



Webinar

Disability Law and Accommodations in the New Hybrid World of 2022



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Changes in the Legal and Learning Environments

1. From in-person to online and back again, plus hybrids!
2. Reality of remote learning: it works! (mostly). Lower costs, easier scheduling, greater accessibility, higher quality technology, better equipped faculty and students.
3. All these changes raise questions about reasonable accommodations, fundamental alternations, and otherwise qualified students.
4. Changes have come swiftly; the Law is still catching up.

Legal Landscape – ADA and 504

- For the most part, same regulatory scheme under ADA and 504
- Public comment on 504 regulations - still pending
 - May 6, 2022 Notice from US DOE - 45 year anniversary of the 504 regulations
 - June 13, 2022 NACUA and EduCause listening session with OCR
 - No draft amendments yet
 - Expected to focus on remote learning and mental health
 - Consistent with President Biden's Unity Agenda
 - Submit comments <https://www2.ed.gov/policy/rights/reg/ocr/index.html>

Legal Landscape – ADA and 504

- For now, look to OCR regs and guidance, and analogous situations for workplace accommodations under EEOC Guidance.
- Auxiliary Aids and Services for Postsecondary Students with Disabilities (a 504 and ADA Title II requirement):
<https://www2.ed.gov/about/offices/list/ocr/docs/auxaids.html>
- EEOC Guidance for COVID-19 and Disabilities:
What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws | U.S. Equal Employment Opportunity Commission (eeoc.gov) (updated July 12, 2022)

Legal Landscape – ADA and 504

- Vaccination mandates consistently upheld
- *Klaassen v. Trustees of Indiana Univ.*, 7 F.4th 592 (7th Cir. 2021); *Harris v. Univ. of Massachusetts, Lowell*, 557 F. Supp. 3d 304 (D. Mass. 2021), appeal dismissed, No. 21-1770, 2022 WL 3095254 (1st Cir. Aug. 4, 2022); *Kheriaty v. Regents of Univ. of California*, No. SACV211367JVSKEsx, 2021 WL 6298332 (C.D. Cal. Dec. 8, 2021)
- Vaccination requirements
 - Exemption for sincerely-held religious beliefs
 - Exemptions for medical disability
 - Consistent application (forms recommended)

Legal Landscape – ADA and 504

- Vaccination exemptions for medical disability
- The few court rulings in this context require medical exemption:
 - *Beckerich v. St. Elizabeth Med. Ctr.*, 563 F. Supp. 3d 633, 640 (E.D. Ky. 2021).
 - *Halgren v. City of Naperville*, 577 F. Supp. 3d 700 (N.D. Ill. 2021)
- Viral testing if job-related and consistent with business necessity – a multi factor test that includes most recent health authority guidance.

Legal Landscape – ADA and 504

- Updated EEOC guidance on remote work:
 - Employee's disability must be the reason for remote work accommodation
 - Remote work during COVID must be considered in determining whether employee can continue to fulfill essential job functions remotely
 - Accommodation not required for medical needs of a household member
 - Accommodation not required if it would pose an undue hardship on the operation of the employer's business

Legal Landscape – ADA and 504

Limits of Academic Deference: Shulse v. Western NEU 2020 WL 4474274

- Courts generally defer to colleges and universities with respect to academic decisions, but there are limitations in the disability context
- Paraplegic undergraduate student with spina bifida and complications
- Requires wheelchair, programmable shunt, and a personal care attendant (PCA)
- His "accessible" room was not large enough to accommodate his gear or PCA, and he was charged extra for it
- Multiple accessibility and accommodations issues
- No formal grievance procedure

Legal Landscape – ADA and 504

Limits of Deference: Shulse v. Western NEU (Aug. 2020)

- PCA was No Trespassed from campus after disagreement over ESA
- Suffered multiple medical crises on campus
- Alleged medical malpractice and negligent care
- Suspended for poor academic performance
- Unable to appeal because website was inaccessible to him
- Brought claims in federal court and WNEU moved to dismiss

Legal Landscape – ADA and 504

Limits of Deference: Shulse v. Western NEU (Aug. 2020)

- a) **Section 504** – WNEU argued not "otherwise qualified" academically; despite deference to the university on academic standards, court ruled that student plausibly alleged that he could meet the academic requirements if he had been given reasonable accommodations.
- b) **ADA Title III** – the issue was whether as a public accommodation WNEU discriminated based on disability by not providing student with full and equal enjoyment of its offerings; the alleged failure to provide reasonable accommodations, including auxiliary education aids, and remove accessibility barriers stated a claim.

Legal Landscape – ADA and 504

Limits of Deference: Shulse v. Western NEU (Aug. 2020)

- c) **Negligence and Duty of Care** – issue was whether WNEU owed the student a duty of care; reasoning from student suicide cases, the court ruled that WNEU had a special relationship with the residential student and a corresponding duty to protect the student from foreseeable harm, and that the medical harm to him was foreseeable, and they may have voluntarily assumed a duty of care by offering health services that may have increased the risk of harm.

Legal Landscape – ADA and 504

Limits of Deference: Shulse v. Western NEU (Aug. 2020)

- d) **Breach of contract** – Court sustained the claim because WNEU's handbook promises to "ensure" an environment free from disability discrimination, strict "adherence" to Title III of the ADA, and "comprehensive health care" for undergraduates.

Tuition Refund Class Actions

Q. These are not disability cases, so how are they relevant?

- Premised on the argument that online education is of lower value than in-person education, otherwise there would be no harm.
- Damages based on institutional or market rates comparisons
 - Those with no rate differences have been dismissed
 - Rate differences reflects costs and incentives, not necessarily value
 - Value is subjective – individualized, can't assume same response
 - Avoid value judgments – online is another means of delivering education

Tuition Refund Class Actions

Educational Malpractice Doctrine

Courts will not consider issues involving **qualitative** appraisals of the university experience in the context of a breach analysis.

- An issue of justiciability
- Courts cannot weigh classroom decisions

See Lindner v. Occidental College, Case No. 2:20-cv-08481-JFW-RAO (C. D. Cal. 2020) (only case applying doctrine to COVID-19 related tuition refund claims).

Reasonable Accommodations



When do we have obligations to accommodate?

- With decreasing stigmatization of mental health issues, disclosures about emotional and psychological challenges are occurring in many settings where they did not typically occur in the past.
- Admissions offices have uniquely difficult positions – they may not inquire or solicit information about disabilities, but information is sometimes voluntarily disclosed.

Admissions has seen the following cases:

Student A wrote an essay about how their suicide attempt at age 14, and continued struggles with mental health issues, has inspired them to be the president of a local chapter of NAMI (the National Alliance on Mental Illness) and to create “Healthy Minds” programs at their high school.

Student B disclosed that they are a veteran of combat in Afghanistan and live with Post-Traumatic Stress Disorder, which has impacted their ability to be in classrooms where there are loud noises or light changes.

Student C’s high school record has two months-long gaps in it and the student made some references to “psychiatric hospitalizations” in their alumni interview.

Student D was homeschooled and shares that they are often perceived by others as acting inappropriately, including complaints about "stalking."

Possible responses?

- After admission, send all students information about how to self-identify as having a disability and requesting accommodation(s)
- After they arrive on campus, do targeted outreach to students after arrival on campus whose application materials suggest they may have a disability, offering ways to contact the disability/accessibility office
- Share information with student affairs staff so that they can do outreach to students of concern
- Share information about students and their possible condition with the health center (if available)

When is an accommodation *NOT* reasonable?

- When it fundamentally alters the education being provided
- Imposes an undue hardship on the institution's operations
- Constitutes/fails to eliminate a direct threat to others
- Constitutes/fails to eliminate a serious imminent risk to the student's own safety and well-being

A fundamental alteration has been found:

- If a student asks to have clinical components of nursing degrees waived, or is unable to complete clinical tasks in medical school
- If a student seeks to be relieved of a particular type of testing or assessment (e.g., multiple choice tests)
- If a student requests a waiver of an academic requirement imposed on all students (e.g., study of a foreign language)

The ADAAA Reaffirmed that Fundamental Educational Alterations were not required

"Nothing in this Act alters the provision of section 302(b)(2)(A)(ii), specifying that reasonable modifications in policies, practices, or procedures shall be required, unless an entity can demonstrate that making such modifications in policies, practices, or procedures, *including academic requirements in postsecondary education*, would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved."

ADAAA, Sec. 6 (a)(1)

In a different context:

Regarding a golfer who sought to use a cart in PGA competitions to assist with his mobility impairment, the Supreme Court stated that a fundamental alteration "is something that either changes such an essential aspect of the 'game' that it makes it a different game, or something that not only accommodates the person with a disability, but gives him / her an advantage over others and thereby fundamentally alters the character of the competition."



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Remote Learning Case Study

- A first-year law student who has an autoimmune disorder contacts her professors and requests to attend classes remotely for the 2022-2023 academic year. She explains that her immunologist has recommended that she engage in social distancing to protect herself from COVID-19, and she understands that the incoming class is especially large, leading to a likelihood of overcrowded classrooms. She says that she has also learned that none of the classrooms have any opportunity to open a window, so that she could sit by an open window, which her immunologist recommends.

Remote Learning Case Study, cont

- Prior to the pandemic, the law school had required all students to attend courses in person. In March 2020, it moved to fully online instruction and remained exclusively online through the 2020-2021 school year. During 2021-2022, the law school offered all courses in person, but permitted second- and third-year students to study remotely.
- For 2022-23, the law school has resumed in-person instruction and requires all first-year students (but not second- and third-year students) to take all classes in person. After discussions with the student, they decline her request for accommodations.

What are Essential Functions?

... “Academic requirements that the recipient can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section.”

34 CFR 104.44 (a)

Like essential functions of a job, the student's essential functions are to fulfill academic requirements, to be effective in their role, and – on residential campuses – to live and study with others.

Define what is essential to the educational program

- The goal is to separate out general expectations and what has always been done from what are the truly essential objectives and components of the course or program.
- Degree requirements are a starting point, but consider whether they are ever waived or modified.
- Evaluate how much a student must function independently.
- Consider whether their conduct outside the classroom can impact the learning/living environment for others.



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School Specific Essential Functions

Program Specific Essential Functions

* If you do not locate your program below, please proceed to the next tab.

| Discipline | Program | Program | Program | Program | Link |
|-----------------------------------|--|-----------------------|-------------------------------------|---------|---|
| Clinical Laboratory Science | Doctorate in Clinical Laboratory Science(DCLS) | | | | |
| Clinical Nutrition | DCN Clinical Nutrition | MS Clinical Nutrition | MS Clinical Nutrition - Entry Level | | Please click here for SHP "General" |
| Dietetic Internship (Certificate) | | | | | |
| Health Care Management | MS Health Care Management | | | | |
| Health Sciences | PhD Health Sciences | MSHS - Aging Studies, | BS Health Sciences | | |



Type here to search



10:39 AM
9/8/2022

A woman with dark skin and long dreadlocks is shown in a close-up, looking down with a distressed expression. She is wearing a purple surgical face mask and a beige knit sweater. Her hands are raised towards her face, with one hand near the mask and the other near her chest. The background is a soft, out-of-focus light blue and white. On the left side of the image, there is a dark grey vertical bar containing the text 'What is essential in law school?' in white. A small red horizontal bar is located at the top left of the dark grey bar.

What is
essential
in law
school?

What is essential to an
undergraduate bachelor's degree
program?

Or a community college non-degree
program?

Academic & Technical Standards

- With respect to post-secondary educational services, an “otherwise qualified” individual is a person with a disability “who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity. 34 CFR §104.3(l)(3)

Princeton's Academic Regulations

- In keeping with a liberal arts philosophy, Princeton students are expected to be fully engaged members of an intellectual community, immersing themselves in the simultaneous study of a variety of disciplines before concentrating in one academic department. A Princeton undergraduate degree is grounded in a common experience of full-time, residential, in-person study normally completed over the course of four years and eight consecutive academic terms. The curriculum is designed in such a way that all students carry a similar course load and make adequate progress toward the degree (as described herein). The first two years of study prepare students for the required independent work in the department of concentration, which is the hallmark of a Princeton education.
- Students are expected to be active participants in their education; the development of critical study and life skills, such as working independently, managing competing obligations, and completing work in a timely fashion, is an essential educational goal.

<https://ua.princeton.edu/contents/academic-regulations>

Princeton's general education distribution requirements

- Princeton's general education distribution requirements represent different ways of knowing, all of which the University believes are essential for educated citizenship. While each student will concentrate in a discipline, a broad exposure to other kinds of knowledge will enhance students' ability to discern what questions can be answered through methods native to their own fields and what questions require other methods.
- For example, a lab experiment can show how a biological process operates, while evaluating whether that process is morally right or wrong requires the incorporation of ethically informed reasoning. A historical study can challenge widespread beliefs about events in the past, but it cannot explain how those beliefs shape human behavior in the present without the methods used in social analysis.
- Exposure to a variety of academic disciplines not only helps us identify the right intellectual tools for the task at hand, but also deepens our respect for the variety of ways human beings seek to understand our world. The general education requirements offer students the chance to develop both intellectual rigor and humility by considering the possibilities and limitations of all forms of academic inquiry.

Safety can also be an "academic and technical" standard

- It is reasonable to have an expectation that college students can safely live independently on a residential campus

"Guidelines governing clearance [to return from a leave of absence] seek to assure, in consultation with the student and their medical care providers, that the student will be able to function effectively in the *autonomous student environment at Brown* without significant disruption to others in the University community, and that *the student can adequately monitor their own health.*"

--- Brown University, Medical Leaves of Absence



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“Nothing in this Agreement shall be construed to be inconsistent with 28 C.F.R § 36.301(b), which states: ‘A public accommodation may impose **legitimate safety requirements that are necessary for safe operation**. Safety requirements must be based on actual risks and not on mere speculation, stereotypes, or generalizations about individuals with disabilities.’”

-- Settlement with Princeton, 2016

Brown University Settlement

- In August 2021, Brown and DOJ announced a settlement for claims that Brown discriminated by failing to re-admit students from leaves of absence due to mental health concerns.



Brown's Medical Leave Clearance

- **PETITIONING FOR CLEARANCE TO RETURN FROM MEDICAL LEAVE**
Guidelines governing clearance seek to assure, in consultation with the student and their medical care providers, that the student will be able to **function effectively in the autonomous student environment at Brown without significant disruption to others in the University community, and that the student can adequately monitor their own health.** The clearance process also provides a review of the ongoing supports a student may need (e.g. medications, and/or continued psychotherapy appointments, and/or continued medical appointments)

Consistent with *Nguyen* holding

- While universities “are not responsible for monitoring and controlling all aspects of their students’ lives,”
- An institution must take “reasonable measures” to protect a student when the institution actually knows of
 - A recent suicide attempt OR
 - A stated plan or intention to die by suicide



Balance

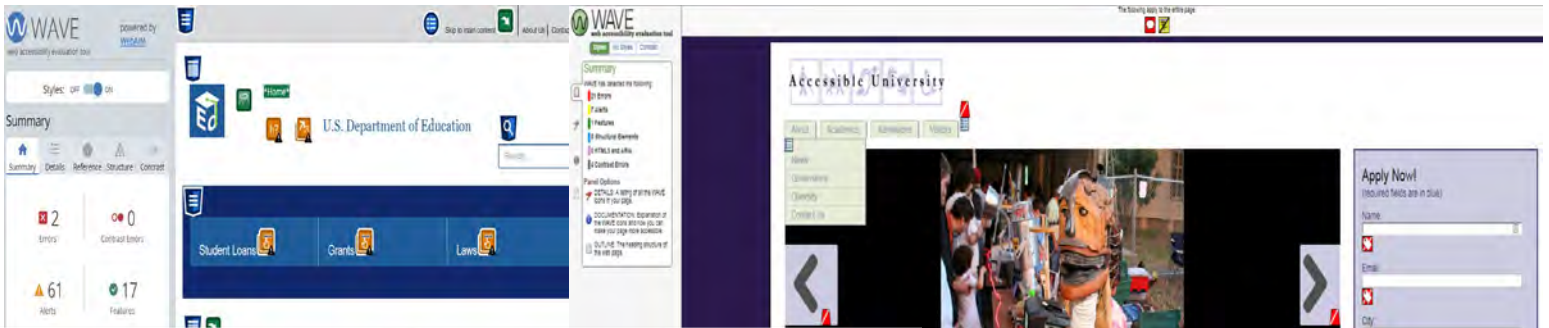
- The *Nguyen* court was balancing different interests and stated that the duty “respects the privacy and autonomy of adult students in most circumstances, **relying in all but emergency situations on the student’s own capacity** and desire to seek professional help to address [their] mental health issues.”
- It also recognized that non-clinicians “cannot be expected to probe or discern suicidal intentions that are not expressly evident.”

An illustration of a diverse group of people in an office environment. On the left, a man with a dark complexion uses blue crutches. Next to him, a woman with red hair and a yellow dress has a prosthetic leg. In the center, a woman in a blue jumpsuit and a man in a yellow shirt are gesturing while talking. On the right, a man with a beard is seated in a wheelchair. The background shows office desks, chairs, and bookshelves. The word "Questions?" is written in large white letters across the middle of the image.

Questions?

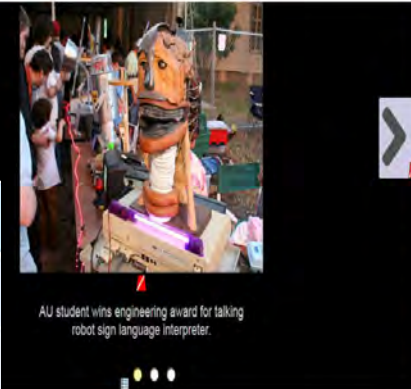
Digital Accessibility

- Navigation
- Focus/reflow
- Headings & lists
- Use of Color
- Dynamic sites
- Tables/forms
- Alt text for images
- Video & Audio accessibility




The screenshot shows the WAVE accessibility evaluation tool interface. On the left, a 'Summary' panel displays 2 errors, 0 contrast errors, 61 alerts, and 17 features. The main content area shows a webpage with a 'U.S. Department of Education' header and a 'Student Loans' section. On the right, a 'Summary' panel lists various accessibility issues. Below the main content, a table provides examples of good and bad contrast ratios.

| Good Example | Contrast Ratio | Bad Example | Contrast Ratio |
|--------------|----------------|-------------|----------------|
| Good Example | 21:1 | Bad Example | 2.77:1 |
| Good Example | 5.1:1 | Bad Example | 2.6:1 |
| Good Example | 8.4:1 | | |
| Good Example | 5.7:1 | | |
| Good Example | 9.5:1 | | |



The video player shows a student interacting with a robot sign language interpreter. The caption below the video reads: 'AU student wins engineering award for talking robot sign language interpreter.'



The 'Apply Now!' form includes fields for Name, Email, City, State/Province, Zip/Postal Code, Country, and Desired major(s). The 'Desired major(s)' field has 'Computer Science' entered.

Understanding WCAG 2.2

Updated 2 September 2022

Accessing Digital Environments

Visual Impairments

- Screen Readers, ZoomText, Control colors

Deaf or Hard of Hearing

- Captions and/or transcripts

Motor Impairments

- Mouth stick/head wand, trackball mouse

Cognitive and Other Impairments

- Literacy/Text-to-Speech software
- Voice recognition software

KEY CONCEPT: Perceivable, Operable, Understandable, Robust



Toolbox

- Federal laws
 - ADA: Title II = public instit.; Title III = private instit. considered “public accommodations”
 - Section 504 of the Rehabilitation Act of 1973. What about Section 508?
 - “Web accessibility for people with disabilities is a priority for the Department of Justice”: DOJ March 2022 guidance.
 - OCR: new affirmative reviews for schools with large online programs
- World Wide Web Consortium’s Web Content Accessibility Guidelines (WCAG)
 - Version? Level?
- State laws, e.g., CA AB 434 (state agencies = WCAG 2.0, Level AA); Illinois Information Technology Accessibility Act (= WCAG 2.0, Level AA)
 - More general non-discrimination laws, e.g., California’s Unruh Civil Rights Act or New York State and City Human Rights Laws also triggered

Updates

- “Drive-by litigation” v. litigation for change, *compare*, broad class actions versus MIT/Harvard litigation
- Payan v. LACCD: Board of Trustees of the LACCD unanimously voted to instruct its attorneys NOT to appeal the case to the U.S. Supreme Court
- “*Litigation explosion*” – according to the ABA, 8,000 federal lawsuits between 2017-2020; since 2018, roughly 20% involve mobile devices; does not include pre-litigation settlements or state filings.
 - See Vu, Launey, Egan, “*The Law on Website & Mobile Accessibility Continues to Grow at a Glacial Pace as Lawsuit Numbers Reach All-Time Highs*,” Jan. 1, 2022

Procurement Process

- Requiring accessibility conformance documentation (pros/cons of VPATs?)
- Accessibility assurances in RFPs & contracts*
 - Consider as a standalone clause/SOW/exhibit, but also consider IP provisions
 - Consider non-technology purchases with a mobile component (e.g., parking apps)
- Evaluating Accessibility
 - Conducting automated, manual, and functional testing
 - User testing
 - Experts? Who pays?
- Working with vendor to improve accessibility (Accessibility Roadmap)
- Exceptions limited on a case-by-case basis
- Providing equally effective alternative access
- Maintaining inventory and renegotiation periods

Digital Accessibility Strategy

- Policies & procedures to support a digital accessibility program
 - Identify standards, definitions, scope, exceptions
- Establish committees, working groups, resources
 - Expensive endeavor, but issue here to stay – firm foundation can be critical
- Determine roles & responsibilities
- Provide/Obtain Professional Development Opportunities
 - Train content creators
 - Provide resources for content creators
- Acquire or develop tools and services to monitor and sustain compliance, including reporting and remediating access barriers
 - Consider additional technology, platforms, outside vendors carefully

Key Stakeholders and Partnerships

- Administrators
- Academic Affairs
- Shared Governance
- General Counsel
- Business Office
- Information Technology
- Distance Education
- Diversity, Equity & Inclusion
- Accessibility/Disability Services
- Marketing & Communications
- Libraries
- Centers for Learning & Teaching
- Auxiliary Services
- Athletics

Determine the Scope of the Task

- The internet & intranet websites
- Third party online education vendors
- Electronic books & electronic book reading systems
- Search engines & databases, including embedded search
- Learning management systems (content management often the larger challenge)
- Specific websites with specific challenges, e.g., athletics or MOOCs
- Classroom technology, particularly in analytic areas
- Mobile-based applications
- Social media?
- *“Wait a minute: I don’t even own this website!!”*

Common Challenge Areas

- Large Websites:
 - “I had no idea it was that expansive!”
 - “Do faculty members’ personal pages ‘count’?”
 - “Marketing says they need this color scheme!” “You can’t change the template!”
- Procurement:
 - “Wait, how many people have purchasing power? ...And, we don’t have any policy?”
 - “But they assured ‘accessibility’...”
 - “Legal reviewed it.”
- Libraries: Digital databases; decades worth of content – legacy content
- Athletics: Real time stats, live video, vendors, etc.
- Video, interactive, or even non-dynamic documents like PDFs

Prioritization

- Registered individuals with disabilities facing digital accessibility barriers
- Low hanging fruit (*e.g.*, Accessibility Statement on website, syllabus, easy template fixes)
- Public facing, high traffic websites
- Essential intranet functions (*e.g.*, registration and payment systems)
- Plan for new, modified, and legacy content

Final Thoughts

- Expect continued and likely more aggressive focus on website accessibility via federal government and advocacy agencies – emboldened by success at Harvard, MIT, LACCD, etc. (Still some circuit inconsistency, however.)
- Digital accessibility and remote learning connection is clear; PC has seen more fundamental alteration approaches in last 12 months than in last 12 years. Expect new regulations on remote learning, accessibility and accommodations, and more litigation on disability accommodations. Review policies, procedures, and personnel training.
- If you haven't created a team and/or the structure to have a response on digital accessibility, you are behind – the time is now to start building infrastructure. Technology is not slowing.

An illustration of a diverse group of people in an office environment. On the left, a man with a beard and a red shirt uses blue crutches. Next to him, a woman in a yellow dress and red hat stands with one leg in a cast. In the center, a woman in a blue shirt and a man in a yellow shirt are gesturing while talking. On the right, a man with a beard is seated in a wheelchair. The background shows office desks, chairs, and bookshelves. The word "Questions?" is written in large white letters across the middle of the image.

Questions?

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