

# Pre-Winter Break Check-In: Disability Issues to Anticipate in the Spring Semester

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## Jennifer Robins, Esq.

Counsel | Labor & Employment and Higher Education Groups



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### Overview

- Jen is an experienced litigator who represents public and private entities and higher education institutions in complex claims, including those that involve the requirements for accessibility and accommodations for people with disabilities.
- Drawing on her previous experience as a federal trial attorney for the Disability Rights Section of the U.S. Department of Justice's Civil Rights Division, Jennifer has deep knowledge of the Americans with Disabilities Act (ADA) and is well-versed in the potential liability these clients may face.

### Degrees

- J.D., *magna cum laude*, University of Michigan Law School
- B.A., *magna cum laude*, Northwestern University's Medill School of Journalism

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## Jesse Krohn, Esq.

Associate | Higher Education Group



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### Overview

- Jesse's experience includes evaluating complaints and conducting investigations of claims of discrimination, harassment, sexual misconduct and retaliation within the higher-ed industry.
- She also handles student, faculty, and employee civil rights matters involving Title VII, Title IX, the Family Medical Leave Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and state and local civil rights laws.
- When these claims cannot be resolved through mediation and other forms of conflict resolution, she represents clients in litigation.

### Degrees

- J.D., University of Pennsylvania Carey Law School
- M.S.Ed., University of Pennsylvania Graduate School of Education
- B.A., Harvard College

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## Anticipating Issues in the New Year



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Study abroad

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Experiential learning (clinics, externships, etc.)

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Housing change requests

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Dining accommodations

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Physical access/transportation in winter weather

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Academic accommodations change requests

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Responding to parent/family inquiries

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## Applicable Laws

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Americans with Disabilities Act (ADA)

    Title II (public institutions)

    Title III (private institutions)

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Section 504 of the Rehabilitation Act

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Fair Housing Act

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## Study Abroad

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## What law applies?

- ADA text is silent on extraterritorial coverage.
- Courts have applied the ADA and other civil rights laws to suits against institutions by students studying abroad.
- OCR has vacillated on whether the ADA applies to study abroad.

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## Guiding Principles

- “The central inquiry is whether the program, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.” *Bird v. Lewis & Clark Coll.*, 303 F.3d 1015 (9th Cir. 2002).
- “Study abroad programs are an integral part of college education today. A denial of equal opportunity in those programs has ramifications on students’ education as a whole and detracts from their overall education.” *King v. Bd. of Control of E. Mich. Univ.*, 221 F. Supp. 2d 783 (E.D. Mich. 2002).

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## Practical Tips

- Ensure counselors are trained to talk with students with disabilities about how they’ll navigate study abroad.
- Be prepared to inform students about accessibility at offered locations and programs.
- Approach to reasonable accommodations requests may vary depending on the type of program in which the student is participating.

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## Hypothetical

Sarah wants to study abroad in a specific city. Her college does not have any programs in that city, but does permit students to enroll in other institutions' programs and accepts the academic credits earned. Sarah locates a program through a school in her desired city, and enrolls with her college's approval. But, upon arrival, Sarah is shocked to learn that the academic accommodations on which she relies, including extended time testing, are not permitted. She calls her academic advisor, and demands that her college "do something."

How should Sarah's college respond?

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## Experiential Learning

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## What law applies?

A recipient of federal funding that considers participation by students in education programs or activities not operated wholly by the recipient as part of, or equivalent to, an education program or activity operated by the recipient shall assure itself that the other education program or activity, as a whole, provides an equal opportunity for the participation of qualified handicapped persons. 34 C.F.R. § 104.43(b).

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## Guiding Principles



- Institutions cannot abandon to external sites the institution's responsibility for accommodating students.
- Blanket rejections of accommodation requests by practicum sites do not end the conversation.
- If a student's experiential learning opportunity is with a site that has a formal affiliation with the institution, the terms of the contract (with the clinical site, school district, etc.) should include nondiscrimination language.

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## Practical Tips

- Create opportunities for early disclosure.
- Educate students about the distinctions between didactic and experiential components of their programs.
- Have, regularly review, and reinforce rigorous, non-discriminatory technical standards to clarify what a student is expected to do.

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## Practical Tips (cont.)

### Technical standards: What the student must do, not what they must be

Must have full use of all limbs	Must be able to perform CPR or other lifesaving procedures
Must have full, unimpaired hearing	Must be able to convey information to students, professional demeanor, the ability to control a classroom of students
Must be mentally and emotionally stable	Must be able to interact with patients in a professional and caring manner

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# Hypothetical

Tony enrolls in his school's pharmacy program. It requires two "clinical experience" practicum classes, one at a community pharmacy and one in a hospital setting. The college has clinical training agreements with various facilities. At the end of his first day at the pharmacy site, a supervisor tells the college that Tony cannot return because of his obvious "health problems." The college places Tony at a psychiatric hospital that does not offer experience in several required critical elements. Tony objects.

How should Tony's college respond?

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# Not a hypothetical!

## *OCR, November 2015*

- The process used by the college to place the Complainant at a clinical site denied him equal access to the educational program.
- The college did not take steps to ensure that the hospital was not discriminating against the Complainant or determine whether he had been excluded because of his disability – instead, it just accepted the refusal of the pharmacy to accept the Complainant.
- The placement ultimately identified for the Complainant was not comparable to the placements provided to nondisabled students.

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# Hypothetical

Audra, who has a back-related disability, enrolled in her college's counseling psychology program, which required a year-long clinical practicum in a health care setting. During the interview for her eventual placement, Audra was told that she would need to climb stairs multiple times a day to access key areas of the facility. She attempted to provide the college with documentation of her disability, but it refused to accept the documentation or assign her to a different site, and told Audra that she must submit the documentation directly to the practicum site, offering no further assistance. Audra objects.

How should Audra's college respond?

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# Not a hypothetical!

## *OCR, March 2016*

- The college failed to consider the Complainant's request for an accommodation at a clinical practicum site that would address her disability-related inability to climb stairs as required.
- The college failed to comply with the requirements of Section 504 by refusing to work with the Complainant to identify the accommodations she would need for her practicum and by denying its responsibility for ensuring that the Complainant had an equal opportunity to participate in the practicum portion of its program.

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## Housing Change Requests

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## What law applies?

- Under the Rehabilitation Act, institutions must:
  - Provide comparable, convenient, and accessible housing to students with disabilities at the same cost as to others. 34 C.F.R. § 104.45(a).
  - Provide such housing shall be available in sufficient quantity and variety so that the scope of students' choice of living accommodations is, as a whole, comparable to that of students without disabilities. 34 C.F.R. § 104.45(a).
- Under the Fair Housing Act, 24 C.F.R. § 100.201, *et seq.*, institutions must:
  - Refrain from discrimination
  - Provide reasonable accommodations

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## Guiding Principles

- Sounds familiar!
- Accommodations must be “necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling unit, including public and common use areas.”
- Must be feasible and practical under the circumstances.

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## Practical Tips

- If at all possible, keep a reserve.
- If demand for singles far outstrips supply, consider the reasons people want them and see if you can accommodate in other ways.
  - E.g., quiet floors
- Set clear expectations for transfer students, students returning from abroad.

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## Practical Tips (cont.)

Request	Possible alternative
Single room for quiet/lack of distraction	<ul style="list-style-type: none"> <li>• Room on a quiet floor / extended quiet hours</li> <li>• Priority study carrel reservation</li> </ul>
An accessible unit in a specific building	<ul style="list-style-type: none"> <li>• Accessible unit in a different building in a similar part of campus</li> </ul>
Private kitchen	<ul style="list-style-type: none"> <li>• Release from housing contract or exemption from on-campus housing requirement</li> <li>• Accommodations in on-campus dining</li> </ul>

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## Dining Accommodations



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## Guiding Principles

- Accessible dining options (e.g., gluten- or other allergen-free) must be comparable in nutrition to meals available to other students. *OCR, December 2019.*
- Students with food allergies / other dietary needs related to disability must have an equal opportunity to participate in and/or benefit from dining services as fully as students without disabilities. *Id.*
- Accommodation process must not be delegated to food vendors. *Id.*

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## Practical Tips

- Be sensitive to cross-contamination concerns. *OCR, December 2019.*
- Dedicate space to store and prepare gluten-/allergen-free food. *DOJ, 2012.*
- Designate a responsible employee for all requests for reasonable modifications for disabilities requiring a special diet. *Id.*
- Employ a dietician to help students develop diets or meal plans. *DOJ, 2016.*
- Allow students with disabilities to pre-order allergen-free meals. *DOJ, 2012.*
- Label foods containing specific allergens. *Id.*
- Train food service and other relevant staff about food allergy-related issues. *Id.*
- Work with vendors, including outside vendors accepting meal points, that offer gluten- and allergen-free options. *Id.*

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## Physical Access and Transportation in Winter Weather

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## What does the law require? Physical Accessibility

**Existing facilities (prior to June 4, 1977)**

- Accessible when viewed in entirety.
- Can comply through reassignment of programs, activities, and services to accessible buildings, alteration of existing facilities, etc.

**New construction**

- Design and construct in a manner that is readily accessible to and usable by individuals with disabilities.

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## What does the law require? Maintenance

- Maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities. 35 C.F.R. § 35.133 (ADA Title II).
- Maintenance obligation includes walkways.
- Specifically includes reasonable snow removal.
  - Removed snow should not be plowed into/on top of accessible features or components of an accessible route.



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## What does the law require? Transportation

- If needed in order to account for physical barriers on campus (for example, surfaces that cannot be traversed by a wheelchair user).
  - *Huezo v. Los Angeles Community Coll. Dist.*, 672 F. Supp. 2d 1045 (C.D. Ca. 2008): not reasonable to limit transportation for students to otherwise inaccessible locations on campus to “the days of class and only right before and after class” because this denied students the ability “to go to class early, stay late to meet with the professor or other students, or go to [that area] at other times of day to use a desk for drafting or studying.”
- If provided to all students, be accessible to all students.
- Accommodations must be reasonable, not necessarily preferred.
  - E.g., instead of “curb-to-curb,” could be a parking permit where otherwise unavailable, or priority registration to ensure courses in specific locations.

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## Hypothetical

Valerie, a wheelchair user, relies on a college-run transit van to access classes. Service is canceled due to inclement weather. She asks her instructors to permit her to participate in class remotely and is told by one that this is not possible because the nature of the course – an architecture studio – requires in-person interaction. Valerie has already missed one studio that semester due to a job interview, and if she misses another, she will, per class policy, be assigned a failing grade. Valerie knows she will be missing another studio in the coming weeks to attend a specialist doctor's appointment. She calls disability services and asks that she be transported to class in an emergency vehicle.

How should Valerie's college respond?

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## Academic Accommodations Change Requests

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## Guiding Principles (You Know This)

- Accommodations are not retroactive.
- May vary depending on the nature of the class (e.g., lab v. lecture).
- Must be reasonable, not necessarily preferred.

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## Hypothetical



First semester, Tim had an accommodation to record classes, which were mostly large lectures for first-year students. Second semester, Tim registers for an upper-level course. The syllabus has a “no recording” policy, and when Tim gives the professor his accommodation verification letter, she says she cannot accept it. She explains that she adopted her policy because the class discusses sensitive and controversial subject matters and she believes that recording will chill speech. Tim demands that the faculty member be required to permit him to record.

How should Tim’s institution respond?

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## Responding to Parent/Family Inquiries

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## Guiding Principles

- Generally cannot disclose records to parents without student’s consent, due to FERPA.
- May be other state/local privacy laws, as well as internal privacy policies and practices.
- Several exceptions in law:
  - Health and safety, 34 CFR §§ 99.31(a)(10)
  - Student is claimed as a dependent for tax purposes, 34 CFR § 99.31(a)(8)
  - Drug or alcohol violations, 34 CFR § 99.31(a)(15)
- “Nothing in FERPA prohibits a school official from sharing information with parents that is based on that official’s personal knowledge or observation and that is not based on information contained in an education record....FERPA would not prohibit...letting a parent know of their concern...that is based on their personal knowledge or observation.”

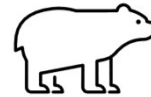
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## Practical Tips

- Be available to *receive* information.
- Prepare parents for the change in the access they were used to having to their student's information.
- Work to support student resilience and independence.



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## Hypothetical

While moving her son, Taylor, back into his residence hall after winter break, Taylor's mother asks to meet with the head of disability services. She and Taylor come to the meeting together, and she presents what she calls a "power of attorney" form, signed by Taylor, and says that disability services must only communicate with Taylor in writing; must copy her on all communications to Taylor; and must not implement any accommodations unless approved by both her and Taylor.

How should the college respond to Taylor's mother?

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Questions?



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