

# Access Considerations for Students with Disabilities

AHEAD Webinar Access Series 2020

# Caveat

These materials are provided for informational purposes only and are not to be construed as legal advice.

You should seek independent or house counsel to resolve the individualized legal issues that you are responsible for addressing. Further, any policy or procedure additions or revisions under consideration should be reviewed by legal counsel for your college or university.

# USE AND PERMISSIONS

This material has been provided for your personal use across your campus. To share it across your campus you are welcome to make photocopies or convert the format of the presentation materials accessible to persons with visual or auditory impairments who use adaptive technology such as JAWS or Zoomtext.

Any other form of duplication or distribution requires the written consent of AHEAD and the presenter in question.

No consent is provided to distribute or republish this document, in whole or part, through digital information technology such as the Internet or any Internet platform such as YouTube.

# Contact Information

[Jamie.Axelrod@nau.edu](mailto:Jamie.Axelrod@nau.edu)

[paulgrossman@comcast.net](mailto:paulgrossman@comcast.net)

[maryleevance@aol.com](mailto:maryleevance@aol.com)

# Faculty (1)

## **Jamie Axelrod, M.S.**

Director, Disability Resources, Northern Arizona University

ADA Coordinator/Section 504 Compliance Officer, Northern Arizona University

Immediate Past President AHEAD

Board member, Coalition for Disability Access in Health Science and Education

AHEAD faculty member

AHEAD Public Policy Committee member

Axelrod, Grossman, & Vance Consulting

## **Paul Grossman, J.D., P.A.**

Chief Regional Civil Rights Attorney, US, ED, OCR, SF, retired

Guest Lecturer for Disability Law: UC Hastings and Berkeley Law; Stanford Law; and, the Coal. for Dis. Access in Ed

Board member: National Association of ADA Coordinators

Faculty member: NAADAC; OCR DisNet; AHEAD and CAPED (Lanterman Awardee)

Former AHEAD Board member (Blosser Awardee); member AHEAD Public Policy Committee

Expert Advisory Panel member: Disability Rights Advocates and Evan Terry Assoc. (architects)

*The Law of Disability Discrimination for Higher Education Professionals*, Carolina Academic Press (updated annually)

Axelrod, Grossman, & Vance Consulting

## Faculty <sup>(2)</sup>

### **Mary Lee Vance, Ph.D.**

Dir., Services for Students with Disabilities, Sacramento  
State University

AHEAD Bd. member, retired

AHEAD faculty member

Editorial Bd. member: Journal of Post-Secondary Education  
(JPED)

Reviewer: NACADA National Advising Journal

Co-editor: ***Beyond the ADA*** (NASPA 2014)

Editor: Axelrod, Girma, Grossman, Lissner, & Lesen, ***The QSD  
Paradigm*** (AHEAD, publication pending, July 2021)

Axelrod, Grossman, & Vance Consulting

# Modules

- I: Introductory insights
- II: Is COVID a “disability” under the Rehab. Act and the ADA?
- III: To mask or not to mask, that is the question?
- IV: Practical solutions and best practices
- V: Questions and Answers

FANCYJOLIE

# Module I

## Introductory Insights



# A Perilous Moment

- This moment can be perilous for students with disabilities, administrators, faculty, and staff with disabilities particularly those individuals who are immuno-suppressed and those with psychology disabilities such as depression and anxiety

# Introductory Insights <sup>(1)</sup>

- At the same time, COVID creates a new set of conditions, that throw a light upon, exacerbate or accelerate existing conditions to the point where their subtle, but long-existing, true discriminatory nature becomes revealed:
  - ***Smith v. Regents***, Order Granting Preliminary Injunction (Super. Ct. Alameda County, Aug. 31, 2020, No. RG19046222) [Judge Seligman]; ***amicus*** brief by DREDF (**joined by AHEAD and CAPEd**) in the Court of Appeal of the State of California, First Appellate District; temporary stay of Super. Ct. order lifted by Court of Appeal (October 29, 2020) [Judges Hume, Banck, & Sanchez]
  - ***National Association of the Deaf (NAD) v. Donald J. Trump***, Civil Action No. 20-2107 (D.C. D.C. September 23, 2020) remedial order
  - ***Martinez v. Cuomo***, 20-CV-3338, 2020 U.S. LEXIS 83518 (S.D. N.Y. May 12, 2020)

# Introductory Insight<sup>(2)</sup>

- Consequently, this moment presents an enormous opportunity for innovation in higher education, particularly in the direction of universal design
  - As everyone is on-line, what was once clearly infeasible, unduly burdensome or a fundamental alteration is suddenly none of these
    - ***Silver v. City of Alexandria***, \_\_\_ F. Supp. 3d \_\_\_; 2020 WL 3639696 (W.D. La. July 6, 2020) [participation in city council meeting by zoom]
    - ***Peeples v. Clinical Support Options, Inc.***, Case No. 3:20-cv-30144-KAR, 2020 U.S. Dist. LEXIS 169167 (D. Mass. September 16, 2020) [supervisory psych intervention work from home]
    - ***Gordon vs. State Bar of California and National Conference of Bar Examiners***, 3:20-cv-06442, (N.D. Cal. September 30, 2020) [extraordinary efforts by the Cal. Bar to prevent the spread of COVID while taking the Bar examination]

# Introductory Insights <sup>(3)</sup>

- Take as an example, the speech professor with diabetes, who considered every accommodation request by students with anxiety to orate on-line only a fundamental alteration, suddenly has a new perspective – to the benefit of both employees and students
- Following “work at home” cases, on-line education, as an accommodation, should no longer be presumptively excluded, but now, should be something to be considered on a case by case
- In the context of COVID, some universal changes are occurring that will benefit ALL students; those who are poor, immigrants, of color, or with a disability:
  - ***Kawaki Smith v. The Regents of the University of California***, Order Granting Preliminary Injunction (Super. Ct. Alameda County, Aug. 31, 2020, No. RG19046222); temporary stay of Super. Ct. order lifted by Court of Appeal (October 29, 2020) **Amicus Brief joined by AHEAD** [Due to barriers and inequities for applicants with disabilities in taking SAT and ACT, the UC Board of Regents must accelerate its decision to stop using SAT/ACT scores are part of the UC undergraduate admissions process

# Module II: Is COVID-19 a Disability?

# So Far, There Are No Authoritative Answers from the U.S. Government (type 1 guidance)

- To date, Federal guidance has fallen into two categories
- Type 1:
  - Addressing the *other* civil rights protections that may pertain to persons with COVID-19; such as:
    - ED OCR guidance to school districts, colleges and universities that they must not allow concerns over the origin of COVID-19 to serve as the basis for discrimination against students who are of a particular national origin <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-coronavirus-fact-sheet.pdf>; [www.eeoc.gov/coronavirus](http://www.eeoc.gov/coronavirus)
  - Most on point from OCR, but equivocal and brief, ED OCR: ***Questions and Answers for Post Secondary Institutions regarding the COVID-19 National Emergency*** (May 12, 2020) <https://www2.ed.gov/about/offices/list/ocr/docs/20200512-qa-psi-covid-19.pdf>
    - Colleges and universities are still required to comply Section 504, Title II, and Title IX
    - But OCR will cut them some slack for what is impossible or infeasible, if you will provide a second-best creative alternative
      - Some focus on the challenges in accommodation of students with sensory impairments

# So Far, There Are No Authoritative Answers from the U.S. (type 2 guidance)

- Type 2:
  - Addressing COVID-19 *as if* it is a disability, but never actually stating such a conclusion; such as, EEOC guidance about what are or are not permissible actions for employers to take in the workplace to limit the spread of the COVID-19 virus among their workforces at home or when returning to work [https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm)
    - ***Of note*, the EEOC’s treatment of COVID-19 as a “direct threat to the health and safety of others.”**
    - See the analysis by Bill Goren, J.D. concerning this EEOC guidance at <https://www.williamgoren.com/blog/2020/03/24/eeoc-guidance-coronavirus-influenza/>
  - **Always keep checking the EEOC website as updates are frequent:** [www.eeoc.gov/coronavirus](http://www.eeoc.gov/coronavirus)

# The Simple Direct Case, in Theory <sup>(1)</sup>

- “An *impairment* that substantially limits a major life activity”
- COVID is a condition which can cause a substantially limiting impairment of:
  - Breathing
  - Cardiac function
  - Immune response
  - Kidney function
  - Thinking
  - Concentrating
  - Caring for oneself
  - For some individuals COVID-19 may trigger a psychological impairment which is substantially limiting



# The Direct Simple Case, in Theory (2)

- Is COVID-19 an impairment that will “virtually always” result in a disability given that:
  - Some individuals will be asymptomatic
  - Some will have mild-moderate symptoms
  - Some will be in a life-threatening struggle in ICU
- Is it more of a “spectrum” impairment where disability is based on level of limitation?
  - Due to transmissibility, is someone who is asymptomatic still substantially limited in communication, interaction, educational opportunity because they need to quarantine or isolate?

# The Direct Simple Case, in Theory <sup>(3)</sup>

- **Substantial**

- The prongs are likely to make a difference:
  - An impairment that substantially limits a major life activity
  - A history or record of an impairment that substantially limits a major life activity
  - Perceived or regarded as having such an impairment

# The Direct Simple Case, in Theory (4)

- As to prongs I and II, the impact of COVID may be critical
  - Again, we need to know more about the long term impact of COVID on a wide range of bodily functions
    - Like the flu?
    - A life threatening struggle in intensive care
- Two limits on Prong III
  - Can't be merely transitory AND minor
  - No right to an accommodation

## Beyond the Theoretical – Any Court Decisions?

- At this time, no Federal court decision that I am aware of has explicitly identified COVID-19, *by itself*, as a disability under the ADA or Section 504
- But they come provide a framework for analysis

# “Tipping Point” Guidance

- Even if an individual’s case of COVID-19, on its own, does not qualify as a disability, under Section 504 and the ADA, its manifestations and/or accompanying social isolation and distancing may impact a known or documented condition (impairment) that *is* a disability within the meaning of Section 504 and the ADA, for example:
  - A person with a disability on the basis of Chronic Obstructive Pulmonary Disease (COPD) may find their breathing even more impaired, so much so that, it now substantially limits their mobility, requiring new or additional accommodations <https://resphealth.org/coronavirus-effects-copd>
  - Persons with depression may find the depth of their depression greater or their cyclical depression triggered to the point where they can no longer complete academic assignments, requiring new or additional accommodations <https://www.nami.org/covid-19-guide>;  
<https://www.who.int/publications-detail/mental-health-and-psychosocial-considerations-during-the-covid-19-outbreak>

# Tipping Point Cases

- Sometimes called “ totality of the circumstances cases”
- ***Silver v. City of Alexandria***, \_\_\_ F. Supp. 3d \_\_\_; 2020 WL 3639696 (W.D. La. July 6, 2020) [plaintiff’s cardiovascular condition in the context of a COVID-19 environment established both a disability and a need for an accommodation]
  - “[C]onsideration of Mr. Silver's documented serious underlying medical situation, ***in light of the pandemic's existence***, is the proper way to make the disability determination here.” [emphasis added]

*Peeples v. Clinical Support Options, Inc.*, Case No. 3:20-cv-30144-KAR, 2020 U.S. Dist. (D. Mass. September 16, 2020)

- TRO issued permitting working at home for supervisor of NPO that provided walk in emergency mental health interventions]
- COVID is pertinent to deciding whether an impairment other than COVID substantially limits a major life activity
- “‘Asthma does not invariably impair a major life activity’. Plaintiff alleges that, because of their asthma, they are at higher risk for serious illness or even death if they contract COVID-19. [D]uring the COVID-19 pandemic, whether a plaintiff has a disability should be judged by the totality of the circumstances, including the heightened risks of an impairment caused by the pandemic ... The court finds persuasive this limited precedent addressing the standard for determining whether an individual has an impairment that substantially limits a major life activity, thus rising to the level of a disability, during this pandemic.” [Citation to *Valentine* and *Silver* omitted.]

# Module III

Accommodations  
including students  
who cannot mask due to their disabilities



# The Paradigm:

## Declining to Mask Due to a Disability <sup>(1)</sup>

- Only “an otherwise qualified individual with a disability” is entitled to participate in the programs and activities of a college or university under the protections of the Section 504 and the ADA
- In the higher education setting an otherwise qualified student is one who can meet the essential “academic and technical requirements” of the program, with or without reasonable accommodation 34 C.F.R. § 104.3
- An individual who represents a direct threat to the health and safety of others, is not qualified, *if*:
  - there are no accommodations or adjustments that will reduce the threat they represent to a safe level; or,
  - there is such an accommodation but the individual won't use it

# The Paradigm:

## Declining to Mask Due to a Disability (2)

- A student who refuses to abide by a college's health and safety requires, while COVID prevails could be a direct threat to health and safety
- A student who refuses to wear a mask on the grounds of a disability *may* be required to document the disability and the need to not wear a mask
  - Persons with respiratory problems *may* not always have a solid basis for an exception
  - Likely, the stronger case will be for persons with physical limitations that prevent them from putting on or taking off a mask, persons with psychiatric disabilities, and persons on the Autism Spectrum
    - ***Mary Lee Vance*** will discuss masking alternatives and other accommodations.

# Interim Best Practice Suggestion <sup>(1)</sup>

- ***Treat every student, who does not follow college COVID-19 health and safety rules, as a “direct threat to health safety of others”***
- ***It is better to err on the side of assuming COVID-19 is a disability and treat every student who has or had COVID-19 as an individual with a disability***
- Rationale
  - We know that COVID-19 is lethal, highly contagious, and can be acquired within a short period of time
  - Many people with COVID-19 are asymptomatic but nonetheless can spread it
  - This is a very hard time for anyone to acquire an evaluation or documentation of a disability – setting the documentation bar high is both unrealistic and dangerous to the health of other students and faculty
  - Disability status leads us to a known way, the “direct threat paradigm,” to analyze both a refusal to mask and requests for accommodations such as brick and mortar or on-line classes

# An Interim Best Practice Suggestion (2)

- There is a lot we just don't yet know pertaining to COVID but what we do know makes it very likely that COVID will at least be a spectrum and may even a “nearly always” disability
  - If agencies and courts are to make sound and reliable spectrum distinctions concerning the range of manifestations of COVID, we will need more data and science than is currently available
  - If the major life activities of “communication” or “procreation” (sex) apply to quarantining and distancing, even persons who are asymptomatic might be an individual with a disability
    - *See Bragdon v. Abbott*, 524 U.S. 624 (1998) [asymptomatic AIDS] *See also School Bd. of Nassau Cty. v. Arline* [asymptomatic and symptomatic tuberculosis]
  - As presented above by Jamie, due to an impact on other existing disabilities that a person may have, under the “**totality of the circumstances**” and “**tipping**” precedents, there are a lot of chances that someone with COVID and some other impairment, like asthma, diabetes, congestive heart disease or some form of immuno-suppression, is an individual with a disability

# Cover Your Backside!

- This type of policy decision is best adopted only after it is reviewed and plans for implementation are created by a team
  - Student health and counseling
  - Security services
  - College counsel
  - Whomever is immediately above you on the chain of command
- For example, if a student refuses to put on a mask, does Security intervene and then direct the student where?
  - Off of campus?
  - To DSS?
  - To health services?

Unmasking the Question:  
Must I Accommodate  
Students with Disabilities  
Who Won't or Can't Wear Mask

Yes, but not necessarily in the manner they wish

# When There Does Not Seem to be any Alternative

Is On-line Instruction  
a Required form of Accommodation?

## On-Line Instruction Required as a Form of Accommodation? <sup>(1)</sup>

- If a student cannot wear a mask to a brick and mortar class, and no accommodation exists for the student to safely attend such a class, the student should be offered the option of attending the same class or a similar substitute class that is *already* available on-line, assuming that the on-line substitute class is:
  - Accessible with the meaning of the Section 504 and the ADA
  - Will receive comparable academic credit



# Is On-Line Instruction Required as a Form of Accommodation? (2)

- What if no such on-line class exists, must a college create one?
  - With rare exception, as a form of accommodation, restructuring a class to include an on-line version, has not been required by OCR or the courts
    - *But see Hogan v. Ogden*, 2008 U.S. Dist. LEXIS 58359 (E.D. Wash. 2008)
    - More recently, *see Gati v. Western Kentucky University*, 283 F. Supp. 3d 616 (W.D. Ky. 2017)[WKU must enter into interactive individualized process before concluding that on-line graduate class in counseling is a fundamental alteration; WKU prevailed once such a process was completed]

# A New Trend

- **However, in employment and other nonacademic settings**, there is a new developing judicial trend at least requiring a case-by-case analysis, with fundamental alteration and undue burden considerations requiring actual, and interactive consideration process for **of working at home** as an accommodation
  - *Belinsky v. American Airlines, Inc.* 928 F.3d 565 (7th Cir. 2019); *Peeples v. Clinical Support Options, Inc.*, Case No. 3:20-cv-30144-KAR, 2020 U.S. Dist. LEXIS 169167 (D. Mass. September 16, 2020); *Silver v. City of Alexandria*, \_\_ F. Supp. 3d \_\_; 2020 WL 3639696 (W.D. La. July 6, 2020)
- Now, where so much instruction is on-line, dismissing out-of-hand creating an on-line option in higher ed. appears to be an unwise practice as fundamental alternation and undue burden defenses are much less likely to succeed than before COVID

# What about the Opposite Circumstance

- A class is on-line only or hybrid and a student with a disability, perhaps AD/HD, wants brick and mortar full time
- Do a diligent, individualized, fundamental alteration/undue burden analysis
- Creating a class where one does not exist, is likely undue burden but not a fundamental alteration
- Permitting a student to attend a “discongregated class” (e.g., 25% capacity) would require a genuine case by case analysis, but safety should remain a preeminent concern

# COVID and Communication

Auxiliary Aids and Services

# Legal Requirements <sup>(1)</sup>

- Regulations implementing Title II of the ADA require “government entities, including public colleges and universities, to make appropriate auxiliary aids and services available to ensure effective communication with the public 28 C.F.R. §35.160(b)(1)
  - “Effective communication” means that whatever is written or spoken, however conveyed, must be as clear and understandable to people with disabilities as it is for people who do not have disabilities  
*See <https://www.ada.gov/pcatoolkit/chap3toolkit.htm>*
- Regulations implementing Title III of the ADA requires public accommodations, including private colleges and universities, to provide auxiliary aids and services 28 C.F.R. §36.303
- Regulations implementing Section 504 of the Rehabilitation Act of 1973, requires all recipient of Federal Financial Assistance, including nearly every college and university in America, to provide auxiliary aids and services 34 C.F.R. § 104.44 (d)

# Legal Requirements (2)

- “Auxiliary aids and services” are the devices or services that enable effective communication for people with disabilities, particularly people with sensory impairments such as persons who are Deaf/Hard of Hearing or Blind/Low Vision 28 C.F.R. §§ 35. 104, 35.160
- Auxiliary aids and services include qualified interpreting (ASL), captioning of spoken information and videos, text and graphics coded to be accessible through common assistive technology, and much more For more examples see <https://www.ada.gov/pcatoolkit/chap3toolkit.htm>
- Under Title II, you must consult with the student to determine what is effective for him or her and give “primary consideration” to the student’s choice 28 C.F.R. Part 35.160(b)(2)
- Title III, which applies to private schools, along with Section 504, also requires auxiliary aids and services, though *in theory*, less deference to the preference of the student; but such schools are also covered by Section 504

# COVID and Captioning

- All audio and video information contained on public facing websites must be captioned when deployed
  - ***National Association of the Deaf (NAD) v. Harvard University***, 2019 WL 1409302 (D. Mass., March 28, 2019); *Terms of Settlement*: <https://creeclaw.org/wp-content/uploads/2019/11/NAD-v-Harvard-Consent-Decree.pdf>; ***National Association of the Deaf v. Massachusetts Institute of Technology***, *Terms of Settlement Agreement* filed D. Mass, February 18, 2020, case 3:15-cv-30024-KAR Document 195-1; Preliminary Approval of Class Action Settlement: 2020 WL 1495903 (D.Mass. March 27, 2020); narrative description of settlement by NAD <https://www.nad.org/2020/02/18/landmark-agreements-establish-new-model-for-online-accessibility-in-higher-education-and-business/>
  - The same requirement applies to wide-scale classes open to the public like MOOCS
  - A narrow exception may exist for materials not produced by or for the college that are solely conveyed through imbedded links *See NAD v. Harvard and NAD v. MIT*
- In closed, standard-scale classes, on-line or brick and mortar, made up of known students, captioning, descriptive narration or ASL is not required where there are no students who are deaf or hard of hearing
- Descriptive narration of video *may* similarly be required for students who are blind

# COVID and ASL

- COVID has revealed that, some settings are so broad and the information so important that it must be presumed that some persons with hearing impairments will prefer ASL to captioning by itself and the ASL interpreting must be provided in an “open frame” (simultaneously visible on the screen)
  - ***National Association of the Deaf (NAD) v. Donald J. Trump***, Civil Action No. 20-2107 (D.C. D.C. September 23, 2020) remedial order
  - ***Martinez v. Cuomo***, 20-CV-3338, 2020 U.S. LEXIS 83518 (S.D. N.Y. May 12, 2020)



# An Engine for Innovation

A case study concerning test accommodations

# Accommodating the California Bar Exam (1)

- ***Kara Gordon, Isabel Callejo-Brighton and John Doe vs. State Bar of California and National Conference of Bar Examiners, 3:20-cv-06442, (N.D. Cal. September 30, 2020)***
  - Three law school students want to take the bar in the same setting as most other students, at home, safe from COVID, rather than travelling to a live testing site
  - There are three on-line test rules they variously claim with which they cannot comply:
    - No bathroom breaks during a test session
    - No paper tests
    - No physical scratch paper
  - 15 California law school deans wrote the Chief Justice of the California Supreme Court, proposing that “that California administer the bar exam on October 5-6 [2020] without remote proctoring and without limits on what materials the student may consult during the exam” <https://taxprof.typepad.com/files/ca-deans-letter-091420.pdf>

# Accommodating the California Bar Exam (2)

- The Cal. Bar defeated the plaintiffs' motion to modify the on-line Bar rules by taking extraordinary measures to ensure that the live testing sites, which will make most of the accommodations variously requested by the plaintiffs, like bathroom breaks and paper exams, places where it would be extraordinary unlikely that a test-taker could catch COVID
- The conditions at the live sites will be safe as the State Bar hired a well-credentialed COVID-19 expert to develop the protocol for the sites:
  - (1) each test taker has a private hotel room and each hotel will have a COVID prevention plan
  - (2) face coverings are mandatory for all staff and exam takers;
  - (3) alcohol-based disinfectants are available for hand use;
  - (4) there will be designated site-safety leaders;
  - (5) measures will be implemented to reduce the occupancy of communal areas, lunch areas, and restrooms to reduce crowding
  - (6) environmental interventions— such as the opening of windows and doors and the use of outside registration tables; and,
  - (7) the temperature will be take of all persons entering the testing location.

# Accommodating the California Bar Exam (4)

- This was not the best outcome; particularly as it relegates bar candidates with disabilities to a two-tiered system and subjects them to all the risks associated with travel while COVID-19 is ever-present
- But:
  - Look at all the innovation that the Cal. Bar undertook to address COVID-19, ones that colleges and universities would do well to consider for immuno-suppressed individuals, *if live testing is necessary*
  - Some innovations adopted by the Bar and Supreme Court of Cal. (or proposed by the Deans), have never come close to implementation before, like the provisional licensing program that permits 2020 law school graduates to practice law under the supervision of fully licensed lawyers <http://www.calbar.ca.gov/Admissions/Special-Admissions/Provisionally-Licensed-Lawyers>
- The success of the Bar and Supreme Court of Cal. in ***Gordan*** is an example of the strategic advantages that come to a public entity that gives what it can before taking a stand on what it will not do, rather than just doing little or nothing
- ***See also Kawaki Smith v. The Regents of the University of California***, Order Granting Preliminary Injunction (Super. Ct. Alameda County, Aug. 31, 2020, No. RG19046222); temporary stay of Super. Ct. order lifted by Court of Appeal (October 29, 2020) **Amicus Brief joined by AHEAD** [Due to barriers and inequities for applicants with disabilities in taking SAT and ACT, the UC Board of Regents must accelerate its decision to stop using SAT/ACT scores are part of the UC undergraduate admissions process]

# Module IV

## Practical Solutions for Common COVID-19 Related Concerns And Some Suggestions

# Face Mask Resistance



- Pictured Face Mask exemption card stating

“I am exempt from any ordinance requiring face mask usage in public. Wearing a face mask poses [sic] a mental and/or physical risk to me. Under the Americans with Disability Act (ADA), I am not required to disclose my condition to you ... Denying access to your business/organization will be also reported to FTBA for further actions.”

(FTBA – Freedom to Breathe Agency)

# Face Covering Exemptions: CSUS Policy Language

- Faculty and staff who require an accommodation should discuss this with Human Resources (HR) at the earliest opportunity.
- Students are asked to submit an application to Services for Students with Disabilities (SSWD) and meet with an Access Coordinator to discuss their disability and inability to wear a face covering.
- There are also exemptions for religious and specific safety reasons. If you have a religious reason for not wearing a face covering, please check with HR.
- If you believe you have a non-COVID-19 safety reason for not wearing a face covering, please check with the Office of Environment Health and Safety (EHS) at 8-2020.

# CSUS PPE Covered by CARES/HEERF

The Coronavirus Aid, Relief, and Economic Security (CARES) Act was passed by Congress and signed into law on March 27, 2020. One aspect of the act was the creation of the Higher Education Emergency Relief Fund (HEERF). HEERF provides funds to institutions for emergency financial aid grants to students whose lives have been disrupted by the COVID-19 pandemic.

Sacramento State was allocated \$17.8 million to provide emergency grants to students for expenses related to the disruption of campus operations due to the COVID-19 pandemic.

Funds help with academically related expenses such as food, housing, course materials, technology, healthcare, and childcare.

This includes accessible technology (for home use) or other unusual accommodation expenses that have arisen as a result of COVID



# Clear Mask



Pictured - Jo Anne Simon, a New York State Assembly Member, a woman with red hair, wearing a transparent face mask and signing in ASL. Also pictured closeup of adult male with same style mask.



# Face Shield Example



- Pictured – clear face shield with foam forehead band blue cloth draping that has drawstring to secure the fabric tightly around the face.

# Emotional Support Animal (ESA) Approval Process Example

- Initial application may be made either with DS office or Housing
- Medical documentation should be reviewed by the DS office
  - “Under the FHA, a housing provider may request reliable documentation when an individual requesting a reasonable accommodation that are not obvious or otherwise known.”
  - The most important question to be addressed in the documentation or through interactive communication process, is how the ESA mitigates one or more of the manifestations of an identified disability and how the documenting official knows of or has observed this mitigating effect
- If following a reasonable opportunity to the student;
  - Based on the limited questions permitted by DOJ, the assertion that a dog or miniature horse is a service animal, as defined by DOJ, cannot be sustained; and,
  - Reliable documentation has not been provided to establish that the animal meets the HUD definition of a “support” or “assistance animal,”
  - The housing provider is not required to grant the accommodation

# ESA Maintenance If You Are Sick

- There is a risk that people with COVID-19 could spread the virus to animals, CDC recommends that pet owners limit their pet's interaction with people outside their household.
- When possible, have another member of your household, room mate, friend or relative care for your pets while you are sick.
- Avoid contact with your pet including petting, snuggling, being kissed or licked, sharing food, and sleeping in the same bed.
- If you must care for your pet or be around animals while you are sick, wear a mask and wash your hands before and after you interact with them.
- If you are sick with COVID-19 and your pet becomes sick, do not take your pet to the veterinary clinic yourself. Call your veterinarian and let them know you have been sick with COVID-19.

# Best Practices to Reduce the Threat of COVID: Develop an Expert-Based COVID Safety Protocol

- As was done as ***Kara Gordon, Isabel Callejo-Brighton and John Doe vs. State Bar of California and National Conference of Bar Examiners***, 3:20-cv-06442, (N.D. Cal. September 30, 2020), covered by Paul, above, use or hire epidemiological experts, knowledgeable about CDC Guidance, to develop and help your campus to implement a safety protocol
  - This may well save the lives of every person who comes onto campus
  - Makes implementation more credible and readily accepted
  - And place you in a better position to defeat legal challenges

# CSUS Best Practice to Reduce the Threat of COVID: Daily Screenings App

- All students and Employees download the CSUS Daily Health app
- COVID daily screening app data sent to the Health Center for follow-up if necessary
- Everyone submit responses prior to coming to campus and present “badge” upon request
- Daily Questions
  - Do you have any of the following ...fever, nausea, cough, shortness of breath, diarrhea, loss of smell or taste?
  - Have you come into close contact (within 6 feet) with someone who has a laboratory confirmed positive COVID 19 test within the past 14 days?

# Best Practices to Reduce the Threat of COVID Reinforcement v. Enforcement

- Student Ambassadors at entrance of each classroom building provide:
  - Free disposable face masks
  - Remind everyone to wear face coverings while inside the building
  - Provide business cards to encourage students to readily turn to Student Health, Counseling and DSS for guidance, support, and assistance related to inability to wear or discomfort with wearing face masks or face coverings
- Free face masks and other PPE distributed around campus free of charge to all employees
- Free transparent facemasks for faculty with students who are Deaf or HH
- Free transparent facemasks for students who are in a seminar or similar discussion-based class with students who are Deaf or HH

# Best Practices to Reduce the Threat of COVID: Student Services

- Housing
  - Single occupancy rooms
  - Suites with one-half occupancies
  - Common areas locked
  - Furniture removed to reduce gatherings
  - No guests/visitors
- Dining
  - Cafeteria service with servers (Grab and Go)
  - Limited numbers allowed in at a time
  - No inside dining
- Counseling/Health Services etc. with online services and limited in-person services (e.g., flue shots)
- Library drive-by services for pick ups and drop offs
- Other services with online services (for those unable/unwilling to meet in person)



# Best Practices to Reduce the Threat of COVID: Maximize the Advantages of Technology

- Virtual “drop ins” via Zoom
- Technology Loans
  - Laptops
  - Hotspots
  - Headsets with microphones
- University owned laptops loaned with accessible technology software loaded on to it (licenses) in absence of lab access
  - Kurzweil, JAWS, Dragon etc.
- Audio Recording/Notetaker Express in lieu of human note takers
- In a pinch, remote captioning/ASL
  - Zoom – audio and video record
  - Otter ai – for student services
- Create "Accessible Technology Committee" to discuss universal access licenses for Kurzweil, Otter ai etc.

# Provisional/Temporary Due to a Perfect Storm: COVID-19, Online Curriculum, Homelessness/Food Insecurity etc., etc.

- Based on professional campus referrals from CARES, Student Veteran Services, Sexual Assault, Formerly Incarcerated etc.
- Based on student self-disclosure and documentation that verifies COVID-19 exposure but doesn't provide the usual specific details
- Possible temporary accommodations (not all inclusive):  
Attendance leniency (occasional absences), make up exams, extra time on exams, priority registration to arrange classes in close physical proximity, accessible parking spots, reduced course load and online/remote courses

# Online Curriculum Accessibility Reminders

- Narrate and describe all visual content, such as video content and blackboard content for persons with visual impairments
- All video and other orally conveyed information on public-facing websites should be captioned
  - This includes widescale services like MOOCs and free classes open to the public without registration
  - Under the Communication Decency Act, an exception may exist for information, not produced by or for the college, conveyed solely by an imbedded link
- All video and other orally conveyed information that concerns public safety and health, including general announcements pertaining to COVID-19 should also include in-frame ASL interpretations
- A class of multiple individuals with sensory impairments may require more than one type of auxiliary aid or service
- Consider alternatives to proctored exams and proctoring software
- Offer classes synchronously with audio/video recording for asynchronous review

# Additional Resources (1)

- State and county health officials, e.g., State of Washington <https://files.covid19.ca.gov/pdf/guidance-higher-education--en.pdf>
- The Centers for Disease Control (CDC) ***Considerations for Institutes of Higher Education*** [www.cdc.gov](http://www.cdc.gov)
- American College Health Association (ACHA) ***Guidelines: Preparing for COVID-19; Considerations for Reopening Institutions of Higher Education in the COVID-19 Era*** [www.acha.org](http://www.acha.org)
- The EEOC (as to employees) [www.eeoc.gov/coronavirus](http://www.eeoc.gov/coronavirus)
- See Gary Phelan, JD, ***EEOC Should Classify COVID-19 as a Disability Under the ADA*** <https://www.law360.com/articles/1280583/eeoc-should-classify-covid-19-as-a-disability-under-ada>
- Disability Rights California (DRC), ***Coronavirus (COVID-19) Know Your Rights-Face Coverings during COVID-19*** <https://www.disabilityrightsca.org/post/know-your-rights-face-coverings-during-covid-19>; and, DRC and the Disability Rights Education Defense Fund (DREDF), ***COVID-19: Face Masks and People With Disabilities***, <https://dredf.org/2020/07/23/covid-19-face-masks-and-people-with-disabilities>

# Additional Resources (2)

- Guidance of HHS OCR for medical science and healthcare educational programs, Secretary Azar, ***Statement on New CDC Face Covering Guidance*** (April 3, 2020) <https://www.hhs.gov/about/news/2020/04/03/secretary-azar-statement-on-new-cdc-face-covering-guidance.html>; and, ***OCR HIPAA Announcements Related to COVID-19***, <https://www.hhs.gov/hipaa/for-professionals/special-topics/hipaa-covid19/index.html>
- American College Healthcare Association (ACHA) Guidelines – “***Considerations for Reopening Institutions of Higher Education in the COVID-19 Era***” (May 7, 2020), [https://www.acha.org/documents/resources/guidelines/ACHA\\_Considerations\\_for\\_Reopening\\_IHEs\\_in\\_the\\_COVID-19\\_Era\\_May2020.pdf](https://www.acha.org/documents/resources/guidelines/ACHA_Considerations_for_Reopening_IHEs_in_the_COVID-19_Era_May2020.pdf)
- The analyses by Bill Goren, J.D., reviewing EEOC guidance, for example <https://www.williamgoren.com/blog/2020/03/24/eec-guidance-coronavirus-influenza/>
- Looking back over all the material I have reviewed, in the main, EEOC guidance seems the most useful but remember that employee and student law are not identical (respectively, Title I vs. Titles II and III) [https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm) [EEOC guidance is subject to frequent updates]

# Transparent Face Mask/Face Shield Options (A Short List)

## Masks

- <https://www.theclearmask.com>
- <https://rafinova.com/collections/fall-smile-masks>

## • Shields

- <https://rapidresponseppe.com>
- <https://www.oystercreekcanvas.com>
- [https://madison.com/ct/news/local/education/latest-badger-shield-design-draws-global-attention/article\\_0d860cee-522d-523a-a1b9-25357ce9daa1.html](https://madison.com/ct/news/local/education/latest-badger-shield-design-draws-global-attention/article_0d860cee-522d-523a-a1b9-25357ce9daa1.html)

# A Few ESA-Related RESOURCES

- <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/animals.html>
- The Fair Housing Act (Title VIII of the Civil Rights Act of 1968)—dorms, fraternities, grad. departments, Greek and resident housing
- <https://www.hud.gov/sites/dfiles/PA/documents/HUDAsstAnimalNC1-28-2020.pdf>
- HUD (Housing and Urban Development) Section 504 regulations (24 CFR Parts 8 and 9) February 2011 HUD guidance. Generally, a housing provider is required to waive a rule banning pets, as necessary to admit ESAs, on a case-by-case basis
- See [http://portal.hud.gov/hudportal/documents/huddoc?id=servanimals\\_ntcfheo2013-01.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=servanimals_ntcfheo2013-01.pdf)
- Though DOJ doesn't regulate this topic, it will support HUD in enforcing its rules in court. One OCR letter, in *dicta*, states that there is a duty to consider ESA's beyond housing as an accommodation under Section 504: Letter to Delaware Technical College: OCR Complaint 03-15-2416 (July 2016)

# Module V

# Q&A