



The Intersection of ADA and COVID - A Discussion on Evolving Strategies

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In Brief Summary: The Legal Framework

- Unchanged, e.g., Section 504 of the Rehabilitation Act of 1973 , ADA
- Section 504 of the Rehabilitation Act
 - “No otherwise qualified individual with a disability in the United States, . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .”
- Americans with Disabilities Act
 - “[N]o 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 subjected to discrimination by any such entity.”

In Brief Summary: The Legal Framework

- Office for Civil Rights of the U.S. Dep’t of Education (“OCR”):
 - COVID-19 has not changed the legal standard, “whether an institution serves students in a brick and mortar or an online environment.”
- Equal Employment Opportunity Commission (EEOC):
 - “EEO laws, including the ADA and Rehabilitation Act, continue to apply during the time of the COVID-19 pandemic, but they do not interfere with or prevent employers from following the guidelines and suggestions made by the CDC or state/local public health authorities about steps employers should take regarding COVID-19.”
 - Employers who allowed employees to telework during the height of the pandemic were not necessarily required to offer teleworking as a reasonable accommodation after offices reopened.
- Important to:
 - be flexible and
 - make an *individualized determination*

Guidance, Enforcement Activity, and Litigation

- Relevant OCR Guidance
 - [Resource Collection for Postsecondary Institutions](#)
 - [DOE COVID Handbook Vol. III Safe Operation and Addressing COVID-19 Impact](#)
 - See "Questions and Answers on Civil Rights and School Reopening in the COVID-19 Environment" (May 13, 2021)
 - <https://www.ed.gov/news/press-releases/department-educations-office-civil-rights-opens-investigations-five-states-regarding-prohibitions-universal-indoor-masking>
- EEOC COVID-19 Guidance
 - See "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws" (Updated May 28, 2021)
 - <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- COVID-19-Related Litigation Activity

Navigating Accommodations Requests in the Learning and Working Environments

To Begin: Distinguishing between ADA Requests and Non-ADA Requests

- Many overlapping types of requests in the face of Covid
- Important to begin analysis of requests and campus response structures by distinguishing ***what type*** of request is being made
- **Not all requests implicate the ADA**
 - Likely seeing *many* requests not related to employee's own medical condition, but rather that of a household member
 - Unvaccinated children, at-risk family and/or household members
 - Religious or other beliefs

Distinguishing between ADA Requests and Non-ADA Requests

- Clear processes and structures for different kinds of requests: helpful to entire campus community and staff facilitating processes
- Office(s) responsible for the interactive ADA process facilitation may not be best positioned to facilitate other types of accommodation request processes
 - If they are doing so, provide clear and consistent information about what process they are following
- Support from public health experts on campus will likely be important to the individuals in the ADA accommodations office(s) – some requests are raising novel and challenging questions
- Remember: Individualized, case-by-case analysis is critical (even where there are general blanket rules generally in the non-ADA context)

The Interactive Process

- Engagement in good faith by both parties
- Analyze the essential functions of a job or the fundamental nature of a program/service
 - Does the position exist to perform that function
 - Does the function require a degree of expertise or skill
 - What's the objective of the course/program
- Determine and understand the functional limitations of the individual with a disability
- Explore potential accommodations

Doe v. Univ. of Ky. (E.D. Ky. 2021)

- Defendant Univ. of Kentucky offered admission and full scholarship to Plaintiff Jane Doe, in November 2018
- Doe sought accommodations for her dietary restrictions
- Univ. of Kentucky offered numerous accommodations that Doe rejected
- Court concluded that the allegations of failure to accommodate failed:
 - “As the record reflects, UK offered Plaintiff every accommodation that Plaintiff *originally* laid out, . . . without success. . . if Plaintiff rejects a reasonable accommodation, she is no longer a ‘qualified individual’ as a matter of law.”

Learning Accommodation Requests

- Remote lectures, sections, labs
- Testing
- Housing & dining
- Note taking & recording & video captioning
- Course materials in advance
- Course load reduction
- Meals in class

Faculty and Staff Accommodation Requests

- Remote office hours
- Information about students
- Remote teaching and work
- Reduction of classroom size
- Supplies
- Classroom location
- Reduced workload
- Remote site accommodation

Fundamental Alteration & Undue Burden

- Still applicable and in some instances, “an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now”
- What's relevant?
 - Whether current circumstances create "significant difficulty or expense" in acquiring or providing the accommodation
 - some unique pandemic-related issues:
 - More difficult to provide temporary assignments
 - Delivery of items impacted
 - More difficult to reduce non-essential functions of the job
 - Budget and resources of the institution post-pandemic

Fundamental Alteration & Undue Burden

- Required to provide reasonable modifications to policies, practices, and procedures when such modifications are "necessary to avoid discrimination on the basis of disability, unless [the institution] can demonstrate that making the modification would *fundamentally alter* the nature of the service, program, or activity." *See generally*, Consent Decree, Dudley and the United States v. Miami University, et al., Case No.: 1:14-cv-38 (2016).
- Review and assess the course
 - collaborative process involving pertinent officials
 - considered alternatives
- Individualized assessment
- Follow-up

Building the Record

- Institutions have wide discretion to make essential function/fundamental alteration decisions
- Institutions' ability to explain and defend those decisions will be enhanced by a process that is:
 - Intentional
 - Deliberative
 - Documented
- Consider analogy to process of building record in support of student affirmative action programs

Case Scenarios

- A dean makes an accommodation for a faculty member to teach remotely without going through any institutional process (at an institution that is returning to in-person only instruction and has denied nearly all requests to teach remotely)
- A student requests remote instruction at an institution that has returned to all in-person learning
- Multiple teaching assistants refuse to come back to the classroom at an institution that is only offering in-person classes



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Legal Implications of Policy Decisions

- Does the determination that a remote teaching accommodation is not a fundamental alteration of the program impact learning accommodation requests?
- Do our policy decisions around remote learning accommodations enlarge or bridge the equity gap?
- Does a determination that a remote learning accommodation amounts to a fundamental alteration of the program impact student fee class action lawsuits?

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Implications for COVID-19-Related Tuition Refund Litigation?

- Reconciling explanation of unprecedented global pandemic response with essential on-campus work and study requirements
 - Public communications
 - Court filings
- It can be done!

ADA Issues Related to the Vaccines



Faculty and Staff Vaccination Issues

- Emergency Use Authorization vs. FDA approval
- <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
 - See Q&A K.1 through K.21
- CDC Workplace Vaccination Program
 - <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/essentialworker/workplace-vaccination-program.html>

Faculty and Staff Vaccination Issues

- Classroom controversies and faculty issues
- Staff issues
- Accommodation dialogue
- Undue hardship/direct threat analysis
- ADA Office role
- Pres. Biden Order/OSHA rule
 - Intersection with ADA

Student Vaccination Issues

- General validity of vaccination mandates
- Recent litigation
- Housing-related issues
- Classroom controversies
- Accommodation dialogue, undue hardship/direct threat analysis
- Exemptions
 - Disability-related
 - Religious
 - Other

Intersection between Covid and Pregnancy: ADA Considerations

- Not a disability under the ADA or Section 504
 - Resulting impairments may be a qualifying disability
- Interplay of Pregnancy Discrimination Act (PDA) and the ADA – Requires employers to provide reasonable accommodation to pregnant employees with work restrictions, whether they are qualified as disabled (EEOC, *Enforcement Guidance on Pregnancy Discrimination and Related Issues*, 6/25/15)
- Vaccine: “COVID-19 vaccination is recommended for all people 12 years and older, including people who are pregnant, breastfeeding, trying to get pregnant now, or might become pregnant in the future.” (Center for Disease Control (CDC), *COVID-19 Vaccines While Pregnant or Breastfeeding*, 8/11/21)
 - “CDC strongly recommends COVID-19 vaccination either before or during pregnancy because the benefits of vaccination outweigh known or potential risks.” CDC, *Health Advisory*, 9/29/21)

Lessons Learned and Practical Considerations

- **Process Clarity**
 - Clear and consistently communicated processes and resources
 - Ongoing dialogue between campus offices involved in accommodations process
 - Documentation!
- **Importance of Individualized Assessment**
 - Sense of process fairness and "being heard"
 - Unilateral denials likely not to receive deference from courts/agencies - exceptions from general policies *can* be a reasonable accommodation
- **Some things work well in the remote environment!**
 - E.g., student disability services offices may have benefited from remote exam administration – this and other practices that may have worked well and do not constitute an undue burden and/or fundamental alteration may be worth considering for the longer term/in-person environment.



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