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| REALTIME FILE AHEAD-Disability Rights in a Pandemic - Maintaining Compliance and InclusionApril 8, 20213-4:38pm ETCART CAPTIONING PROVIDED BY: ALTERNATIVE COMMUNICATION SERVICES, LLC www.CaptionFamily.com\* \* \* \* \*This is being provided in a rough-draft format. Communication Access Realtime Translation (CART) is provided in order to facilitate communication accessibility and may not be a totally verbatim record of the proceedings \* \* \* \* |

>> KIM RICHARDS: Hello. Good morning, everyone. This is Kim Richard, the operations coordinator for AHEAD. Before we get started, just a couple of housekeeping items that I'm sure you're very familiar with right now. We're going to be using the Q&A feature that you can find at the bottom center of your screen for questions.

We are saving the chat for any technical issues. My presenters have told me that if time allows, they would be happy to take questions at the end of their presentation. As I see the numbers rolling in, we'll just give it a few seconds. Oops, I see we are recording. Okay. I guess I can cut this part. All righty. I'm not going to take any more time. I'd be happy to turn things over to Paul Grossman. Paul.

>> PAUL GROSSMAN: Good afternoon, every. You all are in for a treat. We are going to have this afternoon two ‑‑ my label, not theirs ‑‑ two legal superstars who are going to be presenting on Disability Rights in the Pandemic and with a particular focus on students with mental health challenges and disabilities.

And the two people are Jennifer Mathis and Eve Hill. And I am going to talk a little bit about each of them by way of introduction. But before I do that, I would like to give my own estimate, which is that your caseload is about to increase 40% or more. And that to be prepared for that caseload, we have to recognize that a significant part of the additional caseload will be people with psychological, psychiatric, neuropsychological disabilities.

And therefore, listening to experts on how to accommodate these individuals, what their legal rights are I think is a very important way to spend your time. What these two individuals have in common is that they both have relationship with the Bazelon Center for Mental Health Law.

And Jennifer is the Director of Policy and Litigation, and Eve is Chair of the Board. Before I talk about either of them, I want to talk about the Center For Mental Health Law itself because it's a wonderful resource that I hope you all will check out. Easy to Google under Bazelon. Not that common a name. And it will pop up very quickly.

So Judge Bazelon, Justice Bazelon, was appointed just before I was born. So he was on the bench a long time ago. And what is amazing about him was, as he sat on the D.C. Circuit, he recognized mental health rights all the way back then. He was a cutting‑edge authority on this issue. He was a prophet on these issues. And I think it's entirely appropriate that a Center For Mental Health Law be named for Justice Bazelon,

Because he was really the first jurist to pursue the rights of these individuals. Well, for some of you, the Bazelon Center is old. For me not quite so. But I will point out that the Bazelon Center came into existence even before Section 504 was the law by one year.

And the Bazelon Center from my perspective, to build the rights of individuals with disabilities, has focused on three things: One is to end the segregation of individuals with disabilities. And you may note that before the passage of the ADA, that was a very serious problem. But for people who are still institutionalized, it remains a serious problem.

And the key court decision that established the rights of people with individuals to live in the community, to live as individuals, was the Olmstead case. And Jennifer had a key role in that case, and the Bazelon Institute had a key role in that case. And I note that there is still a battle against segregation going on by the Bazelon Center.

Currently against the Staten Island schools which are still segregating students with disabilities. I think another key issue that they really want to work on is self‑determination. And finally, of course, the right of individuals with disabilities to get a meaningful education, including participating in higher education.

So I want you to know there are lots of resources available there. There are model policies. There are guidelines. And I'm going to make spontaneously a radical proposal here, which is Eve and Jennifer, and I wish Carol was on right now, I would like to see some collaboration between the Bazelon Center and AHEAD on giving guidance on students with mental and psychiatric disabilities coming back to school in light of the pandemic.

So I'm going to try to push for that, and I hope you all are open to that idea. So let me talk briefly now about Eve. So many of you actually met Eve, if you are as old as me, all the way back in 2012 when she keynoted at AHEAD in New Orleans. And back then Eve was Deputy Assistant Attorney General at the Department of Justice. And what's important for us to know is she had responsibility over disability rights and Title VI enforcement.

And I have to say, Eve, I think that was the high point of the activities of justice in that area, and I'm very, very grateful for your leadership and now Eve is at Brown, Goldstein and Levy. And you all know that's the last law firm you want to get sued by, particularly over the rights of people with visual impairments. And that's really Eve's specialty is asserting the rights of people who are blind or low vision.

But Eve has certainly pursued these rights in other areas. And, of course, now Eve is leader at the Bazelon Institute. And finally, my hat's off also to Jennifer who's been at the Bazelon, I guess, your whole career, Jennifer, is that right? Or almost your whole career.

>> JENNIFER MATHIS: Not my whole career but a lot of it.

>> PAUL GROSSMAN: Very good. And Eve is one of the people that argued the Olmstead case, really pushed it through.

>> Jennifer.

>> PAUL GROSSMAN: I'm sorry, Jennifer is the people who really pushed through the Olmstead case, which, you know, is really one of our most foundational civil rights decisions. And, you know, you really, Jennifer, I think, are concerned with an area that we don't talk all that much about AHEAD, but it's so important, and that's the safety net.

You know, what is the safety net for people with disabilities? The people among us who are most poor, most challenged, whose life is most difficult, protecting those rights is a very, very important mission. So, Jennifer, I want to say on behalf of everyone, and Eve, I want to say on behalf of everyone, thank you so much for coming today, and thank you so much for all the work you do.

And I'm going to turn it over to ‑‑ is it Eve or Jennifer? Who am I turning it over to?

>> EVE HILL: Eve.

>> PAUL GROSSMAN: Eve. Very good, Eve.

>> EVE HILL: Hi, everybody. Thank you all for joining us on at least what's here a really beautiful day. I hope you're carrying your laptop out into the sunshine or something. So we are really happy to be here. I notice that I got the date wrong on the PowerPoint. I guess I'm wishful thinking that the last year had not happened.

But nonetheless, it has. And now I can't figure out how to move my PowerPoint forward. Which seems like a problem.

>> PAUL GROSSMAN: Click the cursor on the page.

>> EVE HILL: There we go. So a little bit ‑‑ just a little bit of framing about why we are here. According to the CDC, symptoms of anxiety disorder and depressive disorder have increased considerably during the past year compared with the period in 2019. Overall, 40.9% of respondents reported that at least one adverse mental or behavioral health condition, including symptoms ‑‑ reported at least one adverse mental or behavioral health condition.

Including anxiety disorder, depressive disorder, that's almost 31%, symptoms of trauma and stressors related to the pandemic, that's 26%. And having started or increased substance use to cope with the stress related to COVID‑19, that's 13% and a little shocked that it's that low. And the percentage of respondents who reported having seriously considered suicide in the last 30 days before the survey, 10% of the general population was significantly higher among respondents aged 18 to 24 years,

It was over 25%. So I'm going to breeze through the first few slides because they are the basics. I always include them in case anybody doesn't have the basics. But I know you all at AHEAD already know the basics. So the ADA prohibits colleges and universities from discriminating. Tah‑dah! Easy enough. Both private colleges and public colleges.

And Section 504 prohibits discrimination by anyone who receives federal funding, which is most colleges and universities. We also have to, though, consider the Fair Housing Act for any colleges and universities that provide housing, like dorms. And city and state anti‑discrimination and human rights law, most of which have some form of discrimination prohibition on the basis of disability,

As well as the regulations that implement the federal statutes and guidance that put the federal agencies put out about those statutes. And then there are judicial interpretations of the statutes and regs. And you can get a lot of information from the Department of Education Office For Civil Rights in their resolution letters and from Department of Justice settlement agreements. So we've given you links to both of those.

And then a little on the definition of disability. Since the Americans With Disabilities Act Amendments Act, nearly everyone with a mental health diagnosis will have a protected disability. There are going to be questions that are only now starting to make their way through the courts about COVID‑19 as an illness.

Or as a disability, and both short‑term COVID‑19 and long‑haul COVID‑19 will raise those issues. Now, those things are still being played out. But I think, I would say, if it meets the definition of disability in the ADA as an impairment that substantially limits one or more major life activities, then it certainly is a disability.

And entitles people to nondiscrimination and reasonable accommodations. This should not be a high standard. The Justice Department has said over and over again the definition of having a disability is not a high bar, and that's because it's only giving you equal rights. It's not giving you special stuff, so it doesn't need to be a high bar.

We don't need to keep people out of having equal rights. So one of the things that we deal with when talking about defining disability or meeting the definition of disability under the ADA is how you determine that. And a lot of places, most schools, will demand medical testing and verification of the need for accommodations, and that's certainly okay.

But medical testing is not the sole method by which a student can demonstrate having a disability or needing accommodations. And that's going to become a big deal after the pandemic. Even during the pandemic. Because more students will have new or aggravated mental health symptoms and may not have previously identified as having a disability.

They may not have registered with the Disability Services Offices. And they may not yet have a diagnosis. They are experiencing the symptoms. In addition, medical testing can be expensive, time‑consuming, and take time. Doctors' offices cannot often get you in immediately when you need a diagnosis.

So it's important, although not necessarily illegal, but it's important to ensure that you're not getting rid of potentially good students and not getting them what they need because they haven't checked a box on getting a diagnosis when that diagnosis is being delayed by a doctor's office or when they can't afford it. You don't want to exclude people who are entitled to accommodations because of their income.

So DOJ has also made clear that medical documentation can't be the only thing you rely on. You can look at other qualified professionals, past accommodations. In fact, you must look at these things. Observations by educators, both now and in the past. Psycho‑educational or other professional evaluations and their history or diagnosis. So don't rule it out that this person is entitled to accommodations just because they don't have the diagnosis that you're looking for.

If you're requiring medical documentation, you can only require the documentation that relates to this student's stated disability. So, for example, I've seen colleges and universities ask for learning disability documentation, which is even more expensive and more hard ‑‑ difficult to get when the student was not asking for learning disability accommodations. They were asking for mental illness accommodations.

But too often I've seen colleges and universities say, well, you're asking for extra time. We give extra time if you pass these ‑‑ if you get a diagnosis through these learning disability tests. But a mental illness is not a learning disability and isn't assessed through the same tests. Which should be obvious.

And then under the ADA, 504, FHA, state and local laws, a university can't exclude anyone who is otherwise qualified to be in whatever the program is, classes, recreational activities, groups, facilities like dorms or libraries just because that person has a mental illness. If they have a mental health disability, they're qualified to attend the college or university because they've been accepted to attend the college or university.

And the Office of Civil Rights has made that clear. You are qualified to live in the dorm because you're accepted into the university. You've been decided to be qualified. Now, once a person has a disability and has been determined to be qualified for the college, under the ADA and the other laws, colleges and universities don't just have to not discriminate against them, although that's a big issue, and we'll talk more about that.

They also have to make reasonable modifications to their policies, practices and procedures. That means any rule, any ‑‑ just the way we do it. They have to make reasonable modifications to those for students to help them fully participate in campus life. Anything that the university does is part of its services programs and activities.

And in the academic context, a reasonable modification is one that changes ‑‑ that modifies academic requirements when necessary to ensure that a student with a disability is not being discriminated against or being effectively discriminated against. Some examples of academic modifications, modifying exam requirements. Now, often I've seen, again, colleges and universities say, well, we can't give you extra time because we give extra time to students with learning disabilities.

We don't give them to anybody else. You don't have the learning disability paperwork. But people with mental illness may need more time as well. May also need private rooms, more breaks, or breaks of exams into smaller chunks of time.

Voluntary leave and the removal of barriers to taking leave, such as changing deadlines for assignments and exams. Those can be things that can be reasonable modifications. Reduce course loads or alternative work assignments, different ways of meeting your clinical obligations. Those can be reasonable modifications.

Excused absences of class for treatment including for hospitalizations and abilities to make up the work in a reasonable way can be a reasonable modification. Allowing students to work from home can be a reasonable modification. Allowing students to drop a course after the drop date can be a reasonable modification.

And allowing withdrawals after the normal deadlines if they're due to a disability or mental health condition. Now, under the Fair Housing Act, this has caused a lot of consternation lately. Reasonable accommodations to housing policies have to be provided, including allowing a student to live off campus, allowing a student to change roommates or rooms, or even to have a single room.

Allowing students to have a guest or an aide in his or her dorm room, and allowing a student to live with an emotional support animal. There's a little bit of limitation on the emotional support animal in that they're allowed in the housing, but they're not necessarily allowed in class unless they're a service animal.

But draw a balance there that's reasonable for the student as well as for the college. And usually a student with a disability has to require a modification in advance. Usually they do it through the disability services office. So, for example, I always advise people if you're going to need a modification, request it before you're kicked out.

Request it before you're fired. Request it before you fail the test. You're usually not required to give a retroactive accommodation when the school had no reason to know that the student had a disability and needed an accommodation.

But sometimes a disability can arise unexpectedly and interfere with the student's ability to request an accommodation in advance. So, for example, a disability‑related crisis or a hospitalization may interfere with a test that's coming up right now or with class attendance that's coming up right now.

And the student has no opportunity to provide advanced notice. And the school in that situation would likely not be excused from the duty to accommodate, just because they didn't have advanced notice. In that case, the student ‑‑ it wasn't possible for the student to give advance notice. And the disability is obvious.

So as the DOJ and Department of Ed have said, in some circumstances where a disability is obvious to the school, you don't need the documentation, you've got it, and it appears clear that the student, because of the disability, is not able to timely request an accommodation in advance, the school may have greater obligations.

And it would be wise for the school to offer accommodation when it knows or reasonably should know, based on the student's behavior, that the student has a disability, and the disability is interfering with their request of that accommodation.

So, for example, if a school knows that a student is hospitalized for depression, the school should assume that accommodation, like delaying an exam, is needed, and offer it. However, the mere fact that a student is getting counseling or taking medication for depression or another mental health disability doesn't generally require a proactive accommodation. And if you jump in without being asked and force a student to take an accommodation,

That could actually be discriminatory. So students ‑‑ schools do have some defenses. They don't have to provide reasonable modifications if such a modification would create a fundamental alteration of the school's program or would cause an undue burden.

So the key to this is to fundamental alteration, which is used most often in colleges and universities, is that you can refuse to provide an accommodation where the school can show the burden is on the school, that doing what the student wants or needs would fundamentally alter the nature of its academic or residential or other program. It would impose an undue burden on the school. A burden that is so great that it's too great considering all the resources available to the school.

It's not judged in terms of how much tuition that particular student pays. It's not judged in terms of how much that particular class costs. It's about all the resources available to the school. And requirements essential to instruction pursued by each student related to licensing requirements will not generally be regarded as discriminatory.

But on the other hand, things that are related to licensing requirements but not essential to the program of the school can't necessarily be used as a basis to exclude students with disabilities. And we can talk a little bit about that in a later time. Like, for example, in law schools, they'll often say, well, you can't get triple time on an exam because the Bar won't give you triple time.

Well, you don't get to decide what the Bar will or will not do. You need to deal with what's a fundamental alteration or undue burden for the school. Now, prior to the pandemic, I've had this come up a lot lately in my work with students with vision impairments. Prior to ‑‑ not vision impairments ‑‑ with a variety of impairments. Prior to the pandemic, schools would argue and sometimes successfully that allowing a student who couldn't come to class,

Either because they were having an illness that prevented them from leaving their home, or because there was something in class that was terrible for their disability, schools would argue that allowing them to participate by video or online violated a fundamental piece of their curriculum. That class participation, in‑person participation, was fundamental to the learning that they provide, fundamental to their degree.

But you've all noticed that most of us have gone online in significant part over the last year. So that argument is greatly undermined by the recent move of colleges and universities to complete or at least partial online education. And, in fact, I had this in a case, oddly, or coincidentally in December, a school said no, no. We cannot allow your student who has lung cancer and is allergic to some of the things in the classroom to participate by FaceTime.

And then two months later, they closed down and became fully online. So, like, well, that fundamental alteration argument is gone. And then the other defense that schools have is they don't have to do anything that would constitute a direct threat to the health or safety of others. And a direct threat is a significant risk of substantial harm that can't be mitigated by reasonable modifications.

But it has to be ‑‑ direct threat is defined as direct threat to others, not direct threat to self. And it must be an individualized assessment based on objective evidence, not assumptions. So we can't say anyone with bulimia is a direct left to themselves or to others. And because it's not individualized. We have to deal with this one student.

But even though direct threat is based on direct threat to others, schools are allowed to look at legitimate safety requirements that protect the student himself or herself. The key with those is you should apply the same direct standards, significant risk of substantial harm that you can't mitigate with reasonable accommodations.

And they have to be neutrally applied and necessary for the safe operation of the program. And too often you'll see things like students are ‑‑ have a code of conduct that says you can't be a risk to yourself. You can't do unhealthy things. But that the only students kicked out on that ‑‑ for that are the ones with eating disorders or depression or cutting.

Not the ones who are binge drinking and driving, speeding and doing other things that are dangerous. Stair diving. That was a thing when I was in college. I don't know if it's still a thing.
[ Laughter ]
I hope not. So I'm going to pass it over to Jennifer to talk about discipline.

>> JENNIFER MATHIS: Great. And I don't know if I can move ‑‑

>> EVE HILL: I'll move them.

>> JENNIFER MATHIS: Okay. Excellent. Thank you. So discipline ‑‑ the use of disciplinary proceedings is a major concern for students with disabilities and comes up all the time for students with mental health disabilities. Disciplinary charges and processes go hand in hand with other efforts including use of qualification standards to respond to disability‑related needs or disability‑related behaviors by kicking students out of housing, kicking students out of classes.

Kicking students off campus, expelling them from school altogether, disciplinary charges are most often used to impose mandatory leaves of absence on students and sometimes to expel them from school. And I think discipline is just a troubling frame in this context because it suggests punishment. And in most cases students don't need punishment when it's responding to a disability‑related behavior.

And if anything, they need help. And particularly when the school is concerned about a student being a threat to his or her own safety. So as the slide says, even when disciplinary action such as a mandatory leave of absence is intended to protect a student with a disability, it's for his or her own good theoretically, it doesn't mean it's not going to violate the ADA if it is overprotective or it's overpunitive, you know, exclusionary beyond what's necessary, that is still discrimination.

So in responding to a mental health disability, a college has to ensure that the response is proportionate, that the response makes sense so that you're not imposing exclusions, imposing leaves or other conditions that really are ‑‑ go way beyond what is actually necessary, if anything, is necessary to address the behaviors because then you're just excluding someone based on a disability.

And so, again, things that a school might do is protective like a leave of absence can still be discriminatory and harmful. And it is ironic that often things that are done in the name of protection can cause so much more harm than, you know, the original behavior that folks were concerned about, and the school maybe in removing somebody from school, taking away stability, taking away success,

Taking away social connection and all of that and actually making somebody's mental health ‑‑ aggravating somebody's mental health condition. Next slide. So, of course, a student can't be disciplined simply by virtue of having a mental health disability. Obviously, any discipline would have to be due to behaviors that arise as a consequence of the disability if those behaviors violate the disciplinary rules at the school, of course, those rules have to be applied in a nondiscriminatory manner.

And so, you know, just as Eve was talking about the codes of conduct that sometimes are applied only for students with disabilities or only to punish students with disabilities, obviously if that happens with a disciplinary code, then that is going to discriminate if it's not applied in the same way for the same types of conduct for students without disabilities.

And, of course, there is always the obligation to make reasonable modifications to discipline policies, reasonable modification means that it won't fundamentally change the school's program. Next slide. Like, for example, if a student with a mental health disability is acting in a way that the university thinks is disruptive, he can be disciplined or she can be disciplined just as a nondisabled student would for the same behavior.

Simply having a disability obviously doesn't give you a free pass to do the things that everybody else would get punished for and to not get punished yourself. But if the conduct is due to the disability, then you may be entitled to a reasonable accommodation, or the disability, in other words, may be a mitigating factor. So, for example, somebody acts in some sort of disruptive way, goes around campus screaming at people or something,

And, you know, it turns out that that student has just gone through a medication change and, you know, is having a particularly difficult episode because of that but, you know, it was a very limited period of time, and the student is fine now, and students ‑‑ a professional says, you know, there's no problem, then certainly that would be a mitigating factor and, you know, I would say that's a case where that student should be entitled to a reasonable accommodation rather than being disciplined.

The purpose of the rule is to prevent students from, you know, going around and harming or disturbing everybody else, and here that wasn't really ‑‑ that purpose is not being served by punishing a student in that kind of circumstance. So bottom line is, students are more likely to avoid disciplinary action if there's evidence that the school is seeking to punish the student for behavior that is actually disability related.

So wrinkle number 1. If a nondisabled student ‑‑ nondisabled students are not disciplined or not disciplined as harshly as students with mental health conditions for similar behavior, that, of course, would be discriminatory, and that is, again, the example that Eve gave before of codes of conduct that are broad and prohibit students from injuring themselves, harming themselves, but they're only applied to students in this case with anorexia but not to students who binge drink. That would be discriminatory.

Next slide. So even if a safety standard or conduct standard is legitimate, of course, disciplinary actions are subject to the requirement that there be a reasonable modification to reduce the risk of the harm. So there may be an ongoing harm that happens, if there is a way to mitigate that harm. So, for example, if the student would be fine and the behavior would stop with increased support or counseling or if the student needs to withdraw from a course or the student needs to reduce the student's course load or get an alternate

Assignment, take a course at home or online or a voluntary leave of absence, all of those are examples of reasonable modifications that are really an alternate response that is addressing the need, the disability‑related need, rather than treating it just as you ordinarily would treat conduct under a neutral conduct rule. If it is caused by a disability and you need this kind of accommodation to ensure equal opportunity for students with disabilities. Next slide.

So voluntary leave. Sometimes students take voluntary leaves of absence, and that obviously is a much better situation than students being forced to take involuntary leaves. Obviously, they have the right to be treated fairly and without discrimination in taking a voluntary leave. So one of the things that means is schools can't place treatment‑related restrictions when a student tries to return to campus.

And so that means, for example, if the school says, well, we'll let you return from your voluntary leave, but, you know, we want you to sign an agreement saying that you're going to see these professionals and those professionals, and you're going to report to us, you know, on your progress and your compliance with the treatment regimen, you know, all of that.

That is something that they can't do. At least there are, you know, some cases the Department of Education Civil Rights Office has said you can't do that type of thing. You're just imposing extra hurdles due to disability that aren't necessary. I don't know that, you know, every court win accept that, but certainly that has been our view of the law as well, and it's been the Department of Ed's. One things schools can do is they can require students to wait until the next semester starts or the next year starts

Before they can return if that's something that they would require of all students taking a voluntary leave, whether or not it's due to a disability. And students who are on voluntary leave should, of course, be allowed to be on campus to visit their friends, to use the facilities, attend events. Lots of time students are on campus where, in fact, lots of things happen, even nonschool related in school buildings.

And so rules that say you can't be on the campus at all when you're not in school seem problematic, and certainly when someone's on a voluntary leave, there's no reason not to allow that person to go on campus. Next slide. So involuntary leaves. This is, I think, the most common problem that the Bazelon Center encounters when we get calls from folks.

About campus mental health issues. Very often they are blanket leaves. In other words, a leave of absence that is always a certain amount of time or always within a certain range, you have to take a leave of absence of at least a year. We will not let you come back before then if you've had some type of mental health crisis or episode, and even then ‑‑ even in a situation where, you know, the person's treating professional says actually, you've been treating this person for a long time, and this person is fine.

This person ought to be back in school. There's no legitimate reason why the student can't continue, and she's perfectly capable of being in school and keeping up with her classes and being safe. We often face the situation where the school says, no, this is our policy, and you have to take a leave, and it has to be this lengthy period of time.

And I think those are discriminatory. They're just ‑‑ they're harmful, frankly. I alluded to some of these harms before. They can actually exacerbate a mental health condition by isolating the student, removing the student from social connections, and often removing the student from treatment. In one of the cases that we had brought, the student was banned from campus as part of a mandatory leave and could not see his psychiatrist that he had been seeing all of this time because the psychiatrist was on campus.

And so it really, I think, undermines the theoretical purpose of such leaves to protect the student. And, frankly, just, I think, sends the message many students receive the message of an involuntary leave. A lengthy leave is sort of we don't want you here. You know, we're concerned, especially in a case where someone has had suicidal thoughts or suicidal attempts, you know, sort of go kill yourself someplace else is how it is often received in the eyes of a student who has been forced onto an involuntary leave.

I think there's duplicate text, so we can go on to the next slide. Yep. So ‑‑ did we just ‑‑ I think one slide back. Yeah. That's great. In, I think, our view, the only time when an involuntary leave of absence is appropriate is if the student, after having an individualized assessment, really can't safely remain at school or can't meet the academic standards, and that those risks can't be managed with some type of reasonable accommodation.

And those would be pretty rare and limited circumstances. I know the Bazelon Center has said that cannot safely remain would mean that there really has to be a serious and imminent harm at issue to put a student on an involuntary leave. Otherwise I think it would be discriminatory. It would be an overreaction and exclusion beyond what is appropriate from school.

Next slide. And so blanket leaves, again, are not tailored to an individual's particular needs related to their disability. So a blanket one‑year leave of absence following a hospitalization for self‑injurious conduct, you know, may just reflect general stereotypes or assumptions about mental health disabilities that are not actually true in the case of, you know, the particular student.

Similarly, overly broad conduct requirements, things that are similar to all dangerous conduct is prohibited or destructive conduct is prohibited, if those are actually applied disproportionately to students with disabilities or primarily to students with disabilities, even if there are similar behavior from students without disabilities, then those would be discriminatory in their application. Next slide.

So before being required to take an involuntary leave, a student should get an individualized assessment. This is actually part of the direct threat regulation. So the school is supposed to conduct an individualized assessment that's based on current objective medical evidence. It's supposed to consider the nature and severity and the likelihood of the risk. Is this really likely to happen?

Is it really likely to have severe consequences? And, of course, whether the risk can be reduced or mitigated through some type of reasonable accommodation. And colleges, therefore, can't force a student to take a leave by citing safety concerns that are generalized, that are based on just assumptions or stereotypes about a mental illness rather than actually having gone through the analysis with this particular student. And that would generally mean talking to that particular student's treatment professionals

And understanding that student's history and really doing an analysis that takes into consideration what is likely for this particular person rather than, you know, some generalized rule or kind of best guess at what seems appropriate. And any request for medical information from the student should be narrowly tailored to just what is necessary to make that type of determination. Next slide. So returning from a leave of absence. Just as in the employment context, the ADA says requires can't require people to be 100% healed before they're allowed to return to work. A school can't require that a student with a disability be fully cured

Or symptom‑free or stable for some particular amount of time as a condition of enrolling in the school. The school can require documentation evidence that the risk that caused the removal in the first place is now reduced or mitigated. Re‑enrollment criteria should not be different based on what the leave was for. So if you took a leave due to a mental health disability, the re‑enrollment criteria should not be more stringent or different than those for a student who took a leave for a medical reason or some other reason.

Again, I think we talked a little bit about behavior contracts before and that they are problematic and tend not to be based on actual treatment recommendations, and that is something that certainly there are ‑‑ the federal agency, the Department of Ed has said can violate the ADA and 504. And just wanted to give an example of these provisions about returning from leave.

That ‑‑ I think it's in the resources. A mental health settlement with Stanford University, there was a group of students that sued Stanford and entered into a settlement that was primarily around Stanford's imposition of these lengthy leaves for long ‑‑ well, lengthy leaves ‑‑ that were involuntary and that were not based on, you know, the evidence about what was necessary or proportionate for particular students' disabilities but was based on just a general policy of imposing a certain length of leave.

Next slide. Assorted other issues. Housing. Obviously problems have come up, you know, accommodations can be requested due to problems with roommates, school housing policies, emotional support animals, or service animals. You know, I think we probably said emotional support animals here just because with the Fair Housing Act, it is broader than the ADA and covers emotional support animals as well as service animals.

Whereas for a public accommodation, the ADA would apply, and a student could bring a service animal but maybe not always an emotional support animal. With school housing policies, there have been plenty of cases and situations where students have been removed from student housing because of a disability‑related issue.

I'm going to talk a little bit about one of those cases, I think, in a couple of slides. Graduation credit requirements can become an issue when someone takes a leave of absence. I just want to touch on privacy issues, HIPAA and FERPA. This is a very complicated area. In general, when you are talking about students going to on‑campus counseling, then that is ‑‑ an on‑campus counseling center, that records would generally be covered by FERPA rather than HIPAA,

Because they are records about the student that are kept for the school. If a student is going to an outside mental health provider that is not connected with the school or even sometimes maybe it is connected in some way, it might be a university hospital that's at the same university the student is at. But sometimes those hospitals are not always treating the students.

So if it is not, if the records are not there, sort of for the school and the treatment is not done really at the behest of the school, then that's usually HIPAA. Like, this is an oversimplification, but I would say that in general, HIPAA is more protective than FERPA. You know, there have been a lot of concerns about students having their mental health counseling records disclosed by on‑campus counseling centers not only to parents but to school officials.

And there is an exception in FERPA about ‑‑ there's an exception to FERPA about a legitimate educational interest that school officials may have. And that exception does not exist in HIPAA, and that exception is pretty broad. And I think it is that that more than anything tends to result in those records being transferred in ways that the student might not expect and getting into the hands of school officials.

So, you know, sometimes, you know, many people advise students to seek counseling outside of campus if they can, if they're concerned about privacy of their counseling records. Next slide. Okay. We're just going to talk about a few of the cases that have been brought. This case, Doe versus Hunter College was a case brought by the Bazelon Center a number of years ago.

Wow! It's actually 16 years ago. Where the student took pills, tried to kill herself, and went to the hospital. And by the time she got back, they had changed the locks on her dorm room. The Hunter College prohibited her from returning to college for a couple of semesters and required her to get treatment and reapply for going back into the dorms.

They said that they were concerned about suicide contagion. That if she had attempted suicide, that this would somehow romanticize suicide and lead to a slew of other students also trying to commit suicide. And so there was a lawsuit brought and settled. She got back in the dorms and back in the school, I think. But I just want to read an excerpt from one of the records that she was asked to speak to the counselors at Hunter when this first happened.

And this is the type of attitude that I think we have often encountered around students who have mental health disabilities and who are struggling. And I think it just gives a flavor not to overgeneralize from this one record, but I just think it captures so much of the attitude that we see. The record says Ms. Doe appears to be a very needy individual who seeks attention. There is a great concern that she may again repeat the behavior she had already exhibited this past year while in the residence.

And she ended up having to live with her mother when she was kicked out of the dorm, and that caused a lot of problems and exacerbated her mental health issues because she had tensions with her mother. And they said the residence is not to be seen as an escape from the problems she has with her mother. So it's sort of really, I think, a patronizing attitude and, you know, a view that anybody who has struggles with mental health disabilities is not necessarily too emotionally needy a problem.

But in any event, there was a good settlement, and the policy under which she had been kicked out of the dorms for making a suicide attempt was rescinded. And next slide. Okay. Nott versus G.W. was another Bazelon Center case. This is a case where a student's best friend jumped out a window and committed suicide, and the student started to feel depression and anxiety and ended up checking himself into the hospital on campus.

And was worried about, you know, himself after I think he talked to the counselor who said, well, what about you? And are you thinking about suicide? And he said no, but then he starts thinking, gee, they have put me on this medicine, and I understand that one of the side effects of the medicine is it can create suicidal ideation. And so he gets very nervous.

So anyway, he goes to the hospital. And then within hours, school officials are at the hospital telling him he can't come back to his dorm. And then the next day they serve him with a notice that he has violated the school disciplinary code by endangering ‑‑ by creating some kind of danger, presumably to himself, and that he was now barred from campus, and he could not go back to his dorm room.

He could not go to any place on campus. He could not go to the Lisner Auditorium where there are public concerts. He had to sit in a police car on the campus while his parents went up to his dorm room to retrieve his clothing and his belongings because they wouldn't let him up to his dorm room. And it was really ‑‑ it was really just a traumatic experience for him.

That case settled, and there's a confidential agreement. Next slide. That was one of the cases that I think originally got us interested. This is a more recent case, Alejandro versus Palm Beach State College. This was actually a case involving a service dog. It was a woman who had PTSD and was a student at this public university that would not let her take her psychiatric service dog to class.

It helped her avoid panic attacks. It was, like, one of those little dogs in a bag. I think that they saw it as not legitimate even though it was trained to help her do a lot of very important things and really did reduce the number of panic attacks that she had. She was repeatedly removed from classes by security guards because she had the dog there.

She failed a class because the professor wouldn't let her show up without the dog. And so she couldn't come because she was having too many panic attacks. We got a good ruling in that case and then settled. And she was ‑‑ anyway. I think that she ended up going to a different school afterwards if I recall. It's been a while.

But it was a good settlement. And I think that Eve is going to talk about the next case on the next slide.

>> EVE HILL: So this U.S. versus University of Tennessee Health Science Center was one of the first cases that the DOJ took on when I was there involving a student with PTSD who experienced a crisis and agreed to a two‑week voluntary leave of absence and some other accommodations, having her assignment deadlines extended.

But when she returned from leave, the school placed her on a mandatory medical leave of absence. Prohibited her from submitting her work despite having giving her extensions, and prohibited her from contacting professors or other students and banned her from campus and from school and email. Just cut her off completely from the school.

She came back the following semester, and they refused any accommodations at all. Refused to accommodate her by giving her extension on assignments and charged her with unprofessional conduct. So the Justice Department reached a settlement requiring them not to act in these blanket ways against students with mental illness.

So they required an individualized assessment based on the direct threat standard, based on current medical knowledge and objective evidence to determine whether someone was a direct threat or not. They had ‑‑ the school agreed to amend its leave of absence policy, again, requiring an individual assessment prior to any mandatory medical leave, and it had to be based on the student's treating physician and recommendations from university health professionals.

So it couldn't be based on something that was not a health professional. It required consideration of reasonable modifications that would help avoid any need for a leave of absence and allowed mandatory leave only if continued participation would require unreasonable modifications or fundamental alterations if the student rejected all reasonable modifications or if even with the reasonable modifications, the student could not meet the essential eligibility requirements of the degree.

So it required ‑‑ and then it required that those eligibility requirements and discipline policies be amended so that they wouldn't be based on stereotypes or generalizations, and they would be subject to reasonable modifications even once they were nondiscriminatory. They also had to change the student's grades and gave her $45,000 in damages.

Then in what was both a DOJ action and a private lawsuit, a student impulsively took an overdose of antidepressants in his dorm room and then went on his own to the hospital. And Princeton, quote, voluntarily withdrew him from its program, which was not at all voluntary.

So DOJ reached an agreement with Princeton requiring them to change its policies on leave of absence and reinstatement to allow not full‑year leaves of absence but one semester, two semester leaves of absence, and to allow for reasonable modifications when a three‑semester leave was needed. Because when you were gone for three semesters, they would boot you out from the whole program.

Then they went on to ensure that Princeton's counseling and psychological service treatment recommendations to students were individualized and based on medical knowledge and objective evidence, not based on the assumptions in the school's code of conduct.

And that they included the opinions of the student's treating physician. You couldn't just do there on the basis of the school's medical professionals.

It also required Princeton to revise its forms of reinstatement, to prevent using a discriminatory eligibility criteria like have you previously had an attempted suicide? And then requiring individual assessments using the direct threat and legitimate safety standard. And students in the independent suit settled in 2019. I have not been able to see that settlement, but I imagine it involved damages.

So we've put together some resources for you. One is a shameless plug for my latest writing on higher education's next great challenge, ensuring full inclusion for students with disabilities, which I actually refer to as higher education in ADA 2.0. Bazelon's publication campus mental health: Know your rights. And Bazelon's publication on emotional support animals, as well as the Stanford Mental Health Settlement that Jennifer referred to,

And a 2019 Department of Education guidance on the interaction of HIPAA and FERPA, which is ‑‑ I don't know how long for this world it is, but it is what the guidance is right now. So this is Jennifer. And this is me. You can call at least me any time. I won't be there because that's the office number in Baltimore, and I'm currently in my bedroom.

But I do get the messages.

>> JENNIFER MATHIS: Same thing here.

>> EVE HILL: And now I think we have a good amount of time for questions if people have them. And I think there are some.

>> JENNIFER MATHIS: And I've been answering a few that have come up in the chat.

>> EVE HILL: Ah, I couldn't look at the chat because when I share my screen, I share my screen.

>> PAUL GROSSMAN: Eve, I just sent you a proposed answer to one of the questions.

>> EVE HILL: Oh, my God. How did you even do that? So what do you suggest to do when a student is having mental health concerns but has no actual diagnosis or previous diagnosis? Jennifer, do you have suggestions on that?

>> JENNIFER MATHIS: Could you read it again? What ‑‑

>> EVE HILL: What do you suggest to do when a student is having mental health concerns but has no actual diagnosis or previous diagnosis?

>> JENNIFER MATHIS: Yeah. Well, I guess I'm not sure ‑‑ you know, in what context the question arises. Like, is the student having a problem? Is the student having an issue related to ‑‑ we think is related to a mental health issue, in which case if that is the case, I would seek help, whether, you know, there is an on‑campus counseling center, whether the student has, you know, student's own doctor that can refer them someplace.

As I say, personally, even though I think it's great that counseling centers are on campuses, I like the idea of people, if they can and if they can afford it, which sometimes is not possible where the student's health insurance is only covering student counseling centers, but sometimes that health insurance will cover or the student will be on a parent's health insurance, and it will cover counseling off campus.

I think for privacy reasons, if that is a possibility, that is always good. But if the issue is sort of just the person's having some trouble, I think, you know, going to try to get a diagnosis, going to try to get help is good if the issue is that the person is more needing academic help, then I would just seek that. But if the academic issue is related to the mental health issue, then obviously having a diagnosis first will enable you to seek accommodations that you couldn't otherwise seek.

>> EVE HILL: And in some cases it depends on what the accommodation is. I mean, you do want to help people get help. But it depends on if they're coming to you for an accommodation because they are experiencing anxiety, if the accommodation is not that big a deal, you can do that. Particularly if you do it for other students.

You know, my parent is ill and I need to take time off. We do that for other students. It doesn't have to be a disability accommodation. And those things could still be provided even without a diagnosis.

>> JENNIFER MATHIS: Exactly.

>> EVE HILL: Let's see. I think Jennifer answered some of the ones in the chat. The slides are available.

>> JENNIFER MATHIS: I just want to highlight one of those, too, in the chat. Because it was a good question. This issue of what if a student hasn't registered with the Disability Services Office. And I know that comes up a lot. And I think ‑‑ I mean, my own experience is that Disability Services Offices tend to work better, I think, for certain types of disabilities and not as well for others, and mental health is certainly one where often it feels like a little bit of a mismatch.

And it depends on the type of accommodation that somebody might be seeking. But number one, mental health disabilities are such that they often emerge exactly during this time period when a student is in college. And so they may not have been there before. The person may not have recognized that there was a disability before.

And so the first time that an issue comes up ‑‑ and this actually happened in the WP case that Eve mentioned. I think the student finds himself hospitalized and, you know, the student is asking for an accommodation from the hospital. And the school is saying, sorry. You haven't registered with the Disability Services Office.

Well, I'm sorry I didn't know I was going to have a crisis and, you know, develop a psychiatric disability and wind up in the hospital. So I didn't pre‑register. I didn't plan for that. And so, you know, it really, I think, is sort of ‑‑ it's not ‑‑ it makes sense in terms of preparation for the school to be able to offer certain types of accommodations like on testing and to, you know, ask for appropriate documentation where they need it.

For, like, maybe a learning disability for testing purposes or something. But for many situations, you're just not going to have gone to the Disability Services Office first to register, and that makes sense. And that should not be ‑‑ and there's nothing in the ADA that suggests that that would be a barrier to you being able to exert your ‑‑ assert your rights.

>> EVE HILL: Also, registration with the Disability Student Services Offices, while it is generally the way schools have you request your reasonable accommodation, the ADA says there's no particular way to request reasonable accommodation. And so they may not have done it through the Disability Student Services Office. They may have gone directly to a professional. There is nothing illegal about that on their part.

It doesn't form a basis to deny their reasonable accommodation request. Professors, then, and everybody else should be told when you get a request for reasonable accommodation, please refer them to the Disability Student Services Office. Don't just say no. Because that could be taken as the decision of the school.

So one of those student ‑‑ no, that was that one. You want to talk ‑‑ mental health treatment records are not considered treatment records and thus subject to HIPAA guidelines.

>> JENNIFER MATHIS: I took that one.

>> EVE HILL: Okay.

>> JENNIFER MATHIS: And I tried to put in ‑‑ I mean, this is complicated. FERPA has both treatment records and education records. Treatment records are more protected, but treatment records can become education records once they're disclosed. If it's a treatment record, that means for FERPA that it's kept only for treatment purposes.

It's something that's only seen by the treating professional. It's not shared with anybody. But those records can be disclosed under, you know, all of the FERPA exceptions. You know, somebody thinks it's an emergency or it's necessary to avert a safety concern. And so once they're disclosed, then they become education records. And then they have less protection.

And so there is that. But I think ‑‑

>> EVE HILL: And my big problem with that difference is that students and everyone assumes that going to a health care provider is covered by HIPAA.

>> JENNIFER MATHIS: Right.

>> EVE HILL: If you're not going to treat those things as HIPAA covered, there really ought to be very clear notification at the beginning because you're tricking students into turning over information to people that they never expected it to be turned over to.

>> JENNIFER MATHIS: Right. And FERPA has the exception for legitimate education interests. I think it requires schools to do an annual report that defines what they consider to be a legitimate educational interest. So arguably it puts students on some kind of notice that, you know, if you're going to ‑‑ well, exactly, Eve.

>> EVE HILL: Nobody reads that.

>> JENNIFER MATHIS: Exactly. That's just about what I was about to say is that who actually reads these things?

>> EVE HILL: And you don't read it at the time you make an appointment with campus counseling.

>> JENNIFER MATHIS: Exactly. Exactly. But ‑‑ and so all of that is sort of a different question than, right, HIPAA versus FERPA and the fact that I think in the original question it said if there are treatment records, doesn't that mean they're HIPAA? And the answer is no. You know, whether they're HIPAA or FERPA is not about whether they're treatment records.

It's about, you know ‑‑ well, if they're FERPA, they're not HIPAA. That's one thing. And if they're covered by FERPA, they're covered by FERPA if they're done for a school. Even if they're kept by somebody outside of the school, but it's, you know, for the school, and the school gets federal money and the records relate to the student.

And HIPAA is just, you know, a health provider or health insurer keeping protected health information and transmitting billing electronically. And so, you know, ordinarily, I mean, this is an oversimplification, but ordinarily in the world, you'd go to a health provider. Your records are going to be covered by HIPAA.

But if it has anything to do with the school and you're getting some kind of health treatment that is sort of connected with the school and really done sort of for the school, then it's going to be FERPA.

>> EVE HILL: And Paul, you had something to add?

>> PAUL GROSSMAN: Yeah. I just wanted to add a supplement to Jennifer's response to the question, what if a student is not registered with DSS and your answer as well. I think it's important to remember that there are three basic kinds of disability discrimination that occur on campus. One I would call harassment or stereotype discrimination.

And a student need not be registered with DSS at all for protection against that kind of discrimination because they're not asking for an accommodation. They're just being asked to be treated in a nondiscriminatory fashion. And if a student files a claim of disability harassment and the school comes to you and says, is this student registered with you? Well, that's relevant, but it's not determinative at all. The student need not have registered with you to be protected.

The second kind of discrimination we call disparate treatment discrimination. And both Jennifer and Eve talked about that in terms of as an individual with a disability, you are certainly entitled to be treated the same as any other student on campus. So if students are not disciplined for minor alcohol rule breach, then students with disabilities cannot be disciplined for that either.

>> EVE HILL: Right.

>> PAUL GROSSMAN: The difficult question comes up over the third major kind of allegation, failure to accommodate. And on here, there's not a consistent position among all the courts. But I will do my best to just give you the short answer.

Most discipline questions when dealt with by OCR and the courts are whether the student is a qualified individual with a disability. And if you represent a direct threat to the health and safety of others or if you cannot comply with the essential elements of the code of conduct, you might not be a qualified student with a disability.

That depends on whether even with accommodation, you cannot comply with the code of conduct, or even with accommodation, you still represent a direct threat to health and safety. And if you never went to the DSS office to ask for an accommodation and the school has made it crystal clear where the DSS office is, how to register with DSS, it's briefed all its faculty to tell student ‑‑ to tell faculty if a student wants an accommodation, send them to DSS.

Then from OCR's perspective, the student may be at least temporarily out of luck. They didn't ask for the accommodation. Too bad. It's too late. The courts, however, are not so clear on this. Because some courts allow students to make a prospective argument. Going forward, if I got this accommodation, I would not represent a direct threat to health and safety. Going forward with this accommodation, I could comply with the code of conduct. And there prospectively, I will be a qualified student with a disability,

And you need to give me a second bite at the apple. Some courts are like OCR, and they don't give you, as an accommodation, a second bite at the apple. So if I was representing a student, of course I would try to make the prospective argument. But, you know, if I was counseling a student, you know, what would OCR say at this? Well, if you never asked for the accommodation, you might be, at least temporarily, out of luck.

So it's not quite crystal clear and consistent. And moreover, one complicating thing is even though courts tend to allow students to make the prospective argument, they're not often successful. I don't want to say never, but they're often not successful. I just wanted ‑‑ I'm not contradicting anything that Jennifer, you've said. I just wanted to Wade into the weeds here just a little bit.

>> EVE HILL: Thank you, Paul. Another question that I find interesting. How would you address a student with an anxiety disorder that is documented and they refuse to wear a mask on campus, saying it exacerbates their disability, and the university requires the wearing of a mask?

I think those are the kinds of things that we're going to be seeing in all kinds of contexts now. And one of them is you've got ‑‑ one of the ways to look at it is, you've got one person who has a disability and can't do something that is risky to other people with a disability ‑‑ without disabilities, without current disabilities.

But you could look at that as legitimate safety requirements. You still have to do reasonable modifications. Can the person wear a different type of mask like one of the clear cover the face masks? Can the person be seated further away from people so that they're well beyond the 6 feet? We also have to recognize the masks ‑‑ you know, who the masks protect most.

So I think there are a lot of things to try and work on around that. There's currently no clear answer that I know of when you get into these positions. It's almost a dueling disability position. But I would treat it under the legitimate safety requirements and make sure it's really a threat and that there's nothing you can do to mitigate the threat before you tell that person that they must wear a mask or that they can't participate.

The other way to look at it is can they participate in a different way? Can they participate by video?

>> JENNIFER MATHIS: And nowadays I feel like that accommodation may be more widely available since we're doing so much video and so many schools have hybrid classes. So right now, actually, that might be a good possibility because they're already probably doing it by video.

>> EVE HILL: And then is COVID‑related brain fog going to be considered a mental immaterialness? I don't know if it's going to be a mental illness. It may be a cognitive disability. And, no, no one knows at the moment. But if it substantially limits life activity, it should be a disability. That's the determination.

>> JENNIFER MATHIS: And there's been a lot of questions, in general, about whether COVID will be considered, you know, sort of a per se disability. I think based on all of the law that has said all of these years that there are no per se disabilities, that the ADA disability determination happens case by case, the agencies have been reluctant to carve out, you know, per se disabilities but have kind of come close ‑‑

>> EVE HILL: Close.

>> JENNIFER MATHIS: ‑‑ by saying there are some disabilities and have listed many of them that they say are virtually always going to be disabilities when you do the analysis. Whether they do that for COVID, it's sort of unclear just because it manifests differently in different people. And I think that they will probably say some things and they'll give some examples of things that ‑‑ situations where COVID is a disability clearly because it does substantially limit some major life activity.

Personally, I've always thought, well, because it requires everybody to distance, it substantially limits social interaction with people. But, you know, maybe not over sort of a very long period of time. And so there is that. But ‑‑ and ADA disabilities can be short, but they are supposed to be ‑‑ very severe if they're short. You know, I don't know what the agencies are going to do with it, and I suspect that nobody is going to want to say that it is always a disability in every circumstance,

But they will try to give as many examples as possible of where it is or may be a disability.

>> EVE HILL: And with brain fog specifically, we have faced that in terms of chemo brain and other things where something about the treatment or the basic disability also affects this aspect. And those have been accommodated. So this one terrifies me a little because I'm going to have to get in a fight with general counsel. But we have talked to general counsel already about the question regarding online learning as an accommodation post‑pandemic.

But they explained that if classes are taught fully in person again, this would revert back to an undue burden. Can you elaborate on your previous point that this argument doesn't work post‑pandemic? It doesn't work post‑pandemic because once you've done it, it's not a fundamental alteration or undue burden.

It doesn't matter that you stopped doing it now. Fundamental alteration and undue burden doesn't depend on whether you do it for everybody. By definition, a reasonable accommodation is something you don't do for everybody! Whether it fundamentally alters your program or not, very seriously undermined by the fact that you just did it for everybody for a year!
[ Laughter ]
No, we're not going to pretend the year didn't happen! As much as we might like to.

>> JENNIFER MATHIS: And now they've got the equipment and all the know‑how.

>> EVE HILL: And you know how to do it!

>> JENNIFER MATHIS: And all of that. So they might say, well, the person who ‑‑ there's nobody staffing, you know, the online, you know, classes in the same way, helping the professor or whatever. But it seems like it wouldn't be too hard to do it if you've been ‑‑

>> EVE HILL: Well, yes. And, you know, we require note‑takers. We require all kinds of extra staff. The person to push the Zoom button that moves the slide forward.

>> JENNIFER MATHIS: Exactly.

>> EVE HILL: Could be another student just like the note taker is.

>> JENNIFER MATHIS: Exactly.

>> EVE HILL: Sorry, general counsel. It happens all the time. So I also want to do this one. What do you see as the greatest challenge for online learning and disability? And my answer to that is the fact that colleges and universities have paid little to no attention to whether their online learning platforms and materials are accessible to people with blindness, vision impairments, and other print disabilities.

And having to do that on the back end is hard and slows everything down. You have to do it fast. But if you pay attention to it at the beginning, it's easy, and it happens automatically. But the vendors are not putting priority on this because the colleges are not asking them to and not including it in the contracts.

And sadly, the colleges are the ones on the hook for it under the ADA, not the vendor. So if it's not in your contract has it has to be accessible and that you check it to make sure it's accessible, when it doesn't meet your obligations, you're on the hook for that. So I think that's the biggest thing I see is that you can build in a lot of accessibility for a lot of people with disabilities if you pay attention to it in the beginning, the tech part.

And you can leave them all out and get in huge trouble if you just say, eh, it must be okay.

>> JENNIFER MATHIS: So this question ‑‑ I'm not sure that it works in the reverse. Does that mean that classes that are fully online would be required to be held in person if a person needs or requires in‑person teaching? And many students who struggled with online and wanted in‑person tutoring and teaching.

So I think it depends, right? I mean, if there are some classes that are happening in person or even if there aren't but, you know, if you have a teacher who is willing to go in person, if the building is open, I mean, it depends on, I think, a lot of factors. It's not quite as easy to envision how it quickly happens as, you know, the other way where you have ‑‑

>> EVE HILL: Right.

>> JENNIFER MATHIS: ‑‑ people teaching in person now, but can easily do online.

>> EVE HILL: And that also depends on whether we're still in the pandemic or post‑pandemic. If colleges are doing online teaching now because they don't want people in the buildings and congregating, then you may want ‑‑ you may ‑‑ it may be an undue burden right now to provide for in‑person teaching, particularly if the teacher has a problem, that makes them particularly susceptible to COVID or tutoring.

But you could do individual ‑‑ it doesn't necessarily need to be in person to be individualized. So those things, just like they've always been, could still be a combination. After the pandemic when people are able to come back and yet a school decides to continue to be online, once again, I think you can treat it like tutoring is treated in general.

Do we provide that individual assistance for students, and if so, we can provide it in person again because we know we can because we've been doing it for the last 20 years before this year.

>> JENNIFER MATHIS: I think that's about it, unless there are ‑‑

>> EVE HILL: In the chat ‑‑ or in the Q&A, thoughts on being a residential campus and has now shared that a mental health diagnosis tied to COVID‑19 realities, is there rationale for an exemption from the residency requirement?

That's an interesting question as well. Disabilities ‑‑ students with disabilities can get accommodations to ‑‑ what are often first‑year residency requirements. If there's something about their disability that prevents them from living in the dorms makes it unsafe or problematic for them to live in the dorms.

And so the same thing would apply now. Whether it's just the risk of getting COVID as opposed to a mental health diagnosis that you mentioned here, the risk of getting COVID isn't a disability unless the person has a disability that's particularly susceptible and particularly dangerous if they get COVID.

If students are asking to stay remote for an accessible need, how do disability services offices support this request if there is no buy‑in from faculty and/or the college administration? That's your whole job, I feel so bad. Part of it is, what I've said, and I'm a plaintiff's lawyer, so take it with a grain of lawyerness. Faculty don't get to decide this stuff. This is a school policy. And the school's the one who's going to get sued if the student has an ADA violation, not the faculty member.

So, you know, all you can do is say, look. It's the law. I didn't make up the law. You don't get to undermine the law or disagree with the law. It's just the law. I am interested in a bit more information regarding emotional support animals. I see a lot of letters that are purchased online or letters that do not have the nexus of the disability and the need for the ESA.

Our campus is getting overwhelmed with requests, and a good portion are from the online websites, those who are not doing true assessments. "A," any advice on handling these and responses to those types of letters? And "B," is ESA considered a prescription? If so, is it appropriate for professionals who are not allowed to be prescribing ESA when they cannot prescribe any other mitigationlike meds?

>> JENNIFER MATHIS: Well, for title III of the ADA, it doesn't recognize emotional support animals, just psychiatric service animals or other service animals.

>> EVE HILL: But assuming this is a dorm.

>> JENNIFER MATHIS: Right. I was just going to say, if it's a dorm, then it would be the Fair Housing Act. And emotional support animals are required. Yes, there are, you know, fraudulent ‑‑ or not fraudulent, but, you know, people are getting letters. It's not limited to emotional support animals. It's any kind of animal people can get letters from, you know, people online that have never actually ‑‑ that don't know anything about the animal.

And have never seen the person or the animal and can't really actually attest to, you know, whether the person has a disability or whether the animal accommodates a disability. I think rather than kind of getting wrapped up in the, you know, sort of online stuff, you can ask for some type of documentation that the student actually has a disability.

You know, it doesn't need to be a lot, but that's fair. You know, are they ‑‑ if somebody has a disability, they can get to a treating professional who can give you some sort of reasonable confirmation that the student has a disability and, you know, that person can generally attest themselves to whether, you know, the student could talk to them about, you know, that I'm now using a support animal, and this is how it accommodates me.

This is what it does. And that's what matters. And so, you know, these online websites, I think, don't really ‑‑ they're not particularly meaningful, particularly if they can't actually tell you that the person has a disability in the first place. So then they can't really understand much about how the service animal ‑‑ the emotional support animal is accommodating the disability.

But, you know, just getting to somebody who is a professional who, you know, actually is their treating professional or has seen the person and can say something about the animal accommodating the disability.

>> EVE HILL: I would say ‑‑ and I agree with all of that ‑‑ you do have to have a diagnosis, so that's the key to focus on. Somebody certifying something as a support animal doesn't have anything to do with whether they have a diagnosis or not, so start there. The other thing is you're not required to accommodate someone who doesn't have a disability or anything that is not, in fact, an emotional support animal.

These online certifications raise red flags that that might be the case. If you reject them and you're correct that the person either doesn't have a disability or it doesn't ‑‑ or doesn't need an emotional support animal or isn't an emotional support animal, you are perfectly in the clear. If you're wrong ‑‑
[ Laughter ]
‑‑ so it's just a risk of deciding, am I right to go with this, or am I wrong when I don't trust this documentation that the student is providing? If you're right, all they can do is yell at you. Can you speak to the practice of some instructors to set limitations for online exams that prevent students from reviewing and adjusting their answers to multiple choice questions?

I could say a lot about that, but none of it would be appropriate. Why?
[ Laughter ]
And I can't see why that couldn't be reasonably modified, also not entirely sure ‑‑ I have not faced this ‑‑ what the disability is that would require that to be modified.

>> JENNIFER MATHIS: And ‑‑

>> EVE HILL: I would just say it's mean.
[ Laughter ]

>> JENNIFER MATHIS: What are your thoughts on housing accommodations for a single room for a diagnosis of anxiety? I can't live with a stranger, and pediatrician, a student needs a single room in their first year, first semester student. Yeah. I mean, I think that is a legitimate accommodation. Obviously, it's not always going to be available depending on, I guess, you know, how filled the dorms are and, you know, how many single rooms there are.

And if there are kids already living in them. Is it a reasonable accommodation to ask somebody else to move? It might be. But, you know, it seems like most campuses have some single rooms available specifically for that reason. And I think that that ought to be a reasonable accommodation. Yes, there may be ‑‑ obviously, you know, then if 15 other people come forward and request, you know, the same accommodation at some point,

There aren't going to be more rooms and it's not going to be a reasonable accommodation. Obviously, as we said before, I mean, it has to be a real disability. You know, you get to ask for some kind of proof that, you know, the person actually has a disability and that this is, in fact, you know, a need to accommodate that disability and how it will do that.

>> EVE HILL: Here's one. Do you advise that when students register with disability services office, that they are given clear information about FERPA versus HIPAA so they understand the difference? I do think that's a good idea. And just as importantly, I think it's really important that when a student sees a counselor, a school‑based counselor, they get that same information that this is FERPA and we can turn it over, and not HIPAA.

>> JENNIFER MATHIS: Somebody has the classic question about conflicting accommodation needs to different disabilities. Yeah. I mean, I think in this case, obviously this question is about two students rooming together and one has an allergy to dander and fur and the other is seeking an emotional support animal and does have a disability.

>> EVE HILL: Which roommates?
[ Laughter ]

>> JENNIFER MATHIS: Right. And so, you know, I mean, one accommodation is obviously ‑‑ well, either getting them ‑‑ it depends on how severe the disability is. If they're in different rooms, if you put them in a room ‑‑ in a dorm room where there are separate bedrooms with closed doors, does that help, you know? If not, then I think the accommodation is having them live in separate places.

>> EVE HILL: Have you heard of this issue of accessibility for Pearson My Math Lab products? Why, yes, I have. I'd be happy to talk more. And by the way, we are out of time. We should give our ‑‑ I should give ‑‑ I'm happy to give my email address. It's ehill@brown ‑‑ like the color ‑‑ gold ‑‑ like the color ‑‑.com.

>> JENNIFER MATHIS: And mine is Jenniferm, as in Mary,@Bazelon, B‑a‑z‑e‑l‑o‑n.org.

>> EVE HILL: So thank you all very much. It was a pleasure talking to you. I particularly liked the questions. Thank you, Jennifer.

>> JENNIFER MATHIS: Thank you, Eve. All right.

>> EVE HILL: Bye.

>> JENNIFER MATHIS: Bye.

>> KIM RICHARDS: Thanks, everyone, for attending and a big thank you to Eve and Jennifer for sharing all their wealth of knowledge. Obviously, AHEAD does need to take Paul's suggestion of collaborating with the Bazelon Center going forward. So I'll see about that. We had a great turnout today. As a reminder, I know by Monday, maybe tomorrow, but definitely by Monday, the recording to this webinar as well as the PowerPoint will be available by accessing your e‑learning account.

If you have trouble accessing that account, you can send an email to ahead@ahead.org. Or you can call our office at 704‑947‑7779. So we will catch you all next time. Thank you so much for joining us.