



ADA Webinar

ADA and Mental Health in Higher Ed: Current Case Law

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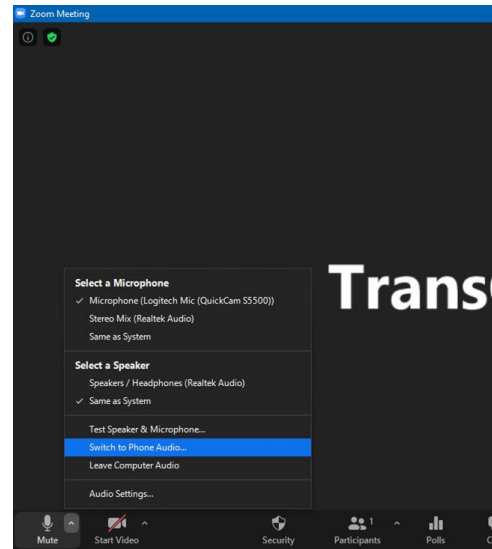


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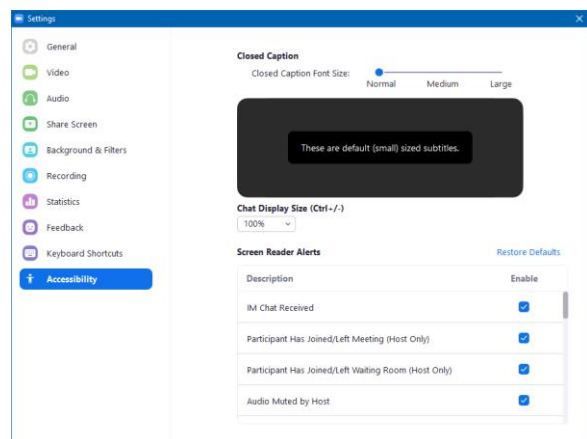
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3

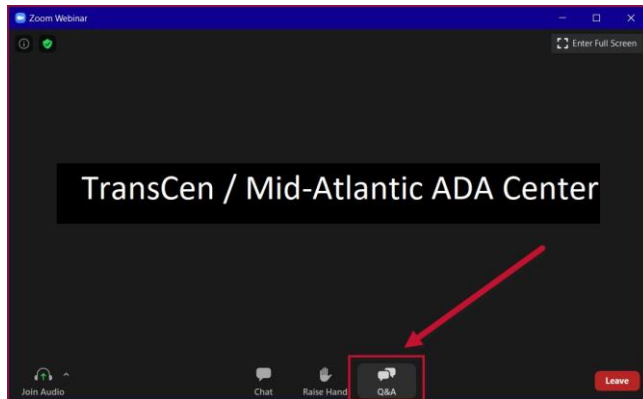
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4

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5



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6



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- Only those who purchased certificates when registering for the session are eligible to receive one
- Certificates are available only for attending the live session; attendance will be verified
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7



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8



About Your Hosts...

TransCen, Inc.

- Improving the lives of people with disabilities through meaningful work and community inclusion



Mid-Atlantic ADA Center, a project of TransCen, Inc.

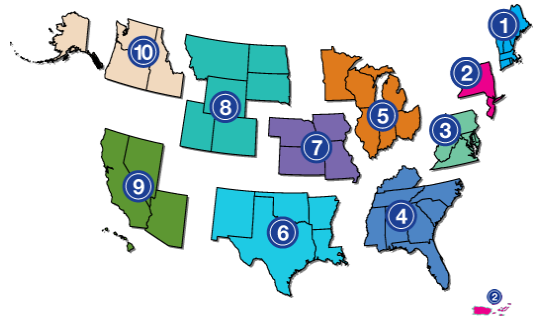
- Funded by National Institute on Disability, Independent Living, and Rehabilitation Research (NIDILRR), Administration for Community Living, U.S. Department of Health and Human Services

9



ADA National Network

- Ten regional centers provide guidance, training, and materials on the ADA
 - **1-800-949-4232**
 - ADAta.org



10





ADA and Mental Health in Higher Ed: Current Case Law



Presented by...



Bazelon Center for Mental Health Law

Mission: Protect and advance the civil rights of adults and children with mental health or developmental disabilities.

- Brit Vanneman, Staff Attorney
- Monica Porter, Policy & Legal Advocacy Attorney

Intro to Campus Mental Health

- A note on terminology
 - Mental Health Disabilities
 - IHEs: Institutions of Higher Education
- Prevalence of mental health disabilities among higher ed students
- Why we are here

13



Campus Mental Health: Learning Objectives

1. Rights & Responsibilities
2. Current Trends
3. Looking Ahead

14





Legal Obligations of IHEs

ADA, Section 504, Fair Housing Act

15



Legal Obligations: ADA & Section 504

- Prohibit discrimination against students whose disability(ies) substantially limit(s) a major life activity

16



ADA

- Title I: Employment
- Title II: Public IHEs
- Title III: Private IHEs

** Department of Justice has regulatory authority

17



Section 504

- Recipients of federal financial assistance (public and private IHEs)

** Department of Education has regulatory authority

18



Components of a Disability Discrimination Claim Under 504/ADA

(1) Student has a **disability**

A physical or mental impairment that substantially limits 1 or more major life activities

(2) Is **otherwise qualified** to meet academic and technical standards that are *essential requirements* of the IHE

(3) **With** or **without** a reasonable accommodation

19



Reasonable Accommodation Examples

AUXILIARY AIDS & SERVICES	MODIFICATIONS TO ACADEMIC REQUIREMENTS	MODIFICATIONS TO POLICIES & PROCEDURES
Private location/alternate environment	Modified deadlines	Attendance Policies*
Communication Access Real-Time Transcription (CART)	Additional time	Changing roommates / rooms
Screen Reading Technologies	Alternate Work Assignments	Allowing guests or service animals in rooms
Aides	Reduced Course Load	Leaves of Absence and Withdrawal policies**
Translators	Virtual Learning	Disciplinary Policies

20



Discrimination Claims cont.

(4) Excluded from participation in, denied benefits of, otherwise subjected to **discrimination**

(5) **On the basis of** disability **

21



Legal Obligations: Fair Housing Act (FHA)

FHA prohibits discrimination in housing on the basis of race, color, religion, sex, familial status, national origin, or disability.

- FHA applies to dorms & college housing.
- Note: States can have stronger laws that provide people with disabilities greater access!

22



Fair Housing Act: Discrimination

- In sale or rental, or otherwise making housing unavailable
- In the terms, conditions, or privileges
- In the provision of services or facilities

...on the basis of disability

OR: Refusal to make reasonable accommodations

23



Fair Housing Act: Reasonable Accommodations

- FHA requires reasonable accommodations when necessary to afford people with disabilities equal access to housing
- Reasonable accommodations:
 - ✓ Have a nexus (relationship) to the individual's disability
 - ✓ Are reasonable (not an undue burden or fundamental alteration)
 - ✓ May involve some cost to the housing provider
 - ✓ Require interactive process

24



Fair Housing Act: Students Requesting a Reasonable Accommodation

Students may request a reasonable accommodation:

- ✓ At any time
- ✓ Orally or (better) in writing
- ✓ Themselves or via someone else, on their behalf
- ✓ By requesting an exception, change, or adjustment to a policy or practice because of a disability

TAKEAWAY: You must request, to receive an accommodation

25



Fair Housing Act: Schools Processing a Reasonable Accommodation

- Obligated to process requests promptly
- Formal procedures not required, but recommended
- Information schools may request: Only what's needed to verify
 1. Disability
 2. Needed accommodation, and
 3. Relationship between disability & needed accommodation
- Duty to keep information confidential

26



Affirmative Defenses

1. Fundamental Alteration
2. Undue (financial, administrative) Burden
3. Direct Threat

For all: Considered on a case-by-case basis

27



Affirmative Defenses: Direct Threat

- Significant risk to health or safety of others that can't be eliminated by a reasonable modification
- Based on actual risk, not mere speculation, stereotypes
- Individualized assessment via medical, objective evidence
 1. Nature, duration, severity of risk
 2. Probability that injury will actually occur, and
 3. Whether reasonable modifications would mitigate the risk

28



A Note on Threat to Self

- Text: Only threat to others
- Reality: Grey area

What is clear: The determination must be based on an individualized assessment based on current medical knowledge

29



Enforcement

Mechanisms & Barriers

30



Enforcement Mechanisms

- Internal Grievance Procedures (req. for public IHEs)
- DOJ, DOE, HUD Complaint Process
- Litigation

31



Barriers to Enforcement

- Deference to IHEs as to what is an essential requirement
- Proving discrimination “solely by reason” of disability, where behavior is a function of disability
- Safety concerns / threat assessments
- Retroactive v. proactive accommodations

32



Current Trends

Animals, Leaves of Absence, Interactive Process, Codes of Conduct, and COVID-19 Implications

33



Trends: Service & Emotional Support Animals

Service Animals

- Dog trained to work or perform tasks for an individual with a disability
- Can go anywhere
- Doesn't require certifications
- Not a pet

Emotional Support Animals

- Any animal that provides emotional support alleviating a disability's effects
- Can go in housing
- Doesn't require certifications
- Not a pet

34



Trends: Leaves of Absence (LOA): Voluntary

Supporting Students Model Policy:

- Students may take voluntary LOA for mental health reasons
- If a student requests, counseling center will help student decide whether to take a LOA and/or help secure a LOA
- Students on voluntary LOA may maintain contact with and visit campus friends, staff, and events

35



Trends: Leaves of Absence (LOA): Involuntary

- Only lawful if student can't remain safely at school or meet academic requirements with reasonable accommodations
 - Individualized assessment of safety & possible accommodations
- Due Process protections apply: Notice, Hearing, Appeal
- Refunds for tuition, other costs available as with other LOAs
- Ends once student can safely return & meet academic requirements, with or without reasonable accommodations

36



Trends: Leaves of Absence (LOA): Returning

Supporting Students Model Policy:

- Student may request to return at any time
- Can require fitness to return, but not more rigorous than others
- Allow unless student unable to return even with accommodations

DOJ & OCR Guidance:

- Can't deny return solely because policy requires set duration
- Can't require work, treatment, or decreased symptoms

37

Trends: Leaves of Absence (LOA): Best Practices

- Have a committee make leave-related decisions
- Follow due process procedures
- Limit confidential inquiries to what is necessary & appropriate
- Refund tuition & housing
- Allow return when student is ready to return
- Recognize school may be the best place to recover
- Provide reasonable accommodations

38

Trends: Duty to Engage in Interactive Process

- **Required by Title I (employers)**

- **OCR / DOJ regularly investigate, include in resolution agreements**

Irvine Valley College (2017): Must meet with student requesting accommodation, decision must be based on individual needs, written notification of decision must be given within 1 week of request

Oakland College (2020): Must notify student of decisionmakers and of decision in timely manner

- **Some courts have found a duty for IHEs to engage in interactive process**

See, e.g., *Newell v. Cent. Mich. Univ. Bd. of Trustees*, 2020 WL 4584050 at *9 (E.D. Mich. Aug. 10, 2020)

39



Trends: Discriminatory Code of Conduct Violations

- **Behavior, which results in violation, is a manifestation of a student's disability**

- **Honor Code / Academic Honesty Policies**

Student with ADHD dismissed for academic dishonesty, did not request an accommodation, even though school knew about the student's diagnosis. *Chenari v. George Washington University*, 847 F.3d 740 (D.C. Cir. 2017)

- **"Creating a hostile or intimidating environment"**

Student with Asperger's diagnosis dismissed for disparaging remarks about another student; had *academic* accommodations but did not request *behavioral* accommodations. *Joseph M. v. Becker College*, 531 F. Supp. 3d 383 (D. Mass. Mar. 31, 2021).

- **Professionalism Policies**

Missing meetings or exams, arriving late, appearing "unkempt". *Jane Doe v. Brown*

40



Trends: COVID-19 Implications

- Wider availability, use of auxiliary aids and services
- Harder for IHEs to prove that an accommodation interferes with an essential requirement
- Long COVID is recognized disability

“A university student who contracted COVID-19 last year has “Long COVID” with severe fatigue, joint pain, and an inability to concentrate, all of which have compounded her preexisting depression. While getting ready to register for classes, the student asked the university’s office for disability services for permission to take three instead of five courses and to attend these courses remotely, explaining that her fatigue would hinder her ability to commute and take a full course load. The university did not conduct an individualized assessment and refused to consider the request.” – DOE OCR

41

Best Practices

Students, Administrators

42

Best Practices: Students

- Disclose + Ask for Accommodations = Duty
 - Requests typically cannot be inferred from circumstances. See *Jin Choi v. Univ. of Texas Health Sci. Cntr. at San Antonio*, 633 F. App'x 214, 215-16 (5th Cir. 2015);
 - Not disclosure: IHE access to student file, student disclosure during university counseling session. *Duhon v. Bd. of Supervisors of La. State Univ.*, 2021 U.S. Dist. LEXIS 158583 (E.D. La. Aug. 20, 2021); *Zapata v. Colo. Christian Univ.*, 2020 U.S. Dist. LEXIS 32612, (C.D. Co. Feb. 20, 2020).
 - Requests need not be *formal*.
- Read policies & make specific asks
- Document conversations, requests
- Ask for decisions to be written

43



Best Practices: IHE Culture

- MHA Survey:
 - Train professors to understand mental health and disability accommodations (73%)
 - Provide more education and outreach about the availability of disability support services for mental health disabilities (69%)
 - Dedicate staff to provide or support students in the accommodations process to remove financial barriers to registration (58%)
 - Offer staff or peer navigators to support students in the registration process (42%)
- **Coordinate outreach** with students, help students navigate processes, develop trusting relationships

44



Best Practices: Accommodations

- Accommodations requests do not need to use “magic words” or follow university policies → Train!
- Provide students with a notice of process (decisionmakers, timelines)
- Engage in an interactive process with multiple decisionmakers once a request is made
- Issue timely decisions in writing and provide a grievance procedure
- Allow retroactive accommodations without contemporaneous proof

45



Best Practices: Administrative Process

- Review professionalism policies
- Pause code of conduct proceedings during accommodations processes
- Disciplinary action should be avoided, and disciplinary sentences mitigated, when the offense was the product of mental health condition
- Review past policy violations after receiving new information about a student's disability
- Do not use threat assessments – stigmatizing and inaccurate

46



Coming Up Legislation

47



Coming Up: Legislation

- Passed the House:
 - H.R. 5407: Enhancing Mental Health & Suicide Prevention Through Campus Planning Act
 - H.R. 6493: Campus Prevention & Recovery Services for Students Act
- (Re-) Introduced:
 - H.R. 7370: Student Mental Health Rights Act
 - H.R. 5654 / S. 3048: Higher Education Mental Health Act
 - S. 2550: RISE Act

48



Q&A

www.bazelon.org/our-work/education/campus-mental-health/

49



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- Please email the code above to ADAtraining@transcen.org by **5 PM E.T. on August 30, 2022**
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50



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Mid-Atlantic ADA Center

Toll-free: **800-949-4232** (DE, DC, MD, PA, VA, WV)

Local: **301-217-0124**

ADAinfo@transcen.org

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51

