

Recent Disability Compliance Issues: The ADA, FHA, COVID, and More

Higher Education Compliance Conference

June 8, 2022

Cory S. Winter

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1

Today's roadmap

- ◆ Overarching principles
- ◆ Working with students with mental illnesses
- ◆ Service animals and assistance animals
- ◆ COVID (ugh, do we have to?)
- ◆ Website accessibility
- ◆ Q & A (but feel free to ask throughout)



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Overarching principles

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What does it mean to be “disabled”?

42 U.S.C. § 12102(1)

A physical or mental impairment that substantially limits one or more *major life activities* of such individual

A record of such an impairment

Being regarded as having such an impairment

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4

Major life activities

- ◇ Caring for oneself
- ◇ Performing manual tasks
- ◇ Seeing
- ◇ Hearing
- ◇ Eating
- ◇ Sleeping
- ◇ Walking
- ◇ Standing
- ◇ Sitting
- ◇ Reaching
- ◇ Lifting
- ◇ Bending
- ◇ Speaking
- ◇ Breathing
- ◇ Learning
- ◇ Reading
- ◇ Concentrating
- ◇ Thinking
- ◇ Communicating
- ◇ Interacting with others
- ◇ Working
- ◇ Or the operation of a major bodily function

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5

REASONABLE ACCOMMODATION



Physical



Developmental



Speech



Sensory



Visual



Mental

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6

Undue hardship

Significant difficulty or expense

- ◆ Nature and cost of the accommodation
- ◆ Overall financial resources
- ◆ Disruption/impact on others
- ◆ Alteration of program/service



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7

The Interactive Process

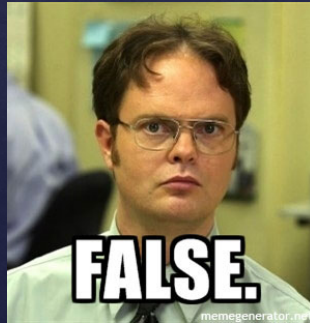


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8

True or false?

If a college or university incurs a financial cost in providing a reasonable accommodation, the college or university can charge that cost to the individual receiving the accommodation.



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A word about Section 504 (Rehab. Act)

Sec. 504. (a) No otherwise qualified individual with a disability in the United States, . . . shall, solely by reason of his or her 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) For the purposes of this section, the term "program or activity" means all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 8101 of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3), any part of which is extended Federal financial assistance.

(c) Small providers are not required by subsection (a) to make

No otherwise qualified individual with a disability in the United States, . . . shall, solely by reason of his or her 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

29 U.S.C. § 794

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Working with students with mental illnesses



- ◇ 37% of high-school students reported that their mental health was not good most or all of the time during the pandemic
- ◇ “Seriously considered attempting suicide”
 - ◇ LGBT+: 46.8%
 - ◇ Total: 19.9%
- ◇ Attempted suicide
 - ◇ LGBT+: 26.3%
 - ◇ Total: 9.0%

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13

College students are not faring much better

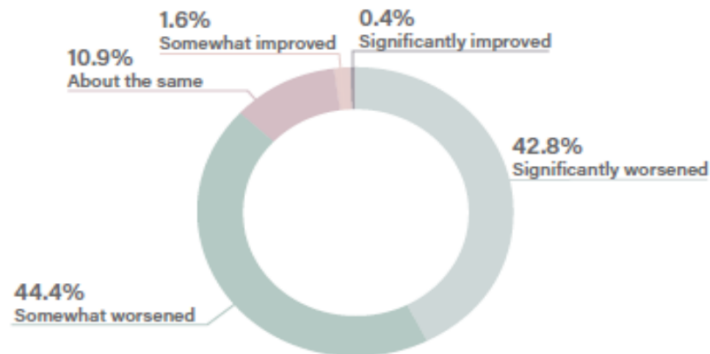
◇ **Half** of all college students screened for anxiety or depression in fall 2020

◇ **83%** of students said that their mental health had negatively impacted their academic performance

14

Boston University study (2021)

GRAPH 2: FROM YOUR PERSPECTIVE, HOW IF AT ALL HAS STUDENT MENTAL HEALTH CHANGED SINCE THE COVID-19 PANDEMIC BEGAN?

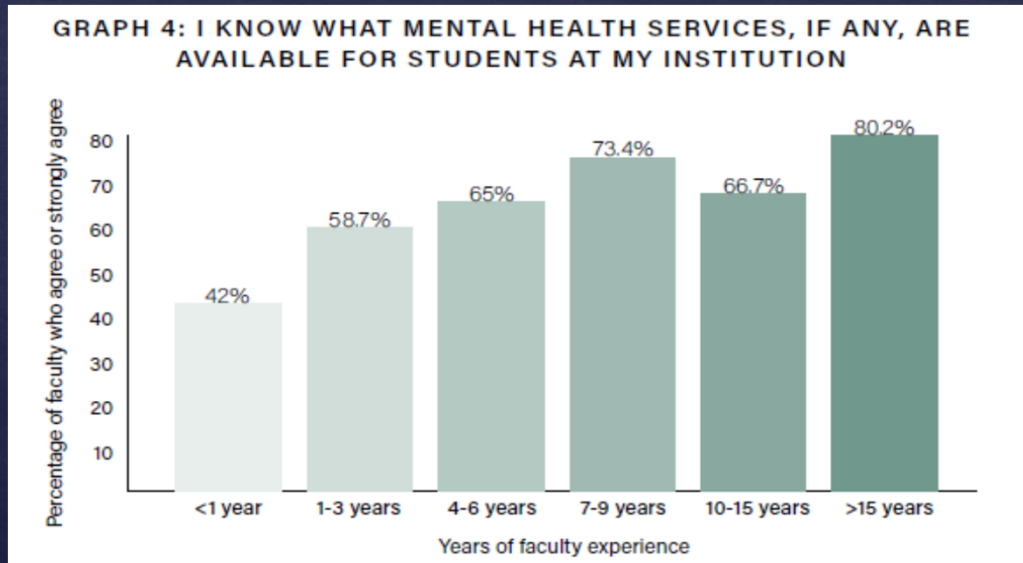


15

“The majority of faculty (79.3%) report that in the past 12 months they have had one-on-one phone, video, or email conversations with students regarding students’ mental health and wellness.”

16

But . . .



17

Faculty would like more training

- ◆ “Results indicate that faculty are in need of *mental health gatekeeper training*, defined as *programs designed to enhance an individual’s skills to recognize signs of emotional distress in other people and refer them to appropriate resources.*”
- ◆ “Over half of faculty (55.8%) report that they do not know if gatekeeper trainings exist at their institution.”
- ◆ “Only 28.8% report that they have participated in a training program. Among those who report that they have undergone such training, 71.5% found it ‘helpful’ or ‘very helpful.’”

18

OCR's principles

1. You can offer mental-health services to a student regardless if the student is experiencing a mental-health issue or whether they are in a crisis.
2. Consider reasonable accommodations that allow the student to allow the student to remain enrolled and on campus.

19

OCR's principles

3. If you are considering separating the student, and to the extent feasible, prioritize voluntary actions by the student.
4. Use involuntary separations as a last resort.

20

OCR principles

5. Ensure that institutional policies are non-discriminatory on their face and treat similarly-situated disabled and non-disabled students similarly.
6. When responding to a potential self-harm situation, conduct an individualized assessment.

21

OCR principles

7. Ensure that institutional policies are non-discriminatory on their face and treat similarly-situated disabled and non-disabled students similarly.
8. You can consider medical and clinical information.

22

OCR principles

9. You can impose reasonable, individualized conditions for students returning after a leave of absence.

23

Rising to the challenge

- ◇ Who?
 - ◇ Faculty
 - ◇ Including TAs/GAs
 - ◇ Housing
 - ◇ Disability services
 - ◇ Student activities
 - ◇ Librarians
 - ◇ Facilities/dining
 - ◇ Athletics/recreation
 - ◇ Graduate schools
- ◇ First contact
 - ◇ Training
 - ◇ Campus and community resources
 - ◇ Intervene
 - ◇ Relate to your mission/identity
 - ◇ Refer
 - ◇ See something, say something



24

Strategy—first contact

- ◇ Training
 - ◇ Campus and community resources
- ◇ Intervene
 - ◇ Relate to your mission/identity
- ◇ Refer
 - ◇ See something, say something

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25

Strategy—helping students succeed



Treat each student's
situation as unique



Collaborate with
appropriate
professionals to
accommodate



Mitigate threats

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26

Some notable cases

- ◇ *Regents of Univ. of Cal. v. Superior Court of L.A.*, 413 P.3d 656 (Cal. 2018) (“*Rosen*”)
 - ◇ Postsecondary schools have a duty to keep students safe from foreseeable criminal assaults that occur while they are engaged in activities that are part of the school’s curriculum or closely related to its delivery of educational services

27

Maas v. UPMC Shadyside (Pa. 2020)

- ◇ Andrews expresses suicidal and homicidal ideation to his mental-health providers
- ◇ Andrews complained about his neighbors, threatening to kill one
- ◇ Later, Andrews reported that he wanted to stab a separate neighbor with scissors
- ◇ Andrews tries to seek in-patient admission; is denied
- ◇ A few days later, Andrews murders a 19-year-old female, a neighbor who lived on the same floor, with scissors

28

“[W]hen the patient has communicated to the professional a specific and immediate threat of serious bodily injury against a specifically identified or readily identifiable third party and when the professional, determines, or should determine under the standards of the mental health profession, that his patient presents a serious danger of violence to the third party, *then the professional bears a duty to exercise reasonable care to protect by warning the third party against such danger.*”

29

Strategy— Practical steps



- ◇ Clearly and repeatedly publicize how students can seek help with mental health
 - ◇ Signage, statements on syllabus, apps, etc.
- ◇ Faculty cannot keep secrets
 - ◇ Must make referrals
- ◇ Disclose to students when and how third parties will be contacted
- ◇ Treat every case as its own
 - ◇ Resist the urge to compare students/cases

30



31



Service
Animals
(ADA & § 504)

Assistance
Animals
(FHA)

32

Service Animals

- ◇ Individually trained to perform tasks
- ◇ Benefit of an individual with a disability
 - ◇ Physical
 - ◇ Sensory
 - ◇ Psychiatric
 - ◇ Intellectual
 - ◇ Other



33

Which of the following questions, if any, can legally be asked regarding a request for a service animal?

- A. Does the dog shed or leave dander?
- B. Will the dog be quiet and not bark?
- C. What disability do you have?
- D. Is the animal required because of a disability?
- E. What work or task has the animal been trained to perform?

34

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- C. ~~What disability do you have?~~
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35

NEWS

More college students are turning to emotional support animals, even amid the punchlines

by Anna Orso, Updated: January 21, 2019



COURTESY LIV TEMPESTA

36

AAs' legal roots

- ◆ FHA proscribes owners/operators of dwellings to discriminate on the basis of disability
 - ◆ In other words, must reasonably accommodate someone with a disability
- ◆ Dwelling: any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence
 - ◆ 42 U.S.C. § 3602(b)

37

Is a residence hall a “dwelling”?

“The question presented is whether student housing . . . is a ‘dwelling’ within the meaning of the FHA. The Court concludes that it is, making the antidiscrimination provisions of the FHA applicable.”

Yes!

U.S. v. Univ. of Neb. at Kearney, 940 F. Supp. 2d 974, 975 (D. Neb. 2013); *see also* 24 C.F.R. § 100.201 (including “dormitory rooms”).

38

AA defined

“An animal that works, provides assistance, or performs tasks for the benefit of a person with a disability,

39

AA defined

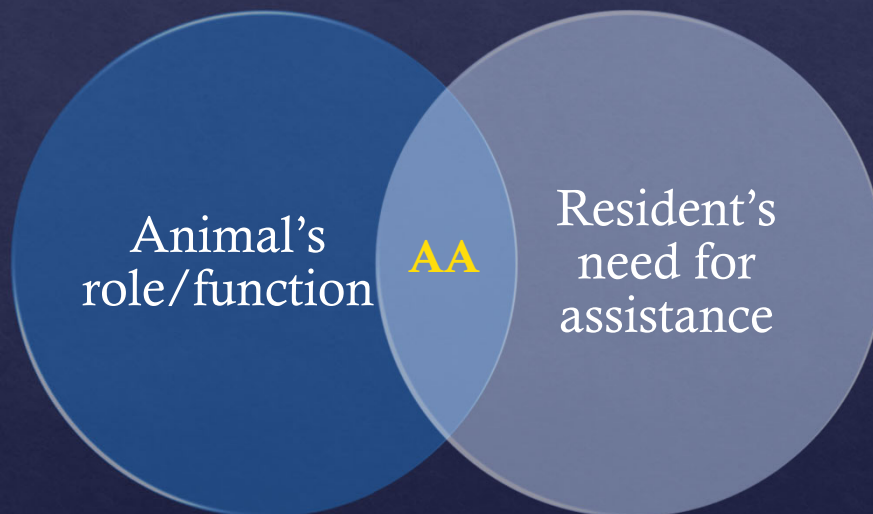
“An animal that works, provides assistance, or performs tasks for the benefit of a person with a disability, or **provides emotional support that alleviates one or more identified symptoms or effects of a person’s disability.**”

40

AA defined

“An animal that works, provides assistance, or performs tasks for the benefit of a person with a disability, or **provides emotional support that alleviates *one or more* identified symptoms or effects of a person’s disability.**”

41



42

What can be required before granting a request for an AA?

Yes

- Documentation of individual's disability*
- Documentation of individual's need for animal

No

- Documentation that the animal has been certified, trained, or licensed
- Demonstration of animal's ability to perform task or work

43

Two questions to have answered by a health professional^{1, 2}

1. Does the animal qualify as an assistance animal (*i.e.* is there a disability)?

2. Does the professional recommend allowing the animal to live in college/university housing as a reasonable accommodation for the individual's disability?

¹ If disability/need for AA is not readily apparent.

² Get permission before speaking with provider.**

44

The Wild West

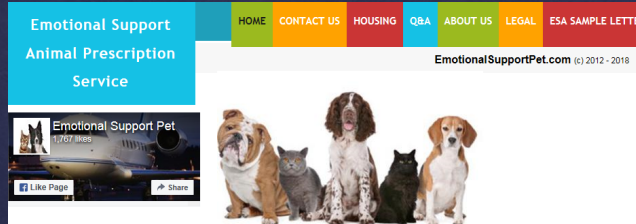


CertaPet

Save time & money, never be forced to separate from your pet, and get protection from unfair pet fees **for less than \$1 per day!**

Dear Landlord:
Based upon my medical history, I am a person who suffers from a disability under the Fair Housing Act, and as defined in the...
Mr. [Name] is an emotional support animal which successfully ameliorates his symptoms without the need for medication. I therefore recommend that Mr. [Name] be accompanied by his cat, [Name].

The ONLY Legitimate
ESA
Letters Online
Satisfaction Guaranteed!




Emotional Support
Animal Prescription
Service

HOME CONTACT US HOUSING Q&A ABOUT US LEGAL ESA SAMPLE LETTER

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Emotional Support Pet (ESA) Services



Emotional Support Animal Doctors and Mental Health Professionals
1-855-429-2555

Are you struggling to find a place to live due to no pet policies?

Do you feel that having a pet in your residence will help alleviate your chronic stress, anxiety, and/or depression?

Qualifying Conditions: Stress, Depression, Anxiety, Insomnia, And More...



NO PETS ALLOWED

According to the Fair Housing Amendment Act, landlords/property managers are required to allow emotional support animals in housing even if they normally do not allow pets, provided that a health care professional states in a letter that the tenant needs an emotional support animal as part of his or her treatment.

LIVE & FLY WITH YOUR PET LEGALLY & HASSLE FREE

Special Offer SALE \$79

An official letter from our licensed physician allows you to take your pet on flights and avoid hefty pet deposits.

Pay \$59 for any one letter (housing/travel) or get the 2-in-1 recommendation for just \$79



45

“Reliable documentation”

- ◆ Disparity between credentials and diagnosis.
- ◆ No indication that animal will help ameliorate disability or symptoms.
- ◆ If you have legitimate doubt as to reliability, you may investigate further.

46

Which of the following animals can a college/university categorically ban as an AA?



Tarantula



Bearded Dragon



Pit Bull



Ferret



Rat

47

Lawful denial of an AA (other than failing to meet requirements).

1. Alternative accommodation would work just as well.
2. Undue hardship ("significant difficulty or expense" under the circumstances).
3. Fundamental alteration to service (here, housing).
4. Resident cannot participate in offered service even with accommodation.

Burden is on the college/university/school to establish the above with a legitimate rationale (and to explain).

48

Removal of assistance animal

- ◆ Who has the authority?
 - ◆ *E.g.*, dean, head of residence life, committee, working group.
- ◆ Grounds
 - ◆ Direct threat to safety; or causes property damage
 - ◆ Fundamental alteration to program
 - ◆ Noncompliance by owner with policy
 - ◆ Unmanageable disturbance or interference

49

On the horizon



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50

Who “wins”?

- ◆ *A* and *B* are roommates in the best, most exclusive on-campus residence hall.
- ◆ Due to the onset of a disability, *A* requires a service animal (dog).
- ◆ *B* objects, saying they have serious allergies to dogs and cannot live with one.
 - ◆ *B* produces a confirming doctor’s note.
- ◆ Neither *A* nor *B* is willing to move.

51

Does your policy (or policies) have you covered?

- Definitions of categories of animals, including pets—and how the categories are distinguished
- Affirming rights of individuals with disabilities
- Limitation of pets
- Procedures to request animal in residence hall (and deadlines)
- Appeals/grievances
- Complaints about animals on campus
- Responsibility/liability of owners
- Prohibition of interference by non-owners with any SA or AA
- Removal of animal

52

COVID

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53



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Updated EEOC guidance

- ◆ December 14, 2021
- ◆ Three-part test applies in the context of COVID-19
- ◆ COVID 19 need not prevent a person from performing a major life activity to be considered “substantially limiting under the ADA,”
 - ◆ Limitations caused by COVID 19 need not be long term to be considered substantially limiting.
- ◆ “Episodic conditions”
 - ◆ Even when symptoms are periodic, COVID-19 can still be considered an “actual disability” if it substantially limits major life activity when active.

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Disability or not?



Mark has tested positive for COVID-19 but has only mild flu-like symptoms that resolve over the course of two weeks.

Does Mark have an actual disability?

No.

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Disability or not?

Zara had COVID-19 last December and has since had episodic “brain fog,” complaining of difficulty concentrating, headaches, and forgetfulness?



Does Zara have an actual disability?

Maybe.

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Disability or not?

Daryl had COVID-19 last month and continues to have shortness of breath when he walks or stands for long periods of time, making his commute difficult or sometimes impossible.



Does Daryl have an actual disability?

Yes.

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Other conditions worsened by COVID-19



- ◆ Be mindful of other medical conditions that may be exacerbated by COVID-19
- ◆ Heart inflammation
- ◆ Diabetes
- ◆ Asthma/pulmonary diseases

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59



- ◆ Whether someone has COVID-19 or COVID-19 symptoms is considered confidential medical information
- ◆ Documentation regarding accommodation requests, supporting documentation, and decisions on accommodation requests must similarly be maintained as confidential
- ◆ Confidential medical information must be maintained confidentiality
 - ◆ Separately from an employee's personnel file
 - ◆ Supervisors/managers may be informed
 - ◆ 29 C.F.R. § 1630.14(d)(4)

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60

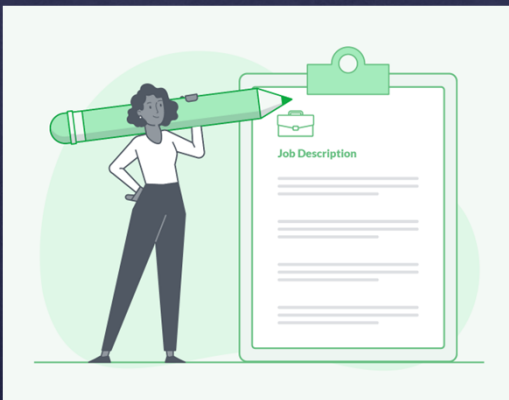
Costa v. Genesis Admin. Servs. (E.D. Pa.)



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61

Strategy



Review and update job descriptions, faculty contracts, and handbooks

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What accommodations can you provide that are *reasonable*?

62



**KEEP
CALM
AND
DOCUMENT
EVERYTHING!**

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Web Accessibility

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“[T]he Department [of Justice] has consistently taken the position that the ADA’s requirements apply to all the goods, services, privileges, or activities offered by public accommodations, including those offered on the web.”

<https://beta.ada.gov/web-guidance/> (Mar. 18, 2022)

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65

Some website accessibility barriers

Weak Contrast
Makes Things
Invisible

Strong Contrast
Makes Things
Legible

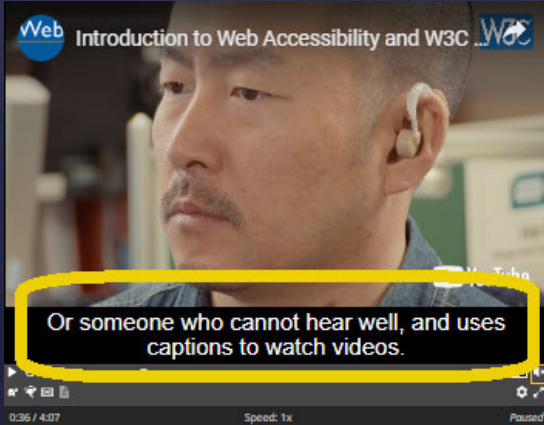
Alt Text: A group of people sitting in front of a computer



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66

Some website accessibility barriers



Submit a new claim
This form is used to submit new claims while on the job. Please submit a photo with each request as no claim can be processed without an image.

Name
 Required

Date
Enter today's date, not the date of the claim.
 Required

Claim Type
 ▾

Claim image
All images will be resized so do not worry about cropping.
 Required

A screenshot of a web form titled "Submit a new claim". The form includes fields for Name, Date, Claim Type, and Claim image, each with a "Required" label. A green "Submit" button is at the bottom.

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67

Some website accessibility barriers



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68

DOJ is paying attention to higher ed

Title II Sample Cases

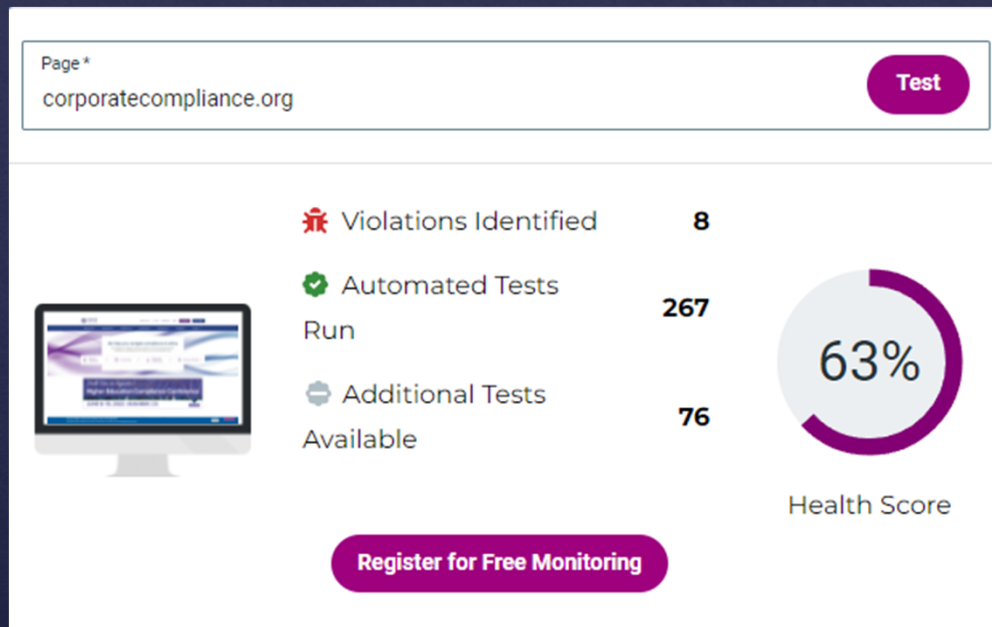
- **Project Civic Access:** As part of the Department's Project Civic Access enforcement work, the Department has reached numerous agreements with cities and counties across the country that include web accessibility requirements. For example, [City and County of Denver, Colorado](#), [City of Jacksonville, Florida](#), and [City of Durham, North Carolina](#).
- **Miami University in Ohio:** The Department reached an agreement with Miami University in Ohio to resolve the United States' lawsuit alleging that the university discriminated against students with disabilities by providing inaccessible web content and learning management systems.
- **Nueces County, Texas:** The Department reached an agreement with Nueces County, Texas, to address claims that the County used an online content registration form that was not accessible to people with disabilities via software that reads text out loud.
- **Louisiana Tech:** The Department reached an agreement with Louisiana Tech University to address claims that the university violated the ADA by providing an online learning product that was inaccessible to a blind student.

Title III Sample Cases

- **Rite Aid Corporation:** The Department reached an agreement with Rite Aid Corporation to address accessibility barriers in Rite Aid's COVID-19 Vaccine Registration Portal.
- **Teachers Test Prep, Inc.:** The Department reached an agreement with Teachers Test Prep, Inc., regarding complaints that the test prep company's online video courses did not provide captions and were inaccessible to people who are deaf.
- **HRB Digital and HRB Tax Group (H&R Block):** The Department reached an agreement with H&R Block to address claims that the company failed to code its website so that individuals with disabilities could use assistive technology such as screen reader software, refreshable Braille displays, keyboard navigation, and captioning.
- **Peapod:** The Department reached an agreement with Peapod to address claims that its online grocery delivery services were not accessible to some individuals with disabilities.

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Content-management/learning systems



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What can I clear up?



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72

Thank you!



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73

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74