



**with Laura Anthony, Melissa Carleton, and  
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# Disclaimer

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- We are not giving you legal advice. Consult with your legal counsel regarding how best to address a specific situation.
- Use chat function to ask general questions and hypotheticals.
- We have a variety of stakeholders here, so please keep that in mind.
- There are no magic answers. (Sorry in advance.)

# Agenda

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- Employees
  - What the Law Requires
  - Hypothetical for Discussion
- Students
  - What the Law Requires
  - Hypothetical for Discussion



# Employee Accommodations

# Americans with Disabilities Act Employees

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- Title I – Employment – 42 U.S.C. 12111 *et seq.*
- Regulations – 29 C.F.R. Part 1630
- Primary Enforcement: EEOC and DOJ
- The devil is in the ~~details~~ **definitions!**



# ADA Prohibition – Title I

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- “No **covered entity** shall **discriminate** against a **qualified individual** on the basis of **disability** in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”

42 U.S.C. 12112(a).

# What does discrimination include?

- “Not making **reasonable accommodations** to the known physical or mental limitations of any otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an **undue hardship** on the operation of the business of such covered entity.”

42 U.S.C. 12112(b)(5)(a)

# Discrimination also includes...

- “Denying employment opportunities to a job applicant or employee who is an **otherwise qualified individual** with a disability, if such denial is based on the need of such covered entity to make **reasonable accommodation** to the physical or mental impairments of the employee or applicant.”

42 U.S.C. 12112(b)(5)(b)



# Definition of Covered Entity

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- All but the smallest colleges and universities will be covered entities
- Covered entities are employers who have 15 or more employees.

# Definition of Qualified Individual

- “An individual who, **with or without reasonable accommodation**, can perform the essential functions of the employment position that such individual holds or desires.”
- “Consideration should be given to the employer’s judgment as to what functions of a job are **essential**.”
  - Hint: Look to your job description, position announcement/posting.

# Definition of Essential Functions



- “Fundamental job duties of the employment position” (not the “marginal functions of the position”)
- Factors:
  - Employer’s judgement
  - Written job descriptions
  - Amount of time spent on the job performing the function
  - Consequences of not requiring the person to perform the function
  - Collective bargaining agreement terms
  - What previous employees did in the position
  - Current work experience of incumbents in similar jobs

# Individual with a Disability

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- **Physical or mental impairment** that **substantially limits** one or more **major life activities**
- **Record** of such an impairment
- **Regarded** as having such an impairment

# Substantial Limitation of a Major Life Activity

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- What does “substantial limitation” mean?
- Case-by-case determination

# Major Life Activities/*Bodily Functions*

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- Seeing
- Hearing
- Eating
- Sleeping
- Walking
- Standing
- Lifting
- Bending
- Speaking
- Breathing
- Learning
- Reading
- Concentrating
- Thinking
- Communicating
- *Immune System*
- *Normal Cell Growth*
- *Digestive, Bowel, Bladder*
- *Neurological/brain*
- *Respiratory*
- *Circulatory*
- *Endocrine*
- *Reproductive functions*



# Construing “Disability”

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- Construe for broad coverage
- **Don't consider mitigating affects** of medication, equipment, hearing aids, “learned behavioral or adaptive neurological modifications,” etc. (But you can consider ordinary eyeglasses and contact lenses!)

42 U.S.C. 12102(1).

# Temporary Disabilities

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- Not disabilities **unless** severity results in substantial limitation of one or more MLAs for an extended period of time
- Case-by-case determination



# Episodic Impairments

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- Episodic or in remission
- When active would substantially limit an MLA



# Reasonable Accommodations – 1 of 2

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- Modifications or adjustments to the job application process
- Modifications or adjustments to the work environment, manner, or circumstances under which the position is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position

# Reasonable Accommodations – 2 of 2

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- Modifications or adjustments to allow employees to enjoy equal benefits and privileges of employment
- May include job restructuring, part-time or modified work schedules, acquisition or modifications of equipment or devices

# Undue Hardship

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- An action requiring significant difficulty or expense.
- Factors:
  - Nature and cost
  - Overall financial resources of the facility, number of employees, effect on expenses and resources, impact on operation
  - Overall financial resources of the employer
  - Operations and structure of employer



# Interactive Process

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- Employee makes request
- Employer determines whether requested accommodation is appropriate, or whether a different accommodation will suffice
  - May request appropriate documentation from medical provider regarding need for accommodation in context of essential functions
  - May request consultation with the medical provider (need release from employee)

# Prohibition on Retaliation

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## Retaliation or coercion prohibited against those who:

- Exercised their ADA rights
- Helped someone else exercise their ADA rights
- Opposed a practice illegal under the ADA
- Participated in an ADA-related investigation or proceeding
- (This also holds true under Section 504, as applicable to students)

# ***Peeples v. Clinical Support Options Inc.***

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- 487 F.Supp.3d 56 (D.Mass. Sept. 16, 2020)
- Asthmatic assistant manager requested to telework due to state of emergency being declared re: COVID-19 in March 2020
- Request initially granted until May 2020, when supervisor indicated all managers must return to the office
- Duties in office were not different than duties performed via telework

# ***Peeples v. Clinical Support Options Inc. (cont.)***

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- Employee returned to the office; none of the requested PPE was provided on the first day. Exposure to non-masked individuals regularly.
- Employee again provides medical accommodation for teleworking but is denied. Employer “expect[ed] all managers to work from the office.” **No individualized assessment of request accommodation.**
- **Court grants injunction against employer.**

# ***Peeples v. Clinical Support Options Inc. – Quote from Court***

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- “[Employer] claims that it has accommodated Plaintiff by providing KN95 face masks, hand sanitizer and wipes, an air purifier, and separate, private work space... A majority of these **so-called accommodations are workplace safety rules rather than an individualized accommodation** to address [employee’s] disability.”
- Offering **accrued leave was not an appropriate accommodation**, because it would not help the employee perform the essential functions of their job.

# Employee Hypothetical – 1 of 3

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- Carson works in the admissions office at your institution as a data entry supervisor. Carson and his subordinates are responsible for accurately entering student information into a database for admission and financial aid records.
- Last spring, Carson and his team were permitted to work from home, on a temporary basis, from March 15<sup>th</sup> through the end of the spring semester because of the COVID pandemic.
- During this period of remote work, certain data entry tasks were delayed until the team could safely return to the office. These tasks included specific demographic and financial aid reporting for certain state and federal reports.



# Employee Hypothetical – 2 of 3



- Carson's subordinates returned to working on campus in August 2020 prior to the beginning of the 2020-2021 school year. Carson was approved to continue working from home because his partner suffers from severe asthma.
- To accommodate Carson's continued remote work arrangement, the university purchased a new subscription-based technology service that allowed Carson to complete his data entry tasks from home. This service is extremely expensive, but it is the only one on the market that is compatible with the university's antiquated student data system. The university pays a large monthly subscription fee every month that this system is used.

# Employee Hypothetical – 3 of 3



- The data entry tasks that were delayed last spring must now be completed on an expedited basis and some of them require data entry staff to physically be on campus to use the university's antiquated computer system. Carson's team has been working steadily to accomplish this task, even working some overtime to finish the reports on time.
- Carson and his family members have been vaccinated, but that vaccination does not cover all possible variants.

# Employee Hypothetical Issues

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- Family member (not employee) with high-risk medical condition
- What if Carson had severe asthma?
- Has the concept of “reasonable accommodation” shifted as a result of the pandemic?
  - Subscription-based computer system
  - Overtime to subordinates for specific tasks



# Student Accommodations



# Americans with Disabilities Act

## Students

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- Title I – Employment
- Title II – Government/Public Entities
- Title III – Public Accommodations
- Enforced by EEOC, OCR, and DOJ
- ADA Amendments Act of 2008



# Public Entities (Title II)

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“No qualified individual with a disability shall, on the basis of 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 public entity.”

28 C.F.R. 35.130(a)



# Public Accommodation (Title III)

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“No individual shall be **discriminated against** 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** by any person who owns, leases (or leases to), or operates a place of public accommodation”

28 CFR 36.201(a)

# Section 504 of the Rehabilitation Act of 1973

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“No **otherwise qualified individual with handicaps** in the United States... shall, **solely by reason of his or her handicap**, be **excluded from participation** in, be **denied the benefits** of, or be **subjected to discrimination** under any program or activity receiving Federal financial assistance...”

# Disability-Based Harassment and Discrimination

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**Affirmative duty** to address harassment based on an individual's disability

# Procedural Safeguards

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- Public notice
- Designation of responsible employee
- Grievance procedures



# Requests and Documentation

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- What is your process for requesting accommodations?
- Students may be required to provide documentation of their disability



# School Responsibilities

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- Interactive process
- Evaluate student's needs
- Modify rules/policies/practices, remove barriers, provide auxiliary aids and services



# Reasonable Accommodation

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## What is reasonable?

- Fact-specific
- Burden is on the student to demonstrate reasonableness of requested accommodations
- What isn't reasonable?

## What isn't reasonable?

- Personal aids/services
- Undue financial/administrative burden
- Fundamental alteration
- Specific aid/service requested by student (not *necessarily* reasonable)



# COVID-19 Pandemic

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- Institutions not excused from obligations to students with disabilities
- Continue to ensure equal opportunity
- Continue to engage with interactive process
- Think creatively

# May 13, 2021 OCR Q&A

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“Colleges, universities, and other postsecondary institutions are not required to modify academic requirements that the school can demonstrate are essential to the program of instruction the student is pursuing or to any directly related licensing requirement.”

“Postsecondary institutions also are not required to provide academic adjustments, auxiliary aids and services, or modifications that would impose an undue burden or cause a fundamental alteration to the service, program, or activity.”

## **May 13, 2021 OCR Q&A – cont.**

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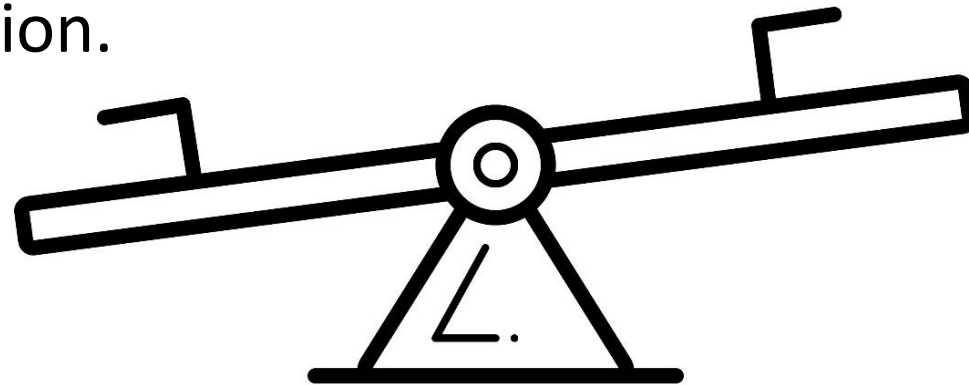
“[OCR] encourages institutions to think broadly when evaluating possible solutions, including new technology and other options to meet the needs of students with disabilities.”

# A Weird Balance?

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We require everyone to be in person all the time because it is essential to our core mission.

We are not responsible for refunding your tuition for last year in this class action lawsuit because our program was just as good online.



# Fair Housing Act (FHA)

- Prohibits discrimination on basis of protected class in sale or rental of dwelling
- Includes dorms and “public and common use areas”
- Applies regardless of federal funding





# Reasonable Accommodations and Modifications under the FHA

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- Must make **reasonable accommodations** and **reasonable modifications** to housing for individuals with disabilities
- Must be an **identifiable relationship or nexus** between request and disability
- When can such requests be **denied**?

# Student Hypothetical – 1 of 2

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- Jae is a rising junior. Jae has rheumatoid arthritis, which puts her at a higher risk if Jae contracts COVID.
- Jae has been vaccinated, but the vaccination does not cover all possible variants.
- Jae completed sophomore year online from her off-campus apartment, as did many of your students.



# Student Hypothetical – 2 of 2

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- Jae has applied to continue learning remotely for Fall 2021 due to the continuing presence of COVID on your campus.
- Jae has also requested to move into a residence hall because your campus has been doing so well requiring non-vaccinated students to wear masks in the halls, and this reduces Jae's risks. Unfortunately, Jae missed the deadline to apply for the housing lottery.

# Final Tips

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- Review your policies and procedures
- Make sure the right people on campus are aware of them
- Engage in an interactive process
- Train supervisors to say and do the right thing!

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