - A complaint being filed with the OCR
 - Findings of noncompliance likely to result in ongoing oversight from ED
 - A lawsuit being filed against the institution
 - Monetary damages can be awarded in Title IX cases



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Admissions

When making a determination about admissions, institutions cannot:

- Apply any rule which treats persons differently on the basis of sex
- Discriminate against or exclude an applicant on the basis of pregnancy, childbirth, termination of pregnancy, or related recovery
- Establish or follow any rule or practice which discriminates on the basis of pregnancy, etc.

Institutions must treat disabilities related to pregnancy, etc., in the same way and under the same policies as any other temporary disability or physical condition

34 C.F.R. § 106.21

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Financial Assistance

When awarding financial aid, institutions cannot, on the basis of sex,

- Provide different amounts or types of financial aid
- Limit eligibility for assistance
- Apply different criteria
- Discriminate based on marital or parental status



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Leave of Absence

- Pregnancy is a justification for a leave of absence for so long as is deemed medically necessary by the student's physician
- Once leave is concluded, the student shall be reinstated to the status which she held when the leave began



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Coursework Accommodations

The Department of Education places a burden on schools to accommodate students, going so far as to say that schools should “advise [pregnant students] of the importance of staying in school...[and] let them know of any school assistance that may be available to them.” Any separate accommodations must be “comparable.”



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Excused Absences

Consider allowing excused absences for parenting students (both male and female)

- Who need to take their children to doctors’ appointments
- Who need to take care of their sick children
- Other extraordinary medical circumstances



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Accommodations in Practice



- Work with pregnant and parenting students individually and come up with an academic plan tailored to each student’s needs and focused on academic success
- Advise pregnant and parenting students of the availability of programs and services to help them stay in school and maintain their educational progress

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Graduate Students: Accommodations vs. Leaves of Absence

Accommodations

- Relieved of full-time duties
- Extension of coursework or certain academic responsibilities
- Eligibility clock extended
- Financial support remains intact
 - May be altered

Leaves of Absence

- Take leave of program
 - May have timeframe governing return
- Relieved of all responsibilities
- Stops coursework/academic requirements
- Stops eligibility clock
- May forgo financial support entirely

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Accommodating Male Students

Think about how you would accommodate a female in the same situation

- Teaching?
- Final exams?
- Writing Center?
 - Flexible work schedule
 - Out of office options: editing electronically submitted student papers



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Lactation Spaces

Department of Education Guidance encourages schools to “designate a private room for young mothers to breastfeed, pump milk, or address other needs related to breastfeeding”



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Lactation Spaces (cont.)

Increased access to lactation stations can be beneficial for student and employee retention—especially in graduate student and faculty contexts

- Advocacy & Awareness
 - National Women’s Law Center
- Recent news articles
 - Inside Higher Ed
 - Huffington Post



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Pregnant & Parenting in STEM

“The lack of family friendly policies – including lactation spaces – is the number one reason why women in STEM fields decide to abandon research careers. This is a great loss not only for the students, but also for the advisers, departments and funding agencies that have invested so much time in them.”

Robin Hoecker, The Huffington Post

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..... Recording Lectures



- Faculty cannot forbid a student to record in the classroom if the recording has been approved as an accommodation for the student's disability
- Section 504 of the Rehabilitation Act specifically mentions recording of lectures as an accommodation
- To protect the instructor, students with recorded lecture accommodations must sign an agreement so as not to infringe on a potential copyright or to limit freedom of speech

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Group Scenario



Belinda is a second-year medical student at CU. She just found out she is expecting her first baby in the spring. She begins to tell several of her professors that she will need to take leave during the spring semester for the birth of her child. At this time, she is not expecting any complications with her pregnancy and intends to take off 1 week from classes for the birth. One of her professors encourages Belinda to consider taking the spring semester off and returning the following year with the next cohort. Belinda does not want to take a leave of absence.

In April, Belinda begins to suffer complications with her pregnancy and is placed on bed rest for the 4 weeks before her due date. Belinda requests to continue to attend classes remotely and makeup her clinical rotations after the birth of her child.

After giving birth, Belinda believes she needs additional time to recover and bond with her baby. She decides to take an additional 2 weeks off from school. She also requests to bring her baby to campus to breastfeed the baby during breaks from class.

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Questions

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Module 6: Recent OCR and Court decisions

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Enforcement: Office of Civil Rights

- Department of Education’s Office for Civil Rights (“OCR”) investigates complaints of discrimination and noncompliance made against educational institutions
- Disability related complaints are on the rise
- Recent increases in OCR complaints that mention pregnancy may lead to increased enforcement efforts from the Department



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Disability Accommodation

- Student with cognitive impairments from traumatic brain injury
- Granted accommodations in graduate counseling program
- Alleged
 - Did not receive accommodations
 - Was subjected to assessments/reviews not required of other students (ad hoc reading/writing tests, memory assessments)
 - Program director told her she would not be able to complete internship and graduate, suggesting she not waste time

Hill v. George Fox Univ. (D. Or. 2017)

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Outcome

- Summary judgment denied in part (on to trial)
- Student met burden of proving “otherwise qualified”
 - University admitted her: “Surely it didn’t just decide to take her money, knowing she could not cut it as a counselor”
 - She succeeded in her program courses
 - Faculty concerns about clinical requirements insufficient *where accommodations not provided*



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Outcome (cont.)

- Failure to accommodate claims go forward (Section 504, contract)
 - Refusal to provide approved accommodations satisfies intentional discrimination requirement of Section 504
- Court indicated (other) plaintiffs could pursue constructive discharge claims under Section 504 if “pushed out ... on account of disability”



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Scenario – Disability Accommodation?

- Medical student with depression and anxiety failed two clinical rotations
- Placed on clinical probation during his fourth year
- Resumed studies and failed a clinical rotation for second time
- Dismissed for “unsatisfactory academic performance”

Scenario (cont.)

- Sought treatment and requested readmission, requesting credits earned
- University denied request, advising to reapply as first-year
- Alleged failure to “reasonably accommodate”

Profita v. Regents of the Univ. of Colo. (D. Colo. 2017)

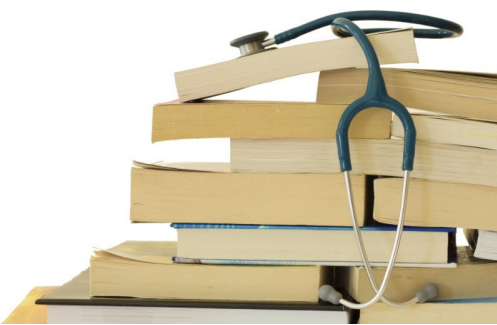


Outcome

- Motion to dismiss granted
- Court considered request for readmission as one for “retroactive leniency” for failed courses, as opposed to a request for accommodations
- Request to excuse past academic performance is not a request for a reasonable accommodation and could not serve as basis for student’s ADA discrimination suit

Darian v. Univ. of Massachusetts at Boston, 980 F. Supp. 77 (D. Mass. 1997).

- Nursing student brought a claim under ADA and Title IX alleging pregnancy discrimination against her university for their refusal to further accommodate her so that she may finish her clinical rotation





Darian (cont.)

- The holding:
 - University met its obligation to offer reasonable accommodations to the student in light her of pregnancy complications
 - Student failed to plead a *prima facie* case of discrimination under Title IX because she failed to meet legitimate educational expectations in her coursework
- Granted summary judgment on both counts

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Hogan v. Ogden, No. CV-06-5078-EFS, 2008 U.S. Dist. LEXIS 58359 (E.D. Wash. 2008).

- Student was placed on medically-mandated bedrest in her eighth month of pregnancy and missed a required exam
- The student proposed accommodations to her professor to complete coursework, but professor refused the student's request and advised her to withdraw from the course
 - Professor made accommodations for other students for exam
- Plaintiff brought suit under Title II of the ADA, Section 504 of the Rehabilitation Act, and Title IX

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Hogan (cont.)

- The court held that the student met all of the educational requirements for her course because:
 - She did not miss class until her bedrest
 - She continued to participate in all group efforts
 - She suffered adverse treatment from the professor's refusal to accommodate her for the exam

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Conley v. Northwest Florida State College, 145 F. Supp. 3d 1073 (N.D. Fla. 2015).

- Student became pregnant while enrolled in paramedic program
 - was denied the opportunity to complete clinical rotations and take final exams for a semester due to taking time off for the birth of her child
 - The college refused to reinstate her
 - The college admitted that they would not have allowed her to participate in the program had they known that she was pregnant
- Student brought suit against the university alleging Title IX discrimination

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Conley (cont.)

- College argued that there is not private right of action for pregnancy-based discrimination under Title IX
- The court disagreed:
 - Although Title IX statute does not define the term “sex,” Congress unambiguously intended for the phrase “on the basis of sex” to include pregnancy-based discrimination

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Varlesi v. Wayne State Univ., 643 Fed. Appx. 506 (6th Cir., March 2016)

- Student alleged:
 - Kicked out of Masters in Social Work program because of pregnancy and status as unwed pregnant woman
- University’s defense:
 - Poor performance at internship was the reason for her dismissal
- Jury awarded Varlesi \$849,000

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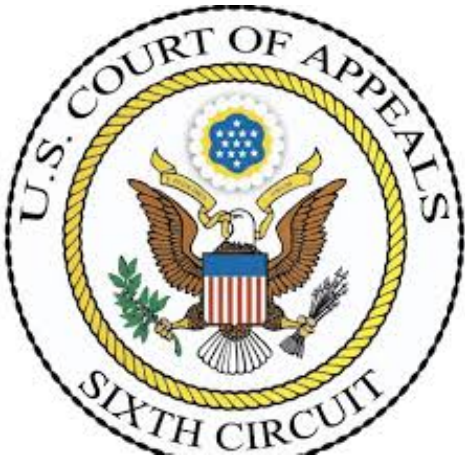
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Varlesi (cont.)

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- 6th Circuit affirmed the district court’s ruling and the jury award
- Award did not shock the conscience because the evidence established that “defendants’ discrimination and retaliation deprived Varlesi of the opportunity for employment in her chosen field by denying her a graduate degree and denying her the ability to obtain that degree elsewhere, thus causing actual damages and foreseeable emotional harm.”



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Pregnancy as a Disability? *Khan v. Midwestern University*

- Student in Midwestern’s medical program who became pregnant, suffered complications, and asked for accommodations
 - Request to postpone final exam was denied
 - Khan failed the course and was dismissed
- Filed suit under Section 504 alleging disability discrimination
- District Court in Illinois rejected University’s argument that Khan didn’t have a disability, noting “[t]he effects of an impairment lasting or expected to last fewer than six months can be substantially limiting.” *Khan v. Midwestern Univ.*, (N.D. Ill., Dec. 7, 2015).

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Khan (cont.)

District Court dismissed on summary judgment because Khan could not prove she was an “otherwise qualified” student to continue in the medical program

- **Court did not back away from the disability analysis: “Plaintiff’s sole remaining claim pursuant to these allegations arises under the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*”**

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Questions



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