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NOTE ON ROTHSTEIN & ROTHSTEIN

Throughout the text, all references to LAURA ROTHSTEIN & JULIA ROTHSTEIN, DISABILITIES AND THE LAW (2009) should be changed to LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW (current cumulative edition). The treatise is now updated twice a year. The referenced sections in the casebook, however, remain the same.
Chapter 2. WHO IS PROTECTED UNDER THE LAWS?

B. DEFINING DISABILITY

[1] Statutory Definitions

Page 36, after the definition of Disability under the Americans with Disabilities Act, add the following:

On May 24, 2011, the Equal Employment Opportunity Commission Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, Amended, became effective. See 58 Fed. Reg. 16978-17017 (March 25, 2011), 29 C.F.R. Part 1630. The guidance, which explains the new regulations, is attached to the regulations as an appendix at 29 C.F.R. Part 1630 App. The regulations apply specifically to employment (Title I), but are probably important guidance on the definition of disability as it would apply to Title II and Title III of the ADA and to the Rehabilitation Act. The regulations make clear that the purpose of the ADAAA is to make it easier for persons with disabilities to gain protection under the ADA and the Act should be interpreted to give the broadest coverage possible. 29 C.F.R. Part 1630.1(c) (4). For a series of questions and answers that offer an excellent short guide to the regulations, see U.S. Equal Employment Opportunity Commission, Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008, http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm (last visited June 11, 2012).

Page 55, Notes and Questions, add to Note 2:

For an understanding of how courts are interpreting this definitional change with reference to HIV positivity, see Horgan v. Simmons, 704 F. Supp. 2d 814 (N.D. Ill. 2010) (under the ADAAA HIV positive status may substantially limit major life activity because it impairs function of immune system).

[2] Prong One: A Physical or Mental Impairment that Substantially Limits A Major Life Activity

Page 61, add to Note 7:

For regulatory guidance on the issue of rules of construction, see 29 C.F.R. § 1630.1(c), and the guidance at 29 C.F.R.§ 16.30.1 (c) App.
Page 63, add to Note 11:


Page 68, add to Note 2:

The EEOC responded to Congress’ directive in the ADAAA to promulgate new regulations clarifying that “the term ‘substantially limits’ shall be construed broadly in favor of expansive coverage” and that the term is “not meant to be a demanding standard.” 29 C.F.R. Sec. 1630.2(j)(1)(i) (2013). The regulation also expressly provides that “effects of an impairment lasting or expected to last fewer than six months can be substantially limiting” for purposes of proving an actual disability. 29 C.F.R. Sec. 1630.2(j)(1)(ix). In *Summers v. Altarum Institute, Corp.*, 740 F. 3d 325 (4th Cir. 2014), the court overturned a lower court’s grant of the defendant’s motion to dismiss the complaint on the basis that the plaintiff’s impairment – fractured leg, fractured ankle, torn meniscus and ruptured patellar tendon – was temporary. It alluded to the EEOC’s regulation and concluded that, given the ADAAA’s instruction to construe the Act broadly, the EEOC’s regulation on temporary disabilities is reasonable. Given the severity of the injuries alleged in *Summers*, the court concluded that the complaint stated a cause of action under the ADAAA when it alleged that the plaintiff was “unable to walk for seven months, and without surgery, pain medication and physical therapy, he ‘likely’ would have been unable to walk for far longer.” According to the court, this was the first appellate case decided under the new ADAAA’s expanded definition of disability. The *Summers* court also chided the lower court for its alternative conclusion that the plaintiff was not a person with a disability because he could use his wheelchair to work. The court of appeals stated, “If the fact that a person could work with the help of a wheelchair meant he was not disabled under the Act, the ADA would be eviscerated.” *Id.*

Page 68, add to Note 3:

For the regulatory clarification on the definition of disability, see 29 C.F.R. § 1630.2(g)(1)(i)-(iii).

Page 68, add to Note 4:


Page 69, add to Note 5:

For a case applying the ADAAA where the plaintiff had carpal tunnel syndrome, see *Gibbs v. ADS Alliance Data Systems, Inc.*, 2011 WL3205779 (D. Kan. July 28,
(genuine issue of material fact exists as to whether plaintiff’s carpal tunnel syndrome constitutes a disability).

Page 69, add the following to the Notes and Questions:

7. The EEOC regulations pursuant to the ADAAA provide clarification regarding both mitigating measures (29 C.F.R. § 1630.2(j) and major life activities (29 C.F.R. § 1630.2(i)). They also provide guidance about the term “substantially limits.” (20 C.F.R. § 1630.2(j)).

Since the statute has been amended and regulations promulgated there have been several judicial opinions interpreting the revised statutory and regulatory requirements. Courts have tended to find conditions such as HIV and cancer to be “per se” disabilities. See e.g., Horgan v. Simmons, 704 F. Supp. 2d 814 (N.D. Ill. 2010) (under the ADAAA HIV positive status may substantially limit major life activity because it impairs function of immune system); Demarah v. Texaco Group, Inc., 88 F. Supp. 2d 1150 (D. Colo. 2000) (employee who underwent double mastectomy could be disabled under ADA when she had trouble walking and caring for herself); Hoffman v. Carefirst of Fort Wayne, Inc., 737 F. Supp. 2d 976 (N.D. Ind. 2010) (even though renal cell carcinoma was in remission, the ADAAA’s clear language requires a finding of a disability where the condition would substantially limit a major life activity if it were active). Even before the amendment some courts had reached broad interpretations of the definition when it came to physical disabilities like cancer. See e.g., Kennedy v. England, 2006 WL 1129405 (D.S.C. 2006) (cancer is per se disability). The decisions on mental health impairments and learning disabilities are mixed. See, e.g. Kinney v. Century Services Corp. II, 2011 WL 3476569 (S.D. Ind. Aug. 9, 2011)(even though plaintiff’s depression was “inactive” and did not impact her work performance, the fact that she had been hospitalized for the condition and her debilitating symptoms when active raised a genuine issue of fact as to whether she was a qualified individual under the ADA); Klute v. Shinseki, 840 F. Supp. 2d 209 (D.D.C. Jan 9, 2012)(attorney with adjustment disorder alleged the federal government, his employer, unreasonably denied him a reasonable accommodation, but court concluded that even under the new ADAAA the plaintiff’s claim merely showed that he was unable to work only with a particular supervisor or in a particular workplace, and therefore, there was no genuine issue of material fact whether there was a substantial limitation of the major life activity of working).

[3] Prong Two: A Record of Such an Impairment

Page 70, add text to end of the section:

The regulations under the ADAAA clarify what is meant by “record of.” See 29 C.F.R. § 1630.2(k)(1).
Prong Three: Being “Regarded As” Having Such an Impairment

Page 72, add to Note 1:

For the regulatory clarification on the definition of “regarded as,” see 29 C.F.R. § 1630.2(g)(3) and 1630.2(l). Whether an impairment is “transitory and minor” is an objective inquiry that does not depend on the employer’s belief. See 29 C.F.R. § 1630.15(f) and the accompanying appendix; *Gaus v. Norfolk Southern Ry. Co.* 2011 WL 4527359 (W.D. Pa. Sept. 28, 2011) (employee is “regarded as” having a disability even if the employer subjectively believed that the impairment was transitory and minor).

Since the 2008 amendments, several judicial decisions have applied the updated standard, reflecting a broader interpretation than might have occurred before the 2009 effective date. For example, in *Roman-Oliveras v. Puerto Rico Elec. Power Authority*, 655 F.3d 43 (1st Cir. 2011) a court found that an employee was perceived as disabled where the employer removed him from his position and forced him to undergo multiple psychiatric evaluations and despite favorable test results was not allowed to work. The court in *Kagawa v. First Hawaiian Bank/Bancwest Corp.*, 819 F. Supp. 2d 1125 (D. Haw. 2011) concluded that where the employer ordered an employee to go to counseling or be fired and manager's report stated that she “hears a voice,” the employee was “regarded as” having a disability. See also *Johnson v. Peake*, 755 F. Supp. 2d 888 (W.D. Tenn. 2010) (director's repeated statements that she would not hire someone with history of chemical dependency shortly before reassigning the chief was evidence that director regarded him as disabled). Courts have begun to clarify that believing that an individual is precluded from working at one particular job does not reach the level of “regarding” that person as disabled. See e.g., *Wolski v. City of Erie*, 900 F. Supp. 2d 553 (W.D. Pa. 2012).

Page 75, add to Note 5.

Chapter 3. EMPLOYMENT

A  APPLICABILITY OF TITLE I OF THE AMERICANS WITH DISABILITY ACT AND THE REHABILITATION ACT

[1] Which Employers areCovered?

Page 93, add to Note 3:

3. (after the third paragraph) The regulations on the definition of “record” of a disability make clear that whether an individual has a record of a disability should be construed broadly “to the maximum extent possible and should not demand extensive analysis.” A person will be considered to have a record of a disability if he or she has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population, or was misclassified as having a disability. Persons with a record of a disability are entitled, under some circumstances, to a reasonable accommodation. See 29 C.F.R. Part 1630.2 (k).

29 C.F.R. Part 1630.2(l) establishes the regulations for determining whether a person will be “regarded as” having a disability. 29 C.F.R. Part 1630.15 (f) establishes how an employer may prove a defense to a “regarded as” claim that the impairment or perceived impairment is transitory and minor.

Page 94, add Note 5:

5. In Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 132 S. Ct. 694 (2012), the Supreme Court held unanimously that the first amendment establishment and free exercise clauses create a broad “ministerial exception” to the ADA. In Hosanna-Tabor, the EEOC alleged that the defendant had violated the ADA’s anti-retaliation provision by firing a teacher with narcolepsy in a church school because she had threatened to bring an ADA lawsuit against the defendant. The Supreme Court held that the First Amendment to the U.S. Constitution precluded a lawsuit brought under the ADA because the ADA should not apply to the employment relationship between a church and its ministers. The Court sanctioned a broad definition of the term “minister” for purposes of the exception. Even though the teacher was not an ordained minister of the church, the Court categorized her as a “minister,” and held that she did not have a cause of action under the ADA.

[2] Applicability of The Three-Prong Definition of Disability to Employment

In Young v. United Parcel Service, Inc., 135 S.Ct. 1338 (2015), the Supreme Court held that the Pregnancy Discrimination Act requires an employer to grant a
reasonable accommodation to a pregnant woman with a 20 pound lifting restriction if she can prove that other employees who were not pregnant with similar inability to work were given accommodations, that the employer’s policy created a significant burden on pregnant women and that the employer’s “legitimate non-discriminatory reason” was not sufficiently strong to justify the burden on pregnant women.

The Court noted that the facts in Young occurred before the enactment of the Americans with Disabilities Act Amendments Act (ADAAA), which went into effect in 2009. It raised the question without deciding it whether the new Title I regulations under the 2009 Amendments, if applicable to Young, would grant a right to a pregnant woman to accommodate her lifting restrictions. The regulations to the new ADAAA state that a disability does not have to last six months or longer to be considered a disability and the guidance gives the example of an employee with a bad back with a 20 pound lifting restriction that lasts for a number of months. The guidance notes that this person would have an impairment that substantially limits the major life activity of lifting and would therefore be covered by the ADA. Thus, the reasonable accommodations provisions of the ADA would apply. See 29 C.F.R.1630.2 (j)(1)(ix) and 29 C.F.R.1630.2 (j)(1)(ix) Appendix (interpretive guidance). It appears that a pregnant woman who has similar lifting restrictions due to her pregnancy may be a person with a disability under the ADA and therefore have a right to reasonable accommodations.

Page 95, after the first sentence, add:

29 C.F.R. Part 1630.1 (c) states that in general this part does not apply a lesser standard than that imposed by Title V of the Rehabilitation Act or 1973 or its regulations.

Page 95, add to Note 2:

See 29 C.F.R. § 1630.15(f) and the accompanying appendix; Gaus v. Norfold Southern Ry. Co. 2011 WL 4527359 (W.D. Pa. Sept. 28, 2011) (employee is “regarded as” having a disability even if the employer subjectively believed that the impairment was transitory and minor).

Page 96-98, add to Notes and Questions:

3. (p. 96, after the first paragraph) The regulations list a number of impairments that in most if not all cases will substantially limit a major life activity. The regulations state that depressive disorder and bipolar disorder substantially limit the major life activity of brain function. 29 C.F.R. Part 1630.2 (g) (3) (iii). (Page 96, add to the end of Note 3) See U.S. Equal Employment Opportunity Commission, Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008, http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm (last visited June 11, 2012).

6. *(p. 97)* The regulations state that HIV substantially limits immune function. 29 C.F.R. Part 1630.2 (g) (3) (iii). See *Horgan v. Simmons*, 704 F. Supp. 2d 814, 2010 U.S. Dist. LEXIS 36915 (N.D. Ill. 2010) (concluding that the plaintiff’s allegation that he was HIV positive was sufficient to withstand defendant’s motion to dismiss because if proven, plaintiff was a person with a disability under the ADAAA because HIV substantially limits immune function).

8. *(top of p. 98)* The regulations state that an employer may not use a qualification standard for uncorrected vision unless the employer can prove that the qualification is job related and consistent with business necessity. 29 C.F.R. Part 1630.10.

Page 100, following the end of the carryover paragraph from p. 99 add:

29 C.F.R. Part 1630.16 gives a list of permitted activities for an employer.

Page 107, add the following:

3. *(end of third paragraph)* The regulations state that HIV substantially limits immune function. 29 C.F.R. Part 1630.2 (g) (3) (iii).

[a] **Attendance Requirements**

Page 161, add the following to Notes and Questions:

*(end of Note 1, p. 161)* A recent case in the Ninth Circuit distinguished *Humphrey*. In *Samper v. Providence St. Vincent Medical Center*, 675 F.3d 1233 (9th Cir. 2012), the court held that regular attendance was an essential function of the job of a neo-natal nurse. In doing so, it stressed the differences between the job of a medical transcriptionist in *Humphrey* and that of a neo-natal nurse who must be present to provide care. In *EEOC v. Ford Motor Co.*, 782 F.3d 753 (6th Cir., 2015) (en banc), the en banc Sixth Circuit overturned a 2-1 panel decision that had held that in the case of a resale steel buyer at Ford with irritable bowel syndrome, there was a jury question whether working from home up to four days per week was a reasonable accommodation. Even though the employee spent much of her time working by telephone and on the computer, the en banc court concluded as a matter of law that being in the workplace was an essential function because at least four of the employee’s ten work responsibilities could not be performed from home, and two more could not be performed effectively from home. Finally, the court concluded, it was necessary to be available for face-to-face meetings with co-workers, stampers and suppliers.
Working Overtime

Page 162, add at the end of this section:

See also, Hoffman v. Carefirst of Fort Wayne, Ind., 737 F. Supp. 2d 976, 2010 U.S. Dist. LEXIS 90879 (N.D. Ind. 2010) (holding that there were genuine issues of material fact concerning whether the plaintiff’s illness that was in remission was a disability and whether the employer failed to grant a reasonable accommodation when it insisted that the plaintiff work at least eight hour days with three hours of commuting).

Page 181, add the following to Notes and Questions:

(end of note 1, p. 182) The regulations state that diabetes substantially limits endocrine function. 29 C.F.R. Part 1630.2 (g) (3) (iii).

E REASONABLE ACCOMMODATION AND UNDUE HARDSHIP

[2] Health Impairments and Reasonable Accommodations

Page 214, add the following to Notes, immediately before Note 2:

29 C.F.R. Part 1630.16 (d) states that it is not a violation of the Act for employers to prohibit or impose restrictions on smoking in places of employment.

[3] Physical Impairments and Reasonable Accommodations

Page 217, add the following to Notes and Questions:

(end of Note 5, p. 217) In Feist v. Louisiana, 730 F.3d 450 (5th Cir. 2013), the plaintiff suffered from a knee condition that made it difficult for her to walk the two cobblestoned blocks from the parking lot assigned to her to work, and requested a parking spot in the parking garage adjacent to her workplace. The employer refused the closer spot. Plaintiff sued, alleging a violation of the ADA, and the defendant filed a motion for summary judgment on the basis that the parking spot did not enable her to perform the essential functions of the job. The court of appeals overturned the lower court, holding that according to the EEOC reasonable regulation, a plaintiff need not demonstrate that a requested accommodation enabled her to perform the essential functions of her job. The plaintiff needs only to demonstrate that the requested accommodation was reasonable. But see Regan v. Faurecia Automotive Seating, Inc., 679 F.3d 475 (6th Cir. 2012) (holding that an employer did not have to accommodate an employee with narcolepsy who found her changed work schedule very tiring because it increased her commute time).
F DISABILITY-BASED HARASSMENT AND RETALIATION

Page 241, add after Note 1:

In May 2013, the EEOC was awarded a $240 million jury verdict, the largest in its history, in a case alleging severe discrimination under the ADA and abuse of employees with mental disabilities. The employees were men who worked at a turkey processing plant who, according to the testimony, were called names such as “retard” and physically abused. See http://www.eeoc.gov/eeoc/newsroom/release/5-1-13b.cfm

In recent decisions where plaintiffs have claimed that the employer retaliated, the plaintiff generally is not able to meet the burden of proving that motivation. Nonetheless, it remains a significant factor that merits training of employee supervisors and those implementing human resources policies.

H RELATIONSHIP OF ADA TO OTHER FEDERAL AND STATE LAWS

Page 255, add to end of Note 7:

A recent Tenth Circuit case, however, concluded under Section 504 of the Rehabilitation Act that a university that refused to consider giving more than six months’ leave, where it had a six month inflexible sick leave policy, as an accommodation to the plaintiff’s cancer did not violate the Act. See Hwang v. Kansas State University, 2014 WL 2212071 (10th Cir. May 29, 2014). There is a question whether this is a correct interpretation of the reasonable accommodation requirement under the ADA given that the ADA requires an individual determination.

In Young v. United Parcel Service, Inc., 135 S.Ct. 1338 (2015), the Supreme Court held that the Pregnancy Discrimination Act requires an employer to grant a reasonable accommodation to a pregnant woman with a 20 pound lifting restriction if she can prove that other employees who were not pregnant with similar inability to work were given accommodations, that the employer’s policy created a significant burden on pregnant women and that the employer’s “legitimate non-discriminatory reason” was not sufficiently strong to justify the burden on pregnant women.

The Court noted that the facts in Young occurred before the enactment of the Americans with Disabilities Act Amendments Act (ADAAA), which went into effect in 2009. It raised the question without deciding it whether the new Title I regulations under the 2009 Amendments, if applicable to Young, would grant a right to a pregnant woman to accommodate her lifting restrictions. The regulations to the new ADAAA state that a disability does not have to last six months or longer to be considered a disability and the guidance gives the example of an employee with a bad back with a 20 pound lifting restriction that lasts for a number of months. The guidance notes that this person would have an impairment that substantially limits the major life activity of lifting and would
therefore be covered by the ADA. Thus, the reasonable accommodations provisions of the ADA would apply. See 29 C.F.R.1630.2 (j)(1)(ix) and 29 C.F.R.1630.2 (j)(1)(ix) Appendix (interpretive guidance). It appears that a pregnant woman who has similar lifting restrictions due to her pregnancy may be a person with a disability under the ADA and therefore have a right to reasonable accommodations.

I ENFORCEMENT

[5] Title II of The Americans with Disabilities Act

Page 263, add at the end of the first full paragraph of [5]:

A circuit split has developed on the question of whether a public employee may sue the employer for employment discrimination under Title II of the ADA. A number of courts have concluded that Title II does not apply to relations between state and local government employers and employees, but applies only to services, programs or activities furnished by a public entity. See Brumfield v. City of Chicago, 735 F.3d 619 (7th Cir. 2013) (concluding that Title II unambiguously does not apply to the employment decisions of state and local governments, and, therefore, the court refuses to give Chevron deference to the Justice Department’s regulation, which states that the provision applies to claims of employment discrimination). See also, Elwell v. Oklahoma, 693 F.3d 1303 (10th Cir. 2012) (same); Zimmerman v. Oregon Department of Justice, 170 F.3d 1169 (9th Cir. 1999) (same). But see Bledsoe v. Palm Beach Soil and Water Conservation Dist., 133 F.3d 816 (11th Cir. 1998)(concluding that Chevron deference applies and applying Title II to an employment discrimination case brought by a public employee). Title I applies to state and local employees, but in the case of state employees, the Eleventh Amendment prohibits money damages brought against the state. See Board of Trustees v. Garrett, 531 U.S. 356 (2001), reproduced at p. 243.
Chapter 4  PUBLIC ACCOMMODATIONS

A  OVERVIEW

Page 265, add before the last sentence in the last full paragraph:

In Gilstrap v. United Airlines, Inc., 709 F. 3d 995 (9th Cir. 2013), the court held that an airline terminal was not a public accommodation under the ADA because air terminals are covered by the Air Carrier Access Act.

Page 281, add to the Notes:

3. The application of Title III to the Internet has been the subject of a number of judicial decisions, with inconsistent results. Compare National Association of the Deaf v. Netflix, Inc., 869 F. Supp. 2d (D. Mass. 2012) (subscription video company video streaming website is a place of public accommodation; applying Carparts analysis; action sought to require closed captioning for all content on video streaming website; not an irreconcilable conflict between ADA requirements and those set by Twenty-First Century Communications and Video Accessibility Act with Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104 (9th Cir. 2000) and Cullen v. Netflix, 880 F. Supp. 2d 1017 (N.D. Cal. 2012) (websites not a places of public accommodation).

C  MODIFICATION OF POLICIES, PRACTICES, AND PROCEDURES

Page 300, add to the end of Note 1:

On July 23, 2010, the Department of Justice issued final regulations on service animals. The regulations became effective March 15, 2011. 75 Fed. Reg. 56,164-236 (September 15, 2010) (Title II) and 75 Fed. Reg. 56,236-358 (September 15, 2010) (Title III). These regulations amend both Title II and Title III regulations. Service animals are defined as those individually trained to do work or perform tasks for the benefit of an individual with a disability (including a psychiatric disability). 28 C.F.R. § 35.104 and § 36.104. The only other animal where reasonable accommodations may have to be considered are miniature horses, and the regulations specify guidance on when accommodating such animals would be appropriate. 28 C.F.R. § 35.136(i) and § 36.302(c)(9). The regulations relating to service animals clarify what animals are protected, that the animal must be trained to perform a service, when service animals may be removed, provisions relating to the care and supervision of such animals, documentation that can be required and inquiries that can be made about service animals, what health and safety concerns are valid, and where such animals can have access. 28 C.F.R. § 35.136 and § 36.302(c).
Accommodation requirements regarding animals in employment and housing settings are not necessarily the same as those for public service providers and programs of public accommodation. In employment and housing settings (which do not yet have regulatory guidance) animals other than dogs and horses might be required to be allowed and more documentation might be permissible. The animal might not be required to be trained to do something and could be an accommodation based on the emotional support that the animal provides. Campus housing raises even more complex and as yet unresolved issues.

A number of judicial decisions have interpreted the 2010 regulations on issues involving service animals with a range of outcomes. These include *O'Connor v. Scottsdale Healthcare Corp.*, 582 Fed. Appx. 695 (9th Cir. 2014) (service animal at hospital). Difficulties are arising about documentation that can be requested in some cases. In *Davis v. Ma*, 848 F. Supp. 2d 1105 (C.D. Cal. 2012), aff'd, 568 Fed. Appx. 488 (9th Cir. 2014), the court found that a store customer's puppy was not a trained service animal, that the puppy was not fully vaccinated, and the doctor’s note did not explain how puppy ameliorated back issues. Ordinarily an individual is not required to have documentation, but perhaps where the service to be provided is not apparent, some documentation may be requested. See also *Sak v. City of Aurelia, Iowa*, 832 F. Supp. 2d 1026 (N.D. Iowa 2011) (local laws prohibiting specific breeds are inconsistent with ADA guidance on service animals).

*Page 302, add to the end of Note 5:*

On July 23, 2010, the Department of Justice issued final regulations finalizing ADA regulations, including regulations on the use of mobility devices, including Segways®. The regulations became effective March 15, 2011. 75 Fed. Reg. 56,164-236 (September 15, 2010) (Title II) and 75 Fed. Reg. 56,236-358 (September 15, 2010) (Title III). These regulations amend both Title II and Title III regulations. See 28 C.F.R. § 35.137 and § 36.311. Entities are allowed to consider the type, size, weight, and speed of the device, the volume of pedestrian traffic, the facility’s design and operation, and risk factors. Further requirements clarify what kind of inquiries can be made in making such a modification.

See also *Ault v. Walt Disney World Co.*, 2011 WL 1460181, 43 Nat’l Disability L. Rep. ¶ 48 (M.D. Fla. 2011) in which the court addressed the conflict between the Department of Justice revised regulations on use of power-driven mobility devices and the plain language of Title III which requires modifications only if they are necessary. The court found that the new regulations are not entitled to deference and that the ban on these devices based on legitimate safety concerns is not a Title III violation because the device is not necessary.
D  ARCHITECTURAL BARRIERS

[1]  Covered Facilities

On July 23, 2010, the Department of Justice issued final regulations under the ADA on a number of matters, including some architectural barrier issues, effective March 15, 2011. 75 Fed. Reg. 56,164-236 (September 15, 2010) (Title II) and 75 Fed. Reg. 56,236-358 (September 15, 2010) (Title III). The regulations amend both Title II and Title III regulations. The Final Rules amend 28 C.F.R. Parts 35 and 36. The regulations address ticketing for accessible seating in sports and similar arenas, residential housing provided by state and local governmental entities and access requirements, and detention and correction facility access issues for new construction and alterations. The new regulations also provide new design standards for new construction and alterations for access in recreation areas (including amusement rides, boating facilities, exercise machines and equipment, fishing piers and platforms, golf facilities, miniature golf, play areas, swimming pools) and in public facilities (including detention and correctional facilities, judicial facilities, and residential dwelling areas).

These regulations allow entities that complied with the 1991 design standards to have a “safe harbor” for existing facilities. The safe harbor exemption is found in the regulations. 28 C.F.R. §§ 35.150(b)(2); 35.151(b)(4)(ii)(C), 36.304(d)(2).

Page 309, add to Note 1:

Effective March 15, 2011, both the Title II and Title III regulations ensure ticketing for accessible seating in stadiums and arenas. 28 C.F.R. § 35.138 and § 36.302(f). The revised regulations also clarify requirements for new construction of stadium style theater spaces. This section also requires for other assembly area seating and dispersal of seats. 28 C.F.R. § 35.151 (g).

[2]  Accessibility Requirements

[a]  Alterations

Page 316, add to Note:

There have been a number of cases addressing the issue of whether sidewalks, curbs and parking lots are services under Title II of the ADA. The Fifth Circuit, sitting in banc, concluded that building or altering public sidewalks is a service covered by Title II and that sidewalks themselves are services, programs or activities covered by the statute. See Frame v. City of Arlington, 657 F.3d 215 (5th Cir. 2011) (en banc). See also Barden v. City of Sacramento, 292 F.3d 1073 (9th Cir. 2002) (holding that public sidewalks and curbs are services, programs or activities under Title II). See LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW § 6:15 (2012) and cumulative editions (citing cases).
[c] New Construction

Page 326, add to Note 2:

Effective March 15, 2011, both the Title II and Title III regulations ensure ticketing for accessible seating in stadiums and arenas. 28 C.F.R. § 35.138 and § 36.302(f). The revised regulations also clarify requirements for new construction of stadium style theater spaces. This section also provides requirements for other assembly area seating and dispersal of seats. 28 C.F.R. § 35.151(g).

G TELECOMMUNICATIONS

[1] Telephones

Page 348, add text at the end of the section before the Problem:

Department of Justice final regulations under the ADA relating to telecommunications became effective March 15, 2011. See 75 Fed. Reg. 56,164-236 (September 15, 2010) (Title II) and 75 Fed. Reg. 56,236-358 (September 15, 2010) (Title III). The regulations amend both Title II and Title III regulations. New provisions provide guidance regarding a use of an automated-attendant system (such as voice mail and messaging) and require the system to provide effective real-time communication with individuals using auxiliary aids and services, including TTYs or other FCC-approved relay systems. 28 C.F.R. § 35.161.

Page 349, add to text at the end of the section:

The Communications and Video Accessibility Act, which is effective in October 2013, 47 C.F.R. § 79.4(c)((1), requires that video content owners (not distributors) have the primary responsibility for captioning video information. It also mandated that the Federal Communications Commission issue regulations requiring “the provision of closed captioning on video programming delivered using Internet protocol that was published or exhibited on television with captions after the effective date of the regulations.” Final regulations were issued on January 13, 2013. See 47 C.F.R.§ 79.4. The regulations prohibit private rights of action and establish an administrative complaint procedure and became effective on April 30, 2012.

[3] Internet and Other Web-Based Communications

Page 349, add to Notes:

The complexity of ensuring access in the Internet has been the subject of ongoing debate and discussion. Litigation has addressed the issue, but not definitively in terms of whether websites are public accommodations, what is required in terms of access, and
who might have standing to bring actions. It can be expected that there will be federal
guidance on these issues at some point in the future. Information on proposed regulations
with respect to website communication and other issues can be found at ada.gov.

Whether websites are considered programs under Title III has not yet been clearly
resolved by the courts. Compare Cullen v. Netflix, Inc., slip opinion (9th Cir. 2015),
available at https://d3bsvxk93brmko.cloudfront.net/datastore/memoranda/2015/04/01/13-15092.pdf
(holding that they are not subject to Title III) and Cullen v. Netflix, Inc., 880 F. Supp. 2d
1017 (N.D. Cal. 2012) (website for Netflix not a place of public accommodation) with
1091 (D. Mass. 2012) (website is place of public accommodations in an action seeking
closed captioning for all content on video streaming website. See also National
Federation of Blind v. Target Corp., 582 F. Supp. 2d 1185 (N.D. Cal. 2007), in which the
court recognized that California state law is broader than federal law in applying
accessibility requirements for public accommodations to all business establishments,
including websites.

Even if websites are subject to Title III, there is not yet clear guidance on what would be
required of entities in terms of ensuring accessibility.

H ENFORCEMENT

[1] Americans with Disabilities Act

Page 351, add text to the end of the section:

A growing body of case law addresses the issue of standing to bring Title III
claims for violations of access requirements. With varying results, courts have
considered factors such as proximity of the location to the residence, previous patronage,
and intent to return. See LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND
THE LAW § 6:17 (2012) and cumulative editions (listing cases).

See also Laura Rothstein, Disability Discrimination Statutes or Tort Law: Which
Provides the Best Means to Ensure an Accessible Environment? 75 OHIO STATE L.J.
1263 (2014); Michael E. Waterstone, Michael Ashley Stein, and David B. Wilkins,
Disability Cause Lawyers, 53 WILLIAM & MARY L. REV. 1287 (2012); Samuel
Bagenstos, The Perversity of Limited Civil Rights Remedies: The Case of “Abusive”
ADA Litigation, 54 UCLA L. REV. 1 (2006); One circuit court has established factors for
determining when litigation is frivolous or harassing and which may justify limited
prohibitions against filing additional lawsuits. In Molski v. Evergreen Dynasty Corp., 500
F.3d 1047 (9th Cir. 2007), cert. denied, 129 S. Ct. 594 (2008) the court noted that a
finding of frivolous, harassing litigation was supported by: 1) numerous claims with false
or exaggerated allegations of injuries; 2) the use of coercive letters intimidating them into
making cash settlements; and 3) limited occasions on which suits were tried instead of
settled. The court determined in a later deliberation of that case that the plaintiff was a vexatious litigant because he filed identical claims at different businesses. The court required a prefiling order for future Title III cases. The dissent in the case was concerned about the extreme remedy and its impact on access to justice. The availability of attorneys' fees to defendants where claims are frivolous has been addressed by some courts.

[2] Air Carrier Access Act

Page 351, add text to end of the section:

In *Gilstrap v. United Airlines, Inc.*, 709 F. 3d 995 (9th Cir. 2013), the court held that “the ACAA and its implementing regulations preempt state and territorial standards of care with respect to the circumstances under which airlines must provide assistance to passengers with disabilities in moving through the airport. The ACAA does not, however, preempt any state remedies that may be available when airlines violate those standards. For instance — but only insofar as state law allows it — tort plaintiffs may incorporate the ACAA regulations as describing the duty element of negligence.” The court also held that “the ACAA and its implementing regulations do not preempt state-law personal-injury claims involving how airline agents interact with passengers with disabilities who request assistance in moving through the airport.”
Chapter 5 GOVERNMENTAL SERVICES AND PROGRAMS

D ARCHITECTURAL BARRIERS

[1] Application of the Architectural Barriers Act, the Rehabilitation Act, and the Americans with Disabilities Act

Page 366, add text before last paragraph in the section:

As of March 15, 2011, Department of Justice regulations clarify new requirements relating to design of certain types of facilities. See 75 Fed. Reg. 56,164-236 (September 15, 2010) (Title II) and 75 Fed. Reg. 56,236-358 (September 15, 2010) (Title III). The regulations amend both Title II and Title III regulations. The Final Rules amend 28 C.F.R. Parts 35 and 36. The regulations address design of residential housing provided by state and local governmental entities and access requirements, and new construction and alterations of detention and correction facilities. The regulations also provide design standards for new construction and alterations for access in recreation areas (including amusement rides, boating facilities, exercise machines and equipment, fishing piers and platforms, golf facilities, miniature golf, play areas, swimming pools) and in public facilities (including detention and correctional facilities, judicial facilities, and residential dwelling areas).

E LICENSING PRACTICES

[2] Professional Licensing

Page 378, add to Notes:

The Ninth Circuit decision in Enyart v. National Conference of Bar Examiners, 630 F.3d 1153 (9th Cir. 2011), allowed a preliminary injunction in a case where a bar applicant was denied computer accommodations that she had used during law school and for the California bar exam. The court noted that the technology that allowed for an enlarged screen should be considered as to whether it would “best ensure” that the test reflects the aptitude or achievement of the applicant instead of the impairment. The court noted that advances in technology should be taken into account. See also Jones v. National Conference of Bar Examiners, 801 F. Supp. 2d 270 (D. Vt. 2011) and Bonnette v. District of Columbia Court of Appeals, 796 F. Supp. 2d 164 (D.D.C. 2011) both issuing injunctions requiring bar examiners to use screen access software).

In 2014, the Law School Admissions Council settled a case regarding the practice of “flagging” LSAT tests taken under nonstandard conditions.

http://www.nationallawjournal.com/id=1202656088420/8.7M-Settlement-Ends-'Flagging'-of-Disabled-LSAT-Takers#
Department of Justice regulations, effective March 15, 2011, address the documentation requirements for obtaining accommodations on examinations. 75 Fed. Reg. 56,164-236 (September 15, 2010) (Title II) and 75 Fed. Reg. 56,236-358 (September 15, 2010) (Title III). If documentation is required, it should be reasonable and limited to the need for the modification, accommodation or auxiliary aid or services requested. 28 C.F.R. § 36.309.

Page 386, add to Note 1:


F MASS TRANSIT

Page 389, add to text before Problem:

An interesting case addressed issues of access on subway lines. In Disabled in Action of Pennsylvania v. Southeastern Pennsylvania Transportation Authority, 635 F.3d 87 (3d Cir. 2011) a summary judgment for the plaintiff was affirmed in a claim by an advocacy group that Title II ADA required accessibility in a subway station where a stairway and escalator were altered. The case recognized that different circuits have different views of what constitutes an alteration under Title II of the ADA.

H ACCESS TO JUSTICE

[2] Criminal Justice System

Page 402, add text before Problems:

Department of Justice ADA regulations effective March 15, 2011, include several provisions affecting the criminal justice system. These include provisions relating to the new construction and alteration of detention and correctional facilities and inclusion of accessible design, 28 C.F.R. § 35.151(k), and integrated housing as appropriate and

Page 403, add to Note 2:

A number of recent cases have looked at the issue of training and liability for failure to train. See e.g., Thao v. City of St. Paul, 481 F.3d 565 (8th Cir. 2007) (no Title II liability when police officer fatally shot individual with paranoid schizophrenia who had barricaded himself in the house and lunged at officer while holding weapons, more training would not have caused different police response); Sanders v. City of Minneapolis, Minnesota, 474 F.3d 523 (8th Cir. 2007) (no ADA violation in claim that police were not trained to deal with individuals with mental illness); Buben v. City of Lone Tree, 2010 WL 3894185 (D. Colo. 2010) (possible Title II violation when law enforcement officers arrested individual with disability who was misperceived to be engaging in illegal conduct; mental disability may have caused behavior; officers deployed electroshock weapon; allowing Title II reasonable accommodation claim to proceed to determine whether city had policy on handling individuals with mental impairments during arrest); C.C. v. State of Tennessee, 2010 WL 3782232 (M.D. Tenn. 2010) (allowing claim to go forward brought by individual with multiple mental impairments who was injured while in a cell in a residential facility; claim involved failure to appropriately train employees who attacked him); Scozzari v. City of Clare, 723 F. Supp. 2d 974 (E.D. Mich. 2010) (summary judgment for city in wrongful arrest Title II ADA claim; resident with schizophrenia shot after altercation; officers’ perception of criminal behavior and not based on perception that disability made conduct appear to be unlawful; rejecting failure to train theory); Shultz v. Carlisle Police Dept., 706 F. Supp. 2d 613 (M.D. Pa. 2010) (no Title II violation in claim of failure to train in situation where police officers had allegedly used excessive force after restaurant patron with seizure was tasered when he refused to board gurney after EMS team arrived; no demonstration of discrimination); Fitch v. Kentucky State Police, 2010 WL 4670440 (E.D. Ky. 2010) (claim that law enforcement was not provided with proper training when commercial driver was arrested for drunk driving, but claimed diabetes was basis for arrest; blood test after arrest showed he had not consumed alcohol); Abdi v. Karnes, 556 F. Supp. 2d 804 (S.D. Ohio 2008) (504/ADA violations related to law enforcement encounters with individuals with serious mental illness, training should be provided where such encounters are highly likely); Furtado v. Yun Chung Law, 51 So. 3d 1269 (Fla. Dist. Ct. App. 4th Dist. 2011) (ADA claim against Sheriff for wrongful death in case by man whose mentally disabled wife was shot and killed during involuntary commitment action; discussion of training to deal with individuals with mental health problems). The highly publicized issues of police shootings involving race issues have also highlighted the importance of police training with respect to certain populations.

Other recent cases have raised the challenges that have occurred involving individuals with mental illness and physical disabilities in the criminal justice system. See, e.g., Hobart v. City of Stafford, 784 F. Supp. 2d 732, 43 Nat’l Disability L. Rep. ¶ 46 (S.D. Tex. 2011) (Title II can apply to arrests; denying summary judgment to city when parents alleged failure to provide reasonable accommodation during arrest; crisis
intervention team not sent to home where son with schizoaffective disorder was acting out; altercation resulted in shooting and death of arrestee). In City and County of San Francisco, Calif. v. Sheehan, 135 S.Ct. 1765 (2015), the Supreme Court dismissed as improvidently granted the writ of certiorari of the Title II issue. In this case, two police officers shot and seriously wounded a woman with severe mental disabilities. The plaintiff sued for damages under Title II of the ADA. There was evident confusion about what San Francisco was arguing at the Supreme Court. The Court noted that the City and County argued in their certiorari petition that Title II did not apply to arrests by police, but by the time the City and County filed their briefs before the Supreme Court, they had changed their argument and accepted that Title II applied to the arrest. Instead, they argued that the plaintiff was not a qualified individual under Title II because she posed a direct threat to others. Noting that in Pennsylvania v. Department of Corrections, 524 U.S. 206 (1998), the Court held that Title II covers inmates in state prisons, the Supreme Court in Sheehan declared that it had never decided whether Title II imposes on public entities vicarious liability for monetary damages for purposeful or deliberately indifferent conduct of its employees. It noted that this is an important question, but because the parties agreed that Title II does impose vicarious liability for monetary damages, it would be improvident to decide the Title II issue. From this case, it appears that the Court is eager to visit the question of monetary damages under Title II based on vicarious liability of a public entity’s employees’ bad acts.

Page 403, add to Notes:

5. In 2014, in Hall v. Florida, 572 U.S. --, 2014 WL 2178332 (2014) the Supreme Court held unconstitutional a Florida law that defined intellectual disability. Under that statute an intellectual disability required an IQ test score of 70 or less. The case involved a defendant with an IQ slightly higher than 70 who faced the death penalty. Under Florida law all further exploration of intellectual disability was foreclosed. The Court held that the law created an “unacceptable risk that persons with intellectual disability will be executed.” A 2015 Supreme Court decision again addressed this issue. In Brumfield v. Cain, June 18, 2015, the Court ruled in a case involving a death penalty inmate that the state court record had “ample evidence creating reasonable doubt as to whether Brumfield’s disability manifested itself before adulthood.” Thus he should have been allowed to have this issue considered in his case.
Chapter 6  HIGHER EDUCATION

A  NONDISCRIMINATION IN HIGHER EDUCATION


Page 416, add to text at the end of the section:


[2]  The Americans with Disabilities Act

Page 417, add to text at the end of the section:

On May 24, 2011, the Equal Employment Opportunity Commission Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, Amended, became effective. See 58 Fed. Reg. 16978-17017 (March 25, 2011), 29 C.F.R. Part 1630. This applies specifically to employment (Title I), but is likely an important guidance on the definition of disability as it applies to Title II and Title III of the ADA and to the Rehabilitation Act, including higher education.

B  ADMISSIONS

[1]  Determining Qualifications

Page 442, add to Note 5:

A recent complexity has arisen with respect to how institutions of higher education can incorporate the defense of “direct threat” in determining whether someone is qualified for a program. The ADA definition of direct threat as it applies to employment is “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” 42 U.S.C. § 12111(3). The EEOC regulations further provide that the determination is to be based on an individualized assessment of the present ability to safely perform the essential functions of the job. Such an assessment is to be based on “reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.” Factors to be considered are “the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of
the potential harm.” In the EEOC regulations on defenses involving employment cases, it is noted that “The term ‘qualification standard’ may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace.” (emphasis added). The Supreme Court, in its decision in *Chevron U.S.A., Inc. v. Echazaba*, 536 U.S. 73 (2002) (see pages 88 and 184) held that although the statute does not refer to threat to self, the EEOC interpretation is not inconsistent with the statute. Therefore, the EEOC interpretation was upheld.

The definition of direct threat in cases involving Title II (state and local government programs) and Title III (public accommodations) is found in the regulations rather than the statute itself. Title II regulations provides that direct threat is “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies practices or procedures, or by the provision of auxiliary aids or services….” 28 C.F.R. § 35.104. A separate section provides that a public entity is not required to allow participation to an individual who poses a direct threat. 28 C.F.R. § 35.139. Such assessment is to be individualized and based on reasonable judgment and best available current evidence.

Title III also defines direct threat in the regulations. The definition is identical to Title II. 28 C.F.R. § 36.104. The regulations further provide that a public accommodation is not required to provide services or benefits to someone who poses a direct threat to the health or safety of others. 28 C.F.R. § 36.208.

In the context of higher education and the legal profession this most often arises in the context of students with mental health or substance abuse issues. These problems may arise in the context of eating disorders, suicide attempts, and other self-destructive conduct. Universities seeking to take action because of these concerns face a dilemma about how to appropriately respond within the constraints of the ADA. The question remains whether a student who poses a direct threat to him or herself but not to others will be considered a “direct threat.”


*Page 448, add to Note 1:*

The Ninth Circuit decision in *Enyart v. National Conference of Bar Examiners*, 630 F.3d 1153 (9th Cir. 2011), allowed a preliminary injunction in a case where a bar applicant was denied computer accommodations that she had used during law school and for the California bar exam. The court noted that the technology that allowed for an enlarged screen should be considered as to whether it would “best ensure” that the test reflects the aptitude or achievement of the applicant instead of the impairment. The court noted that advances in technology should be taken into account. Although this case involved a bar exam rather than admissions to a higher education program, it is probable that courts would apply a similar interpretation.

the screen reading software on the *Multistate Professional Responsibility Exam and Bonnette v. District of Columbia Court of Appeals*, 796 F. Supp. 2d 164, 43 Nat’l Disability L. Rep. ¶ 173 (D.D.C. 2011) in which the court also applied the “best ensures” standard from ADA regulations requiring bar examiner to allow use of certain technology.

In 2014, the Law School Admissions Council entered into a settlement agreement regarding the practice of “flagging” LSAT tests taken under nonstandard conditions. flagging” LSAT tests taken under nonstandard conditions. [3]

http://www.nationallawjournal.com/id=1202656088420/8.7M-Settlement-Ends-'Flagging'-of-Disabled-LSAT-Takers#.

[3] **Identifying and Documenting the Disability**

*Page 455, add to Notes:*

3. Department of Justice regulations, effective March 15, 2011, address the documentation requirements for obtaining accommodations on examinations. 75 Fed. Reg. 56,164-236 (September 15, 2010) (Title II) and 75 Fed. Reg. 56,236-358 (September 15, 2010) (Title III). If documentation is required, it should be reasonable and limited to the need for the modification, accommodation or auxiliary aid or services requested. 28 C.F.R. § 36.309.

C **THE ENROLLED STUDENT**

[1] **Auxiliary Aids and Services**

*Page 466, add to Notes:*

The case of *Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445 (S.D. N.Y. 2012), aff’d in part, vacated in part, 755 F.3d 87 (2d Cir. 2014), is addressing copyright protection issues under the fair use doctrine where colleges and universities and other nonprofit institutions use a digital library to provide access to materials for individuals with visual impairments by developing a full text searchable database and to provide the works in accessible formats. The case so far has not fully resolved those issues, but it is an important issue to follow.

A second important technology issue to watch is what accommodations are required for online courses. A 2015 settlement in a case brought by the Department of Justice against edX Inc., which was created by Massachusetts Institute of Technology and Harvard University, addresses this issue and sends a signal to other similarly situated institutions. The four-year agreement addresses modifications to the website, platform, and mobile applications. See Settlement Agreement, United States and edX Inc., Apr. 1, 2015, available at [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/02/edx_settlement_agreement.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/02/edx_settlement_agreement.pdf)
[2] **Modifications of Requirements**

*Page 480, add to Notes:*

On July 23, 2010, the Department of Justice issued final ADA regulations, including regulations on service animals. The regulations became effective March 15, 2011. 75 Fed. Reg. 56,164-236 (September 15, 2010) (Title II) and 75 Fed. Reg. 56,236-358 (September 15, 2010) (Title III). The regulations amend both Title II and Title III regulations. Service animals are defined as those individually trained to do work or perform tasks for the benefit of an individual with a disability (including a psychiatric disability). 28 C.F.R. § 35.104 and § 36.104. The only other animal where reasonable accommodations may have to be considered are miniature horses, and the regulations specify guidance on when accommodating such animals would be appropriate. 28 C.F.R. § 35.136(i) and § 36.302(c)(9). The regulations relating to service animals clarify what animals are protected, when service animals may be removed, provisions relating to the care and supervision of such animals, inquiries that can be made about them, and where such animals can have access. 28 C.F.R. § 35.136 and § 36.302(c). While these regulations address issues involving students in the public aspect of a higher education experience, they do not directly apply to student housing or student employment settings. This clarification has not yet been issued by any regulatory agency.

There have been a number of cases involving requirements that students use electronic readers. The 2009 suits filed by the National Federation of the Blind involved using electronic reading devices that lack accessible text-to-speech function alleging that requiring use in certain classrooms is discriminatory. Settlements in some of these cases have resulted in agreements not to require such devices unless access to devices with substantially equivalent ease of use for students with visual impairments can be provided. 2009 WL 3352332 (D. Ariz. 2009).

There has been recent attention to the issue of food allergies in campus settings. Following a settlement agreement with a university about food on campus, the Justice Department released a new technical assistance document, “Questions and Answers About the Lesley University Agreement and Potential Implications for Individuals with Food Allergies”. Because there is not yet a case that has finally decided this issue, it is not clear what is actually required of universities with respect to modification of food service programs on campus. See [www.ada.gov](http://www.ada.gov).

[3] **Architectural Barrier Issues**

*Page 489, add to Notes:*

On July 23, 2010, the Department of Justice issued final regulations under the ADA on a number of matters, including some architectural barrier issues. These regulations became effective on March 15, 2011. 75 Fed. Reg. 56,164-236 (September 15, 2010) (Title II) and 75 Fed. Reg. 56,236-358 (September 15, 2010) (Title III). The regulations amend both Title II and Title III regulations. The Final Rules amend 28
C.F.R. Parts 35 and 36. The regulations address ticketing for accessible seating in sports and similar arenas, residential housing provided by state and local governmental entities and access requirements. The Americans with Disabilities Act regulations under both Title II and Title III also apply to the new construction or alteration housing at places of education. 28 C.F.R. § 35.151(f) & § 36.406(e).


Page 497, add to Note 2:


In response to a highly publicized situation involving a wheelchair athlete in a public school setting (http://www.npr.org/templates/story/story.php?storyId=170229198) the United States Department of Education Office of Civil Rights (OCR) clarified requirements to ensure reasonable opportunities for access to athletic programs. Schools do not have to allow students with disabilities to participate in any competitive program offered; can require a level of skill to be eligible to participate in a competitive program, but the criteria must not be discriminatory. Schools cannot operate programs on the basis of stereotypes or generalizations about students with disabilities. Schools offering extracurricular athletics must allow qualified students with disabilities an equal opportunity to participate by making reasonable modifications, unless it would be a fundamental alteration to the program. Where the interests and abilities of students with disabilities cannot be fully and effectively met by the school's existing extracurricular athletics, the school should create additional opportunities for those students with disabilities that are supported as equally as school's other athletic activities. What is not clear from the guidelines is what additional opportunities “should” be provided. See Seth M. Galanter, Dear Colleague Letter, U.S. Department of Education Office for Civil Rights, Ed.gov, Jan. 25, 2013, available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.pdf. It is not clear how this will affect higher education athletic programs.

Increasing attention is being given by advocates to communications at athletic events. In Innes v. Board of Regents of University System of Maryland, 29 F. Supp. 3d 56 (D. Md. 2014) the plaintiff sought effective communications at athletic events and on sports websites for spectators who are deaf. The court has allowed the case to proceed under the ADA and Section 504.
A HISTORICAL PERSPECTIVE

Page 508, change definition of IDEA categorical definition to:

In October 2010, “Rosa’s Law” changed the term mentally retarded to intellectually disabled in all federal statutes and regulations. P.L. No. 111-256 (2010). This term should be replaced throughout this casebook as appropriate.

See also Laura Rothstein, Roads and Schools: Parallel Paths in the Government Role to Education for Students with Disabilities, 83 MISSISSIPPI LAW JOURNAL 777 (2014).

C NONDISCRIMINATION AND REASONABLE ACCOMMODATION UNDER SECTION 504 OF THE REHABILITATION ACT AND THE AMERICANS WITH DISABILITIES ACT

[2] Substantive Application

There has been recent attention to the issue of food allergies in higher education campus settings. Following a settlement agreement with a university about food on campus, the Justice Department released a new technical assistance document, “Questions and Answers About the Lesley University Agreement and Potential Implications for Individuals with Food Allergies”. Because there is not yet a case that has finally decided this issue, it is not clear what is actually required of universities with respect to modification of food service programs on campus and how this might apply to K-12 school settings. See www.ada.gov.

Page 575, add to Note:

The definitional changes of “disability” resulting from the ADA Amendments Act of 2008, as discussed in Chapter 2, make it more likely that some more students will be covered than might have been the case previously. This has not been a major issue in the education context, but it could be a factor in situations such as asthma, chronic illness, and some learning and related disabilities.
8  HOUSING

New guidance released on April 30, 2013, by the U.S. Department of Housing and Urban Development (HUD) and the U.S. Department of Justice, reinforces the Fair Housing Act requirement that multifamily housing be designed and constructed so as to be accessible to persons with disabilities.

For more information about HUD and the civil rights laws it enforces, go to hud.gov/fairhousing and click on “Learn more about FHEO.” More information about the Justice Department’s Civil Rights Division and the laws it enforces is available at justice.gov/crt/index.php.

C  REASONABLE ACCOMMODATION

[3] Accommodations for Assistance or Service Animals

NOTE

Page 624, add after Problems:

On July 23, 2010, the Department of Justice issued final regulations on service animals. The regulations became effective March 15, 2011. 75 Fed. Reg. 56,164-236 (September 15, 2010) (Title II) and 75 Fed. Reg. 56,236-358 (September 15, 2010) (Title III). The regulations amend both Title II and Title III regulations. Service animals are defined as those individually trained to do work or perform tasks for the benefit of an individual with a disability (including a psychiatric disability). 28 C.F.R. § 35.104 and § 36.104. The only other animal where reasonable accommodations may have to be considered are miniature horses, and the regulations specify guidance on when accommodating such animals would be appropriate. 28 C.F.R. § 35.136(i) and § 36.302(c)(9). The regulations relating to service animals clarify what animals are protected, when service animals may be removed, provisions relating to the care and supervision of such animals, inquiries that can be made about them, and where such animals can have access. 28 C.F.R. § 35.136 and § 36.302(c).

While these regulations only apply to Title II and Title III of the ADA, they may serve as guidance for Fair Housing Act cases. Charging fees for animals will require care in determining when a waiver might be required as a reasonable accommodation. See Fair Housing of the Dakotas, Inc. v. Goldmark Property Management, Inc., 778 F. Supp. 2d 1028, 42 Nat’l Disability L. Rep. ¶ 280 (D.N.D. 2011) in which there was no clear explanation about when fees applied.
D STRUCTURAL BARRIERS

Page 624, add to text after first paragraph in section:

On July 23, 2010, the Department of Justice issued regulations effective March 15, 2011. 75 Fed. Reg. 56,164-236 (September 15, 2010) (Title II) and 75 Fed. Reg. 56,236-358 (September 15, 2010) (Title III). The regulations amend both Title II and Title III regulations. The Final Rules amend 28 C.F.R. Parts 35 and 36. Included in the revisions are provisions requiring accessible design for new construction and alterations of residential housing in places of education, 28 C.F.R. § 35.151(f) & § 36.406(e), residential dwellings for individual sale operated by public entities, 28 C.F.R. § 35.151(j), and places of lodging, 28 C.F.R. § 36.406(c). Additional requirements specify that places of lodging where guest rooms are not owned by the entity that owns, leases, or operates the overall facility and physical features of the guest room interiors are not subject to certain barrier removal requirements. 28 C.F.R. § 36.304(g)(4). New regulations also provide that for public accommodation buildings subject to historic preservation requirements, where physical access would threaten or destroy the historic significance, alternative methods of access should be provided. 28 C.F.R. § 36.405. Additional provisions address housing in social service centers such as group homes, halfway houses, shelters, and similar establishments that provide temporary or other sleeping accommodations. 28 C.F.R. § 35.151(e) & § 36.406(d).

E LEAST RESTRICTIVE ENVIRONMENT AND INDEPENDENT LIVING

Page 632, add to Notes:

As more housing for senior citizens and individuals with mobility impairments becomes available, issues related to use of motorized vehicles are increasingly arising. On July 23, 2010, the Department of Justice issued final regulations finalizing ADA regulations, governing the use of mobility devices, including Segways®. The regulations were published in the Federal Register on September 15, 2010 and became effective March 15, 2011. 75 Fed. Reg. 56,164-236 (September 15, 2010) (Title II) and 75 Fed. Reg. 56,236-358 (September 15, 2010) (Title III). The regulations amend both Title II and Title III regulations. See 28 C.F.R. § 35.137 and § 36.311. Entities are allowed to consider the type, size, weight, and speed of the device, the volume of pedestrian traffic, the facility’s design and operation, and risk factors. Further requirements clarify what kind of inquiries can be made in making such a modification. While these regulations do not specifically apply to housing, they may be considered in addressing these issues in a housing context.
The economic downturn and budgetary challenges of funding home health care by various governmental programs has resulted in a wave of challenges to funding mechanisms for these services. The litigation involves claims that the failure to fund services in community and home-based settings is resulting in moving people to nursing homes and other institutional settings in violation of the least restrictive environment principle. See e.g., *M.R. v. Dreyfus*, 767 F. Supp. 2d 1149 (W.D. Wash. 2011) (claim that across-the-board reduction in state Medicaid program that provided for in-home personal care services violated ADA); *Pitts v. Louisiana Department of Health*, 2011 WL 2193398, 43 Nat’l Disability L. Rep. ¶ 138 (M.D. La. 2011) (granting class certification to individuals in state Medicaid program claiming that state cuts had an impact on the integration mandate; individuals were seeking long term personal care service); *Haddad v. Dudek*, 784 F. Supp. 2d (M.D. Fla. 2011) (allowing claims to go forward by Medicaid recipient claiming failure to provide home and community-based health care under Rehabilitation Act and ADA); *Marlo M. v. Cansler*, 679 F. Supp. 2d 635 (E.D. N.C. 2010) (involving termination of funds for home-based care and services for adults with developmental disabilities or mental illnesses based on adverse impact on least restrictive environment); *Duffy v. Velez, Medicare & Medicaid*, 2010 WL 503037 (D.N.J. 2010) (denying dismissal of Title II suit by individual seeking home-based medical benefits; denial based on monthly income which was $10 too high; would have placed him in a more restrictive, less integrated institution); *Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161 (N.D. Cal. 2009) (cuts in ADHC program likely to create serious risk that adults with disabilities would be institutionalized).
Chapter 9  HEALTH CARE AND INSURANCE

B.  NONDISCRIMINATION IN HEALTH CARE SERVICES

Page 674, add to Notes:

4. President Obama signed into law in March 2010, the Patient Protection and Affordable Care Act. Attorneys General of several states have joined to bring lawsuits claiming that the Act is unconstitutional because of the provision that requires Americans to buy health insurance. A few courts have held that the law is unconstitutional while others have upheld its constitutionality. During Spring 2012, the United States Supreme Court heard argument on the question of whether President Obama’s health care law violates the United States Constitution. At the center of the arguments against the constitutionality of the Act is the “individual mandate,” which requires all individuals who do not get a waiver to buy health insurance. In National Federation of Independent Business v. Sebelius, 567 U.S. __ , 132 S. Ct. 2566 (2012), the Supreme Court held that the individual mandate was unconstitutional under the Commerce Clause and Necessary and Proper Clause powers, but upheld the independent mandate as constitutional under Congress's taxing power. The Court also held that the provision of the Affordable Care Act that significantly expanded Medicaid was an invalid exercise of Congress's spending power because it coerced the states to either accept the expansion or lose existing Medicaid funding.

C. ARCHITECTURAL BARRIERS AND REASONABLE ACCOMMODATION

Page 699, add to Note 1.

On July 23, 2010, the Department of Justice issued final regulations effective March 15, 2011. 75 Fed. Reg. 56,164-236 (September 15, 2010) (Title II) and 75 Fed. Reg. 56,236-358 (September 15, 2010) (Title III). The regulations amend both Title II and Title III regulations. One of the issues addressed in the revised regulations is the obligation regarding effective communication. The new regulations provide that the obligation extends to companions of individuals with disabilities. The guidance addressed the need to make an individualized assessment based on nature, length, and complexity of the communication and the context. Individuals with disabilities should generally be consulted about the type of aid, but the public accommodation ultimately has the decision so long as it is effective. The regulations clarify that an individual is not required to bring another individual to interpret nor rely on an adult accompanying the individual to interpret. Exceptions are allowed in appropriate emergency situations. 28 C.F.R. § 35.160 and § 36.303(c). The Title II regulations further specify requirements regarding public entities using video remote interpreting services including quality of the
equipment and interpreters and qualifications of users of the technology. 28 C.F.R. § 35.160(d).

Page 700, add to Note 3.

In 2013, the Justice Department reached five settlements to remedy alleged violations of the ADA. The agreements resolve allegations that five health care providers – including a hospital, skilled nursing facilities, a rehabilitation center, and a doctor’s office -- violated the ADA by failing to provide effective communication to people who are deaf or have hearing loss in the provision of medical services. For information on these settlements see the Department of Justice’s Barrier-Free Health Care Initiative, a partnership of the Civil Rights Division and U.S. Attorney’s offices across the nation, to target enforcement efforts on a critical area for individuals with disabilities, by accessing the Department of Justice ADA website at ADA.gov.

Page 700, add to Notes:

4. Department of Justice ADA regulations, effective March 15, 2011, amend both Title II and Title III regulations. Included in the revised regulations are provisions relating to physical design generally and specifically to dispersal of accessible patient bedrooms in medical care facilities, 28 C.F.R. § 36.406(g). 75 Fed. Reg. 56,164-236 (September 15, 2010) (Title II) and 75 Fed. Reg. 56,236-358 (September 15, 2010) (Title III).

Other provisions give guidance regarding use of automated-attendant system (such as voice mail and messaging) and requires that systems must provide effective real-time communication with individuals using auxiliary aids and services, including TTYs or other FCC-approved relay systems. 28 C.F.R. § 35.161.