COVID-19 and the ADA

By Equip for Equality[1]

I. Introduction

The COVID-19 pandemic has impacted all of us. It has changed the way we work, the way we vote, the way we learn, and the way we shop. The pandemic has raised complex legal questions, such as whether COVID-19 is a disability, whether employers and universities can mandate the COVID-19 vaccine, and whether businesses need to accommodate people who cannot wear a mask. It has shined a light on the importance of effectively communicating government information and ensuring non-discriminatory policies within the healthcare system. It has also potentially created opportunities, such as remote work as a reasonable accommodation and universal vote-by-mail.

The Americans with Disabilities Act (ADA) is a civil rights law that applies across a broad range of topics including employment (Title I), public entities (Title II), and places of public accommodation (Title III). Given the breadth of the ADA, it is not surprising to see the vast interplay between this important civil rights law and the COVID-19 pandemic.

This legal brief strives to capture a current snapshot of this constantly evolving area of the law by reviewing court cases, settlements, and federal agency guidance. It will discuss COVID-19 as an ADA-disability; employment rights; mask and vaccine mandates; access to education; effective communication; voting rights; corrections; access to healthcare; and access to private businesses.

II. Definition of a Disability

Under the ADA, a person has an ADA-qualifying disability if they fall within one of three prongs. They could have "a physical or mental impairment that substantially limits one or more major life

[1] This legal brief was written by Barry C. Taylor, Vice President of Systemic Litigation and Civil Rights, Rachel M. Weisberg, Supervising Attorney & Employment Rights Helpline with Equip for Equality, the Illinois Protection and Advocacy Agency (P&A). The authors would like to recognize EFE senior attorney Paul Mollica and legal fellow Dan Duffy for their valuable assistance, as well EFE legal interns Megan Grenville, Dustin Koslen, and Abigael Schulz. Equip for Equality is providing this information under a subcontract with the Great Lakes ADA Center.

activities of such individual."[2] Alternatively, they could qualify as disabled if they have been "perceived" to have an impairment; or, thirdly, if they have a "record of" having a disability.[3]

The emergence of COVID-19 has raised the question whether the infectious disease, itself and/or predisposition to being infected and severely harmed by it, constitutes as an ADA-qualifying disability. While some uncertainty remains about the COVID-19 as an ADA-disability; however, courts and federal agencies have provided initial guidance.

People with Pre-Existing Disabilities

The CDC has issued guidance confirming that people with certain medical conditions have an increased risk of severe complications should they contract COVID-19.[4] Courts have easily concluded that individuals with pre-existing impairments that place them at high-risk for COVID-19 are likely people with disabilities during the COVID pandemic.

In ***Silver v. City of Alexandria,* 470 F. Supp. 3d 616 (W.D. La. 2020)**, a 98-year-old man with a pacemaker due to inoperable and dangerous heart conditions sought an accommodation so that he could attend city council meetings by telephone during COVID-19.[5] After the city denied this request, the man filed a motion for a preliminary injunction under Section 504 of the Rehabilitation Act (Section 504) and the ADA. In defense, the city argued that the plaintiff was not legally entitled to an accommodation because his alleged disability was situational only in light of the COVID-19 pandemic. The district court held that the plaintiff's conditions should be considered a disability in the context of COVID-19 and that he is entitled to accommodations. It observed that "[n]either the ADA nor the Rehabilitation Act contain any language to limit application to certain environmental or health-related situations."[6] The court further explained that the "determination of a qualifying disability in this case cannot be looked at in a vacuum,"[7] and that such determination must be based on the totality of health circumstances in conjunction

[2] 42 U.S.C § 12102(1)(a).

[3] 42 U.S.C § 12102(1)(a).

[4] Centers for Disease Control and Prevention: People with Certain Medical Conditions. Available: https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html (last visited September 12, 2021) (CDC Guidance).

[5] *Silver v. City of Alexandria*, 470 F. Supp. 3d 616, 622 (W.D. La. 2020)

[6] *Id.*

[7] *Id.*

with medical risks of social interaction. Thus, the court found "easily" that the plaintiff has a qualifying disability.[8]

Similarly, in ***Fraihat v. United States Immigration & Customs Enforcement,* 445 F. Supp. 3d 709, 751 (C.D. Cal. 2020)**, the court provided injunctive relief to Immigration and Customs Enforcement (ICE) detainees with heightened medical vulnerability to COVID-19.[9] The court ordered that ICE improve conditions that exposed disabled detainees to higher risk from contracting COVID-19. The court found that the plaintiffs were likely to have qualifying disabilities under Section 504 because their health conditions put them at a "severe risk of illness or death if exposed to COVID-19."[10] Specifically, people with the following conditions were included in this subclass: cardiovascular disease (congestive heart failure, history of myocardial infarction, history of cardiac surgery); high blood pressure; chronic respiratory disease (asthma, chronic obstructive pulmonary disease including chronic bronchitis or emphysema, or other pulmonary diseases); diabetes; cancer; liver disease; kidney disease; autoimmune diseases (psoriasis, rheumatoid arthritis, systemic lupus erythematosus); severe psychiatric illness; history of transplantation; and HIV/AIDS. ***See also Busby v. Bonner,* 466 F. Supp. 3d 821 (W.D. Tenn. 2020)** (defining the subclass as pretrial detainees at Shelby County Jail in Tennessee of "[a]ll persons currently or in the future held at the Jail in pretrial custody during the COVID19 pandemic who are at increased risk of COVID-19 complications or death because of disabilities as defined [by the ADA and Section 504].").

Notably, there are certain risk factors identified by the CDC that are not "impairments" under the ADA and thus, would not be sufficient to ensure ADA coverage.[11] For example, while age can be a risk factor, age itself is not an impairment or a basis for ADA protection. Similarly, pregnancy and obesity – in most jurisdictions – are not, by themselves without underlying conditions, considered impairments under the ADA.

Second, the Department of Health and Human Services (HHS) and Department of Justice (DOJ) have issued joint guidance saying that "long COVID" *can* be a qualifying disability under the ADA and other civil rights laws. On July 26, 2021, the Departments issued ***Guidance on "Long COVID" as a Disability Under the ADA, Section 504, and Section 1557* (DOJ/HHS Guidance)**, concluding

[8] *Id.*

[9] *Fraihat v. United States Immigration & Customs Enf't*, 445 F. Supp. 3d 709, 751 (C.D. Cal. 2020).

[10] *Id.* at 747.

[11] CDC Guidance.

that "long COVID" is a physiological impairment affecting one or more body symptoms.[12] While COVID symptoms usually go away after a matter of weeks, long COVID occurs when symptoms continue to last for months or, in some cases, symptoms appear after the initial infection. These symptoms can be typical COVID symptoms that persist or even cause organ damage. Because long COVID is a physiological impairment, it can be an "actual disability" or "record of" so long as the person shows that they have symptoms that substantially limit a major life activity. For example, long COVID can cause "brain fog" that can substantially limit the major life activities of brain function, concentration and thinking. It can also cause lung damage, which substantially limits respiratory function and breathing.

The DOJ/HHS Guidance is specific to Titles II and III of the ADA, Section 504, and Section 1557 of the Patient Protection and Affordable Care Act. As of the date of publication, the Equal Employment Opportunity Commission (EEOC) — the federal agency that interprets and enforces Title I of the ADA — has not yet published any opinions about COVID-19 or long COVID as an ADA-qualifying disability. It is anticipated, however, that COVID cases under Title I would be interpreted consistently DOJ/HHS Guidance.

Is an COVID-19 Infection an ADA-Qualifying Disability?

It remains unsettled whether COVID-19 itself is an ADA-qualifying disability. There are few cases that have considered this issue, and they were brought by plaintiffs who failed to include sufficient factual assertions. Consequently, the court decisions do not offer meaningful guidance. In ***Champion v. Mannington Mills, Inc.,* 2021 WL 2212067 (M.D. Ga. May 10, 2021)**, the court dismissed an ADA action for failure to state a claim, holding an individual who contracted COVID-19 but was not substantially limited in any life activity was not disabled.[13] The plaintiff was terminated for coming into work after interacting with her brother who tested positive for COVID. The plaintiff forgot about her interaction with her brother and went into work before she was confronted by her supervisor about the interaction and subsequently fired the next day. The plaintiff alleged ADA "association discrimination" because she was terminated due to association with her brother who had contracted COVID, and that her brother's COVID diagnosis constituted

[12] Department of Justice and the Department of Health and Human Services, *Guidance on "Long COVID" as a Disability Under the ADA, Section 504, and Section 1557*, July 26, 2021, Available https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/guidance-long-covid-disability/index.html

[13] *Champion v. Mannington Mills, Inc.*, 2021 WL 221067 (M.D. Ga. May 10, 2021).

a disability. The court held that a COVID diagnosis was not itself a disability unless the condition was shown to substantially limit a major life activity. Here, the court held that plaintiff only stated that her brother "had to miss several days of work due to his COVID-19 infection, that bare allegation, without more, does not rise to the level of a "disability" under the ADA."[14]

Similarly, in ***Payne v. Woods Services, Inc.,* 2021 WL 603725 (E.D. Pa. Feb. 16, 2021)**, the plaintiff alleged that he tested positive for COVID-19 but was ordered to return to work after six days.[15] The plaintiff responded that he had not completed the medically advised 14-day quarantine and could not return. The plaintiff was terminated for job abandonment. Among other claims, the plaintiff alleged ADA disability discrimination. The court dismissed the ADA claim because plaintiff did not include any allegations that the symptoms of COVID-19 limited him in any substantial life activities. The court further found that a "regarded as" disability claim could not move forward because "[p]laintiff has not alleged any facts related to his employer perceiving him as disabled. If anything, the facts in the [c]omplaint suggest that his employer did not consider him to be disabled, as they requested that he return to work." Notably, the court acknowledged that while it is the defendant's burden to show that the plaintiff's impairment was transitory and minor, here, the plaintiff did not offer enough details to permit the court to even determine whether the impairment fell within this defense.

Whether, and to what extent, COVID-19 is an ADA-qualifying disability is sure to be the topic of more court cases in the future.

III. Employment (Title I)

The COVID-19 pandemic has completely changed the workforce. Employees and employers alike have been looking to the EEOC's guidance to help navigate these unchartered situations. Early on, the EEOC issued a document called ***What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (EEOC COVID Guidance)*** and has updated this document throughout the pandemic.[16] This document discusses everything from reasonable accommodations to medical exams and inquiries to vaccine and mask mandates.

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[14] *Id. at *4.*

[15] *Payne v. Woods Services, Inc*., 2021 WL 603725 (E.D. Pa. Feb. 16, 2021).

[16] Equal Employment Opportunity Commission, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (EEOC COVID Guidance). Last updated May 28, 2021. Available:

Reasonable Accommodations

Due to concerns about acquiring COVID-19, disabled employees have sought various kinds of reasonable accommodations to limit their exposure. One of these highly sought-after accommodations is telework. Some suggest that a "silver lining" of the COVID-pandemic is the wide-spread acceptance of telework, which has historically been a controversial reasonable accommodation desired by disabled employees. Now that employees with disabilities have a demonstrated record of successful telework, there may be stronger support for a claim that an employee should be permitted to continue teleworking as an accommodation under the ADA.

One case demonstrating this principle is ***Peeples v. Clinical Support Options, Inc.,* 487 F. Supp. 3d 56 (D. Mass. 2020),** where an employee obtained a preliminary injunction to work remotely.[17] The plaintiff was a manager with moderate asthma and was approved to do telework at the beginning of the pandemic. Despite being able to do all functions of their job remotely, the employer ordered all managers to return in person and denied the plaintiff's request to continue telework. The plaintiff "reluctantly" returned to work but remained fearful at work with limited PPE and people not wearing masks. The plaintiff submitted requests for telework accommodation with letters from an allergist and a supervisor. The employer, however, failed to conduct an individualized assessment of the plaintiff's situation and instead continued to deny their request to work remotely. The district court held that asthma is a disability in the context of COVID-19 and that "[t]he risk of irreparable harm to Plaintiff – in the form of the possible serious consequences of an infection if they are not permitted to telework – cannot be discounted."[18] The court also noted the employer's failure to engage in a meaningful interactive process. The case was settled in December of 2020.[19]

Another accommodation that has proven important to disabled employees is reassignment. In ***Madrigal v. Performance Transportation, LLC*, 2021 WL 2826704 (N.D. Cal. July 7, 2021)**, a case brought under California state law, which incorporates the ADA, the court refused to dismiss the plaintiff's case.[20] The plaintiff, who had diabetes, worked as a driver in a position that involved

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https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

[17] *Peeples v. Clinical Support Options, Inc.,* 487 F. Supp. 3d 56, 66 (D. Mass. 2020).

[18] *Id.* at 65.

[19] https://www.pacermonitor.com/public/case/36125307/Peeples_v_Clinical__Support_Options,_Inc.

[20] *Madrigal v. Performance Transportation, LLC*, 2021 WL 2826704 (N.D. Cal. July 7, 2021).

driving and delivering food to customers. In February 2020, the plaintiff experienced respiratory symptoms and was diagnosed with pneumonia and hospitalized. He was released from the hospital at the beginning of the COVID pandemic, he decided to take an extended medical leave due to his high-risk status because of his diabetes. In August 2020, the plaintiff tried to return to work and asked to be reassigned to a position in a warehouse where he would have minimal contact with other people for a temporary period. Instead of engaging in the interactive process to discuss this or other accommodations, the employer fired the employee. In its decision, the court confirmed that diabetes is an underlying impairment, and it is well-settled that it increases the risk of serious illness or death from COVID-19. The court also concluded that the employer denied the employee's request for reasonable accommodation without discussing any alternatives.

The EEOC filed its first ADA lawsuit related to COVID-19 on September 7, 2021, ***EEOC v. ISS Facility Services***, **21-CV-3708 (N.D. Ga.)**.[21] The EEOC brought this case on behalf of an employee who worked as a health and safety manager who, from March 2020 to June 2020, worked from home four days a week due to COVID-19. When her workplace reopened in June 2020, the employee asked to continue working remotely two days per week and to take frequent breaks while working on site because she had a pulmonary condition that caused her to have difficulty breathing and placed her at greater risk of contracting COVID. While her employer permitted other employees in the same position to work remotely, this employee's request was denied, and she was later fired. This is likely the first of many cases related to COVID-19 that the EEOC will pursue and is certainly one to watch.

Disability-Related Questions, Exams, and Vaccine Mandates

Employers can only ask disability-related questions and require medical examinations if the requested information is job-related and consistent with business necessity. Given the issues at play in the pandemic, the EEOC has explained that during the COVID-19 pandemic, employers can ask employees if they are experiencing symptoms of COVID-19 (such as fever, chills, cough), take employees' temperatures, and administer a COVID-19 test.[22] However, employers must not

[21] *EEOC v. ISS Facility Services*, 21-CV-3708 (N.D. Ga.) (filed Sept. 7, 2021); see also https://www.eeoc.gov/newsroom/eeoc-sues-iss-facility-services-disability-discrimination

[22] EEOC COVID Guidance, A.2-3, A.6.

ask these questions or require these exams in a discriminatory fashion and must keep all acquired medical information confidential.[23]

Per the EEOC, employers are permitted to ask employees whether they are vaccinated and to provide proof of vaccination.[24] The EEOC explains that these questions are not considered disability-related inquiries and thus, are permissible at any stage of employment.

Many employers are requiring their employees to receive the COVID-19 vaccine, which has raised the question of whether such mandates are permissible under the ADA. The EEOC COVID Guidance provides that the ADA "does not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, subject to the reasonable accommodation provisions of … the ADA and other EEO considerations…"[25] As explained by the EEOC, if an employee is unable to receive the COVID-19 vaccine for a disability-related reason, the employer is required to engage in an interactive process to identify whether there is a reasonable and effective workplace accommodation. Although to date, there have been no court cases examining employer vaccine mandates under the ADA, this is an area that is sure to be litigated.

There have been legal challenges to employer vaccine mandates brought on bases other than the ADA; to date, none have been successful. ***See, e.g., Bridges v. Houston Methodist Hospital,* 2021 WL 2399994 (S.D. Tex. June 10, 2021)** (dismissing case brought by Hospital employees challenging decision to require vaccinations).

IV. Access to Government Services (Title II)

Access to Education

Students have also had their worlds turned upside down due to COVID-19. While COVID-19 posed novel challenges for students and schools, it is important for covered entities, including schools, to remember key ADA principles, including the need to base decisions on objective information. For instance, in ***Brenner v. Shreveport School of Progressive Education*, No. 20-cv-01203 (W.D. La. Oct. 23, 2020),** a student with Type I diabetes had a service dog to assist with detecting

[23] EEOC COVID Guidance, B.

[24] EEOC COVID Guidance, K.9.

[25] EEOC COVID Guidance, K.1.

changes in their sugar levels.[26] Upon returning to school during the COVID pandemic, the head of the school informed the student that a service animal would not be permitted into the school due to a concern that the dog could be infected with COVID-19 and spread it to students. The student filed an ADA lawsuit, and the court granted the student immediate relief in the form of a preliminary injunction permitting the service animal to accompany the student to school. The parties reached a settlement agreement shortly thereafter.

Looking at higher education, a court decided a hugely important case involving the use of standardized tests for college admissions. In ***Kawika Smith v. Regents of the University of Calif.*, RG1904622 (Cal. Dist. Aug. 31, 2020),** the plaintiffs challenged UC's "test-optional" policy, where students are not required to submit ACT or SAT scores, but may do so for a "second look" or "plus factor" in their admission application.[27] In addition to challenges by students of color and multilingual learners, students with disabilities sued under a California state law that incorporates the ADA asserting that this policy discriminated against applicants with disabilities. The plaintiffs argued that the COVID-19 pandemic virtually eliminated their ability to obtain accommodations or locate accessible test locations preventing them from obtaining meaningful access to the application process. The court granted the plaintiffs' request for a preliminary injunction, ordering UC schools to stop from using ACT and SAT exams while the case was under review.[28] Following the court's decision, the parties reached a settlement where the UC schools will no longer be use ACT and SAT schools for admissions or scholarships from Fall 2021 to Spring 2025.[29]

Finally, colleges and universities have also been faced with lawsuits challenging vaccine mandates. In ***Klaassen v. Trustees of Indiana University*, 2021 WL 3073926 (N.D. Ind. July 18, 2021),** the university required students to be vaccinated or to apply for a medical or religious exemption, which would require non-vaccinated students to wear masks, obtain negative tests, and social distance.[30] Several students challenged this requirement, although not under the ADA.

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[26] *Brenner v. Shreveport School of Progressive Education*, No. 20-cv-01203 (W.D. La.).

[27] *Kawika Smith v. Regents of the University of Calif.*, RG1904622 (Cal. Dist. Aug. 31, 2020).

[28] *Id.*; *See also* Public Counsel Press Release www.publiccounsel.org/press_releases?id=0138.

[29] Smith v. Regents of the University of Calif., RG1904622 (Cal. Dist. Aug. 31, 2020), Available at http://www.publiccounsel.org/tools/assets/files/1588.pdf

[30] *Klaassen v. Trustees of Indiana University*, 2021 WL 3073926 (N.D. Ind. July 18, 2021).

The court denied the students' request for a preliminary injunction. The Seventh Circuit denied the students' motion for an injunction pending appeal.[31]

The U.S. Department of Education, Office of Civil Rights, published Guidance called **Questions and Answers on Civil Rights and School Reopening in the COVID-19 Environment,** which provides information about the rights and responsibilities of school districts, colleges, and students related to COVID-19.[32] One question posed is what to do when a student with a disability cannot safely wear a mask due to their disability. The Department of Education states that for this narrow subset of students, the school "must determine based on a student's individual circumstances whether the student is able to attend school safely if other prevention strategies can be followed, in accordance with CDC guidance" such as consistent masking and PPE of others, avoiding large gatherings, and maintaining sufficient physical distance. However, if this is not possible, then the Department notes that instruction might need to be provided remotely.

Parental & Federal Responses to Mask Mandates

Several states, including Arizona, Florida, Iowa, South Carolina, Tennessee, Texas, and Utah, have enacted bans on school districts requiring students to wear masks at schools.[33] For example, Florida will withhold funds from any school district that requires students to wear masks. Florida's governor, DeSantis, reasoned that universally requiring masks at schools is a limitation on parents' fundamental right to make health and educational decisions for their children.[34] Conversely, parents of children with disabilities in Florida and states with similar mask bans, argue that such bans discriminate against students.[35] They reason that a ban "illegally forces

[31] *Klaassen v. Trustees of Indiana University*, 2021 WL 3281209 (7th Cir. Aug. 2, 2021).

[32] U.S. Department of Education, Office of Civil Rights, Questions and Answers on Civil Rights and School Reopening in the COVID-19 Environment, May 13, 2021, available at: https://www2.ed.gov/about/offices/list/ocr/docs/qa-reopening-202105.pdf

[33] Sheryl Gay Stolberg & Erica L. Green, *The Biden Administration will use a Federal Civil Rights Office to Deter States From Banning Universal Masking in Classrooms*, N.Y. TIMES (updated Aug. 30, 2021), https://www.nytimes.com/2021/08/18/us/politics/biden-masks-schools-civil-rights.html.

[34] Complaint, *Hayes, et al., v. DeSantis*, 1:21-cv-22863 (S.D. Fla.).

[35] *See id.*; Stephanie Gruber-Miller, *Parents of Students with Disabilities Sue Over Iowa's COVID Mask Mandate Ban in Schools*, DES MOINES REGISTER (Sept. 3, 2021), https://www.desmoinesregister.com/story/news/politics/2021/09/03/iowans-disabilities-sue-kim-reynolds-over-mask-mandate-ban-schools-covid-department-of-education/5711038001/; Jordan Williams, *Lawsuit Claims SC*

parents of children with underlying conditions to choose between their child's education and their child's health and safety"[36] and which effectively bans children with disabilities from public schools.[37]

Disability rights groups and parents in Iowa, Florida, Texas and South Carolina filed suit against their respective states, alleging that since these bans exclude students with disabilities' equal access to education, such bans violate the ADA, and seeking immediate relief through motions for preliminary injunctions and/or temporary restraining orders.[38]

In ***The Arc of Iowa et al. v. Reynolds et al.,*** **21-cv-00264 (D. Iowa Sept. 13, 2021),** a lawsuit was filed by parents of public school children with health conditions that increase their risk of serious complications or death from COVID-19, including asthma, Down Syndrome, cerebral palsy, heart and lung conditions, hypertension, sickle cell anemia, and weakened immune systems.[39] The plaintiffs asked the court for a temporary restraining order, or a TRO, barring the state from banning school districts from requiring universal masking. The court granted this request. In so doing, the court explained that the plaintiffs had met their burden of showing that they were likely to suffer irreparable harm due to both the potential of acquiring a severe illness or death, as well as a loss of educational opportunity. The court further held that the plaintiffs were likely to succeed on the merits of their case. If school districts were not permitted to require masking, then school programs would not be "readily accessible" as students with disabilities cannot attend in-person learning without the very real threat to their lives, whereas permitting schools to have universal mask mandates would allow children with disabilities opportunity to participate. The court also explained that universal masking could be required as a reasonable modification to policy that would provide disabled students with equal access. Finally, the court

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School Mask Mandate Discriminates Against Children with Disabilities, HILL (Aug. 24, 2021), https://thehill.com/homenews/state-watch/569189-lawsuit-claims-south-carolina-school-mask-mandate-ban-discriminates.

[36] Williams, *supra* note 33.

[37] *See* citations at *supra* note 33.

[38] *Disability Rights South Carolina, et al. v. McMaster et al.,* 21-cv-02728 (D.S.C.); *Hayes, et al., v. DeSantis*, 1:21-cv-22863 (S.D. Fla.); *The Arc of Iowa et al. v. Reynolds et al.,* 21-cv-00264 (D. Iowa); *E.T. et al. v. Abbott et al.,* 21-cv-00717 (W.D. Tex.).

[39] *The Arc of Iowa et al. v. Reynolds et al.,* 21-cv-00264 (D. Iowa Sept. 13, 2021).

noted that requiring students with disabilities to receive education online would violate the ADA's integration mandate.

The Biden Administration has also responded to the states' mask mandates with investigations by the U.S. Department of Education's Office of Civil Rights, which has reminded the governors of Texas and Florida that individual school districts have the funding and discretion to implement CDC recommended safety measures.[40]

Effective Communication of Government Information

One of the cornerstones of Title II (and Title III) of the ADA is the requirement to provide the auxiliary aids and services necessary to ensure effective communication for people with disabilities. Ensuring effective communication to government information is always important but became even more crucial during the COVID-19 pandemic.

At the start of the pandemic, former Governor of New York, Andrew Cuomo, gave daily briefings on the ongoing health crisis that included critical information during a time of great uncertainty. The daily briefings did not have in-frame American Sign Language (ASL) interpretation. In ***Martinez et al v. Cuomo,* 459 F. Supp. 3d 517 (S.D.N.Y. 2020),** deaf residents of New York, together with Disability Rights New York, sued the Governor alleging that deaf residents were deprived effective communication in violation of the ADA and Section 504.[41] The court granted a preliminary injunction that Governor Cuomo had to begin to provide "in-frame" ASL interpretation. In doing so, the court also rejected Governor Cuomo's argument that the "multiplicity of ways" the briefings were offered was enough and stated that press briefings must be "readily accessible."[42] Although the Governor's website had videos of ASL interpretations of the briefings, some residents lacked internet access. Similarly, although some of the channels that broadcasted the briefings had closed captioning, some residents did not read English at all, or well enough to understand the information.

Similarly, deaf residents and an advocacy group in Florida sued Governor DeSantis and Florida State University's (FSU) board of trustees and presidents in ***Yelapi v. DeSantis*, 2021 WL 1918784**

[40] Stolberg & Green, *supra* note 33.

[41] *Martinez et al v. Cuomo,* 459 F. Supp. 3d 517 (S.D.N.Y. 2020).

[42] *Id. at* 523-24.

(N.D. Fla. Mar. 12, 2021).[43] Governor DeSantis and FSU operated a television channel that broadcasted the Governor's press briefings and did not provide in-frame ASL interpreters for all press briefings. The court held that plaintiffs had stated a plausible claim under the ADA, and though noting that an ASL interpreter is not always required, held that this may be a case where one is needed, depending on whether defendants' communication with plaintiffs is as effective as with others, and whether the modification sought is reasonable.

President Trump faced a similar suit for not providing ASL interpreters during his briefings about the COVID-19 crisis in ***National Association of the Deaf v. Trump*, 486 F. Supp. 3d 45 (D.D.C. 2020).**[44] There, the court held that the Rehabilitation Act implied a private right of action against executive agencies and granted a preliminary injunction that ASL interpreters had to be provided.

Another way in which individuals with disabilities might have been excluded from effective communication with the government occurred when the COVID-19 vaccine became available. Individuals who are blind and who searched the internet for vaccine appointments could not always book a vaccine, because state websites were often inaccessible to people who use assistive technology, like screen reading software.[45] There have yet to be any published cases on the topic, but it is certainly a topic to look out for in cases.

Voting Rights

Even before the pandemic, voters who are blind and others with print disabilities were actively advocating for accessible vote-by-mail systems. ***See National Federation of the Blind v. Lamone,* 813 F.3d 494 (4th Cir. 2016); *Hindel v. Husted*, 875 F.3d 344 (6th Cir. 2017).** Given the widespread use of vote-by-mail or absentee voting to curb the spread of COVID-19, the need to ensure a system where blind voters could vote-by-mail privately and independently became even more

[43] *Yelapi v. DeSantis*, 2021 WL 1918784 (N.D. Fla. Mar. 12, 2021).

[44] *National Association of the Deaf v. Trump*, 486 F. Supp. 3d 45 (D.D.C. 2020).

[45] Grace Fernandez, *COVID-19 Continues to Highlight Gaps in Accessibility for People with Disabilities,* JOHNS HOPKINS, (2021), https://www.jhsph.edu/covid-19/articles/covid-19-continues-to-highlight-gaps-in-accessibility-for-people-with-disabilities.html; Haley Messenger, *Blind Americans face roadblocks booking online vaccine appointments,* NBC NEWS, (Mar. 13, 2021, 5:02 AM), https://www.nbcnews.com/business/consumer/blind-americans-face-roadblocks-booking-online-vaccine-appointments-n1260954

immediate. Court cases were filed across the country, resulting in courts ordering election authorities to make their voting systems accessible.

As one example, in ***Taliaferro v. North Carolina State Board of Elections*, 489 F.Supp.3d 433 (E.D.N.C. 2020),** the court ordered the state to implement an accessible absentee voting system, finding that it could be made accessible in five weeks or less.[46] The state raised concerns with ensuring ballot security, but the court said such concerns did not outweigh the plaintiffs' right to vote privately and independently.

Similarly, in ***Powell v. Benson,* No. 2:20-cv-11023 (E.D. Mich. April 25, 2020)**, two blind voters and an advocacy organization filed a Title II action against the state for its exclusively paper ballot vote-by-mail system, which prevented them from voting privately and independently.[47] As a result, the parties entered into a consent decree in which Michigan agreed to acquire an accessible vote-by-mail system, deliver ballots to people with print disabilities to be able to mark the ballot electronically, and train county and local officials on accessible vote-by-mail.

Similar situations arose across the country as courts ordered that accessible vote-by-mail procedures be instated for people with disabilities. ***See Drenth v. Boockvar,* 2020 WL 2745729 (M.D. Pa. May 27, 2020)** (granting a TRO to ensure accessible vote-by-mail in Pennsylvania); ***Gary v. Virginia Dep't of Elections*, 2020 WL 6589326 (E.D. Va. Aug. 28, 2020)** (consent decree reached resulting in accessible mail-in ballot that people with disabilities can mark electronically); ***Hernandez v. New York State Board of Elections*, 2020 WL 4883889 (S.D.N.Y. Aug. 19, 2020)** (order that state board direct county boards of elections print disabilities to provide accessible mail-in ballot that can be marked electronically); ***Frye v. Gardner*, No. 20-cv-751-SM, 2020 WL 7246532 (D.N.H. Dec. 9, 2020)** (lawsuit resulted in New Hampshire launching accessible voting system for people with vision disabilities to request absentee ballot privately and independently; court declines to dismiss as moot to allow plaintiffs to amend prayer for relief).

Another important issue related to COVID-19, the ADA, and voting rights is curbside voting, an option that became popular in many states to ensure that people with medical conditions could safely vote in person. Some states, however, banned curbside voting, including Alabama. In ***People First of Alabama v. Merrill*, 491 F. Supp. 3d 1076 (N.D. Ala. 2020)**, voters with disabilities

[46] *Taliaferro v. North Carolina State Board of Elections*, 489 F.Supp.3d 433 (E.D.N.C. 2020).

[47] *Powell v. Benson,* No. 2:20-cv-110230 (E.D. Mich. April 25, 2020).

filed a lawsuit against the Alabama Secretary of State arguing that the ban violated the ADA, as well as various constitutional provisions.[48] The court held a trial and concluded that the ban violated the ADA by forcing voters with disabilities to risk unnecessary exposure to the virus if they voted in person. The court found that the ban deprives disabled voters of an equally effective opportunity to participate in the benefit of in-person voting. The court explained that a policy allowing – but not requiring – counties to offer curbside voting was a reasonable accommodation. The court enjoined the ban, which allowed counties that wanted to offer curbside voting to do so. Alabama asked the Eleventh Circuit Court of Appeals to stay the injunction, which it declined to do. However, Alabama then asked the Supreme Court to stay the ban.

In ***Merrill v. People First of Alabama,* 141 S. Ct. 25 (2020),** the Supreme Court refused to stay the ban which, as a practical matter, permitted Alabama to enforce its ban on curbside voting for the 2020 elections.[49] Justice Sotomayor wrote a strong dissenting opinion, noting that the state cannot "meaningfully dispute that the plaintiffs have disabilities, that COVID–19 is disproportionately likely to be fatal to these plaintiffs, and that traditional in-person voting will meaningfully increase their risk of exposure."[50] The dissenting Justices criticized the Secretary of State for arguing that the benefit at issue here is "voting generally," explaining that absentee and in-person voting are different benefits and voters with disabilities are entitled to equal access to both.

Criminal Legal System

Some of the largest outbreaks of COVID-19 have been among incarcerated populations. Social distancing is hard, individuals have limited access to items like soap and masks, and the institutions themselves are often hard to keep clean and sanitized; thus, keeping the virus contained in a prison is nearly impossible if just one person has it.

As a result, people in custody and advocates filed lawsuits all over the country, raising a wide-range of claims, seeking to improve conditions within the facilities and, in the alternative, to

[48] *People First of Alabama v. Merrill*, 491 F. Supp. 3d 1076 (N.D. Ala. 2020).

[49] *Merrill v. People First of Alabama,* 141 S. Ct. 25 (2020).

[50] *Id*. at 27.

release incarcerated people. Some of these lawsuits included claims under the ADA and Section 504.

One example is ***Money v. Pritzker*, 453 F. Supp. 3d 1103 (N.D. Ill. 2020**), later renamed to ***Richard v. Pritzker***, where people incarcerated in the Illinois Department of Corrections (IDOC), brought a lawsuit against seeking injunctive relief to increase releases by expanding the use of sentence credit, medical furlough and electronic detention.[51] The court denied plaintiffs' motion for emergency relief and class certification. However, the parties later reached a settlement whereby the IDOC agreed to continue to identify and evaluate "medically vulnerable prisoners for release through legally available mechanisms."[52] It also agreed to award certain earned discretionary sentencing credit for those who are eligible and who are within nine months of their release date. As part of the settlement, the IDOC also agreed to train a broad classification of employees about the ADA and on providing COVID-19 related reasonable accommodations to medically vulnerable people with disabilities.

In ***Campbell et al v. Barnes*, No. 30-2020-1141117 (Orange Cnty. Superior Ct.)**, petitioners sought the release of incarcerated people with disabilities due to the COVID-19 pandemic.[53] Petitioners argued that individual prisoners' disabilities are not considered and constitutes discrimination. Further, they argued that these facilitates cause a disproportionate risk to inmates with disabilities due to the lack of social distancing, staff or intake testing, and mask requirements. The court ordered that the petitioners be released within 48 hours of decision and release enough inmates to reduce population to 50% in congregate living areas.

Similarly, in ***NC NAACP v. Cooper* (No. 20 CVS 500110, 10th Dist. NC)**, plaintiffs sought to compel the release of prisoners so facilities' populations can be reduced to allow for social distancing.[54] In its emergency petition for *writ of mandamus*, the North Carolina chapter of the NAACP pled

[51] *Money v. Pritzker*, 453 F. Supp. 3d 1103 (N.D. Ill. 2020).

[52] *Money v. Pritzker*, settlement, available: https://www.uplcchicago.org/file_download/inline/62ee3ad6-062e-4b6b-abaf-600048f05526

[53] The order can be found at Superior Court of California, Orange County, *News Release* (Dec. 16, 2020), https://www.occourts.org/media-relations/current-news-releases/PW_Jail_12162020.pdf.

[54] A summary of the proceedings and court filings can be found at ACLU of North Carolina, *NC NAACP v. Cooper (Rights of Incarcerated People)*, https://www.acluofnorthcarolina.org/en/cases/nc-naacp-v-cooper-rights-incarcerated-people.

that people with disabilities are at extreme risk for infection and that a third of people housed by North Carolina's Dept. of Public Housing (DPS) have a disability. The parties reached a settlement that agreed to release at least 3,500 people from state custody. According to DPS, so far 4,450 incarcerated people have transitioned out of facilities.[55]

Access to Healthcare

Title II and III of the ADA apply to healthcare providers and seek to ensure that people with disabilities have equal access to health care services.

One of the starkest examples of discrimination against people with disabilities within the healthcare system comes from a review of the crisis standards of care, which have been developed by states to direct healthcare professionals how to ration healthcare in times of shortages.

Many states' crisis standards of care expressly discriminate against people with disabilities. For example, at the beginning of the pandemic, Tennessee's crisis standards of care disqualified certain populations from care services or equipment, such as ventilators.[56] The guidance discriminated against individuals with advanced neuromuscular, cancer, dementia, traumatic brain cancer, as well as people who require assistance with activities of daily living or already require chronic ventilatory support. The Office for Civil Rights (OCR) at the U.S. Department of Health and Human Services received a complaint regarding Tennessee's crisis standards of care and responded by providing technical assistance to the state.[57] After OCR's intervention, Tennessee's new standards only permitted doctors to consider the patient's imminent mortality. Categorical exclusions, such as specific diagnoses, as well as disability and age were removed from the criteria and removed from the state's primary instrument that assessed likelihood of short-term survival.

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[55] North Carolina Dept. of Public Safety, *Adjusted Reentry Dates for Offenders*, https://www.ncdps.gov/adjusted-reentry-dates-offenders.

[56] *TN COVID Treatment Rationing Plan Triggers Disability Discrimination Complaint*, DISABILITY RIGHTS TN (Mar. 28, 2020), https://www.disabilityrightstn.org/resources/news/march-2020/tn-covid-treatment-rationing-triggers-disability-d.

[57] Press Release, OCR Resolves Complaint with Tennessee After it Revises its Triage Plans to Protect Against Discrimination, Health & Hum. Serv. (June 26, 2020), https://public3.pagefreezer.com/content/HHS.gov/31-12-2020T08:51/https:/www.hhs.gov/about/news/2020/06/26/ocr-resolves-complaint-tennessee-after-it-revises-its-triage-plans-protect-against-disability.html

Similarly, Alabama's emergency plan directed hospitals not to "offer mechanical ventilator support for patients" with intellectual disabilities, "moderate to severe dementia," and "severe traumatic brain injury."[58] Through an OCR early resolution process, this direction was removed from the state's emergency plan in April 2020. The state then produced a substantially revised crisis standard of care in August 2020.[59]

To prevent the spread of COVID-19, many hospitals and health care facilities modified their visitor policies preventing entrance by anyone other than the patient. Strict no-visitor policies can prevent patients with disabilities from access to family members or other supporters who help the patient communicate to medical staff.[60] The ramifications of such restrictions are alarming, such as denying the person with a disability the ability to make informed decisions and provide consent.

People with disabilities and advocacy groups quickly began advocating for reasonable modifications. Some of these situations were resolved, including in Connecticut, where the governor issued an executive order regarding non-visitation policies for short-term hospital stays, outpatient clinics, and outpatient surgical facilities to make sure that people with disabilities were not denied reasonable access to a needed support person.[61]

[58] Press Release, OCR Reaches Early Case with Resolution with Alabama After it Removes Discriminatory Ventilator Triaging Guidelines, Health & Hum. Serv. (Apr, 8, 2020), https://public3.pagefreezer.com/content/HHS.gov/31-12-2020T08:51/https:/www.hhs.gov/about/news/2020/04/08/ocr-reaches-early-case-resolution-alabama-after-it-removes-discriminatory-ventilator-triaging.html.

[59] ALABAMA PUBLIC HEALTH, ALABAMA CRISIS STANDARDS OF CARE GUIDELINES (2020), alabamacscguidelines2020.pdf (alabamapublichealth.gov).

[60] *COVID-19 Medical Rationing & Facility Visitation Policies: Hospital and Facility Visitor Policies*, Ctr. For Pub. Rep. (last updated May 25, 2021), https://www.centerforpublicrep.org/covid-19-medical-rationing/.

[61] Executive Order 20200609, St. of CT Dept. of Pub. Health, 20200609-DPH-Order-regarding-patients-with-disabilities-in-health-care-facilities.pdf (ct.gov); OCR Resolves Complaints after State of Connecticut and Private Hospital Safeguard the Rights of Persons with Disabilities to Have Reasonable Access to Support Persons in Hospital Settings During COVID-19, (2020), www.hhs.gov/about/news/2020/06/09/ocr-resolves-complaints-after-state-connecticut-private-hospital-safeguard-rights-persons.html.

Due to the importance of this issue, disability advocacy agencies and stakeholders partnered to develop a comprehensive evaluation criterion for hospital visitor policies.[62] The guidance aims to help stakeholders determine whether a provider's no-visitor policy is compliant with federal law. Further, the guidance shows how states' restrictions on no-visit policies can differ by comprehensive bans on no-visit polices or how states may vary their laws based on the type of facility, the patient's disability diagnosis, the patient's communication limitations, or whether the visitor is a support person or a visitor.

The accessibility of telemedicine is another important issue. When shutdowns due to COVID-19 occurred, many health care facilities transitioned to telehealth services to avoid people coming in person and potentially spreading or contracting the virus. The telehealth services, though, have not always been accessible to people who are blind or low vision—as the tools may not be compatible with certain programs such as screen readers—or captioning or sign language interpreter for people who are deaf may not be available if not arranged in advance.[63] People who live in rural and low-income communities also found it difficult to complete telehealth visits due to lack of broadband – fast internet. Additionally, tele-physical assessments of persons with mobility or manual dexterity disability may be challenging due to difficulties interacting with virtual interface.[64] This, too, is an area to watch.

V. Access to Private Businesses (Title III of the ADA)

Whether private businesses can require patrons to wear a mask and what, if any, reasonable accommodations must be provided to people who cannot, has been a much-talked-about topic since the start of the pandemic.

In ***Emanuel v. Walt Disney Co.*, 2021 WL 2454462 (E.D. Pa. June 16, 2021),** the plaintiff sought an exemption to the store's mask requirement on behalf of her child with autism, explaining that her son is highly sensitive to touch.[65] The court denied the store owner's motion to dismiss,

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[62] Evaluation Framework for Hospital Visitor Policies, Ctr. For Pub. Rep. (June 9, 2020), https://www.centerforpublicrep.org/wp-content/uploads/Disability-Org-Guidance-on-COVID-19-Hospital-Visitation-Policies_5-14-20_Final.pdf.

[63] The Unique Challenges During COVID-19 for People with Disabilities, (2020), https://www.massgeneral.org/news/coronavirus/Covid-19s-impact-on-people-with-disabilities

[64] Jonathan Linkous, Challenges in Telehealth, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7346769/.

[65] *Emanuel v. Walt Disney Co.*, 2021 WL 2454462 (E.D. Pa. June 16, 2021).

finding that the plaintiff had sufficiently pled that her child's request for a reasonable modification was both reasonable and necessary. The court explained that the request was potentially reasonable, given that her son was not currently infected, she informed the store of her son's disability, the store was relatively empty, other shoppers were wearing masks, and the state's mask mandate provided an exemption for medical conditions. Additionally, the court determined that the plaintiff sufficiently pled that the accommodation was necessary because masks were "… so unpleasant [for her child] that he would immediately rip the covering off."[66]

Conversely, in ***Pletcher v. Giant Eagle, Inc.*, 2020 WL 6263916 (W.D. Pa. Oct. 23, 2020)**, the plaintiff sought to enjoin the grocery chain's mask and face covering requirement policy, as well as the chain's barring of the plaintiff from entering the store because of his previous refusal to abide by the policy.[67] The court denied this request, explaining that the plaintiff did not provide any medical evidence to support his claim that he had a mental health impairment where face coverings caused breathing difficulties and severe anxiety. Additionally, the plaintiff made numerous social media posts where he reported that he can wear a mask but refuses to comply with mask policies. The court further reasoned that "…it is neither necessary nor reasonable for Giant Eagle to alter its policy, as the grocery store permits people with disabilities to wear full face shields as an alternative and offers alternatives to in-person shopping such as curbside service, home delivery and personal shoppers."

Like Giant Eagle, other public accommodations have defended cases by patrons who refuse to wear a mask because they offer goods and services in a variety of ways. In ***Hernandez v. El Pasoans Fighting Hunger*, 2021 WL 2763827 (W.D. Tex. July 1, 2021),** an individual with asthma, PTSD with chronic anxiety and panic, sued a food bank for not allowing him inside without a mask.[68] The court dismissed the plaintiff's lawsuit, concluding that a place of public accommodation is not required to provide a patron with his "ideal or preferred accommodation;" instead, the food bank must provide an accommodation that permits the plaintiff to participate equally in the good, service or benefit offered.[69] Here, the food bank offered him reasonable accommodations, such as home delivery, just not his ideal accommodation of going inside

[66] *Id.*

[67] *Pletcher v. Giant Eagle, Inc.*, 2020 WL 6263916 (W.D. Pa. Oct. 23, 2020).

[68] *Hernandez v. El Pasoans Fighting Hunger*, 2021 WL 2763827 (W.D. Tex. July 1, 2021).

[69] *Id*. at *3.

without the mask. The court found Title III of the ADA was not violated because it does not require a party to provide a preferred accommodation, as long as it is an effective accommodation. The court explained this is even more so the case when an exemption from a mask policy would pose a direct threat to the health or safety of others, citing CDC and NIH guidance.

A similar case arose in ***Giles v. Sprouts Farmers Market Inc.*, 2021 WL 2072379 (S.D. Cal. May 24, 2021),** when an individual was denied entrance to a grocery store because she refused to wear a mask.[70] She alleged that she explained to store personnel that she had medical conditions and documentation showing she could not wear a mask. The court granted the store's motion to dismiss. The court noted in its reasoning that the store did allow face shields, and she did not allege she could not wear a face shield. The court also noted that because they offered to have an employee shop for her, there was no policy that prevented her from shopping. The court went on to hold that if the store conducts an individualized assessment of whether an individual poses a direct threat, based on reasonable judgment grounded in medical knowledge and public health authorities and based on consideration of reasonable modifications, denying that individual from the store's premises does not constitute discrimination under the ADA.

In ***Lewis v. Pritzker*, 2020 WL 6581652 (N.D. Ill. Nov. 10, 2020),** two *pro se* plaintiffs sued the Governor of Illinois, individual employees and three private businesses under Title III of the ADA after they were denied entrance to the private businesses for failing to wear a mask.[71] Both plaintiffs alleged they could not wear a mask because of chronic asthma. The plaintiffs based their claim against the Governor on his statewide executive order and mask mandate. The court dismissed the claim against the Governor because the places of accommodation at issue were private businesses, not the Governor. In ***Lewis v. Walmart Corp.*, 2020 WL 6750168 (N.D. Ill. Nov. 17, 2020)**, the court dismissed the claim against the individual employees because there is no individual liability under the ADA.[72] Finally, in ***Lewis v. Walmart Corp.*, 2021 WL 963810 (N.D. Ill. Mar. 15, 2021)**, the court dismissed the claim against the businesses finding that the plaintiffs did not plead an intent to return and therefore did not have standing to bring a claim for injunctive relief, which is the only remedy available under Title III.[73]

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[70] *Giles v. Sprouts Farmers Market Inc.*, 2021 WL 2072379 (S.D. Cal. May 24, 2021).

[71] *Lewis v. Pritzker*, 2020 WL 6581652 (N.D. Ill. Nov. 10, 2020).

[72] *Lewis v. Walmart Corp.*, 2020 WL 6750168 (N.D. Ill. Nov. 17, 2020).

[73] *Lewis v. Walmart Corp.*, 2021 WL 963810 (N.D. Ill. Mar. 15, 2021).

Some deaf and hard of hearing individuals rely on lip reading to communicate effectively, which becomes difficult to impossible when people are wearing masks. To address this issue, in ***Bunn v. Nike,* 20-cv-7403 (N.D. Cal.)**, a deaf woman in California sued Nike, alleging she was unable to communicate with retail employees while shopping.[74] Nike settled the case and agreed to equip its California retail workers with clear masks, place notices in stores and provide guidance to employees about the availability of clear masks to accommodate deaf and hard of hearing customers.

It is worth noting that courts have cited the COVID-19 pandemic in support of their ADA decisions. For example, in ***Majico v. Alba Web Designs, LLC,* 515 F.Supp.3d 424 (W.D. Va. Jan. 25, 2021)**, a blind customer brought action against a private business. The customer alleged the business's website violated Title III of the ADA for being inaccessible to customers who were visually impaired.[75] Defendant filed a motion for judgment on the pleadings, arguing that it was not covered by Title III. The court denied this motion. While recognizing that the Fourth Circuit had not addressed the issue of whether a website itself is a public accommodation for purposes of the ADA, the court reasoned that a website is a place of public accommodation and, as part of its decision, noted the importance of online retail and e-commerce during the pandemic. The court held that "excluding online retailers and their commercial websites from the reach of Title III would run afoul of the purpose of the ADA and would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public."[76]

VI. Conclusion

The COVID-19 pandemic has raised new, complex and important legal issues that greatly impact the lives of people with disabilities. While courts have had the opportunity to issue opinions on a wide range of topics over the last eighteen months, courts are sure to continue to grapple with these cases for some time to come.

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[74] Daniel Wiessner, *Nike will give workers transparent masks to settle deaf customer's lawsuit*, WESTLAW NEWS, (Jan. 28, 2021, 12:04 PM), https://www.reuters.com/article/employment-nike/nike-will-give-workers-transparent-masks-to-settle-deaf-customers-lawsuit-idUSL1N2K31S8

[75] *Majico v. Alba Web Designs, LLC,* 515 F.Supp.3d 424 (W.D. Va. Jan. 25, 2021).

[76] *Id.*, at *7.