

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CAITLIN CORRIGAN)

Plaintiff)

v.)

BOSTON UNIVERSITY)

Defendant)

CIVIL ACTION NO: _____

COMPLAINT
(For Declaratory and Injunctive Relief and Damages)

INTRODUCTION

This action invokes three disparate strands of law, which collectively deprived Plaintiff of her rights and privileges and immunities guaranteed to her under federal law, specifically in denying Plaintiff the ability to engage in educational activities under the Americans with Disabilities Act 42 U.S.C. § 12101 et seq. This lawsuit alleges specifically that the policies of Boston University of imposing a testing protocol that did not provide for accommodation denied Plaintiff the ability to engage in “a major life activity,” which includes but is not limited to “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, writing, communication, interacting with others, and working...” or combinations of the above. Finally, Plaintiff contends that Boston University further violated the Americans with Disabilities Act by failing to provide a transparent and comprehensive appeals process and failing to provide an interactive good faith process leading to reasonable accommodation, which generated more confusion than clarity. As part of this deficiency, the identity of the “bad actors”

responsible for these violations has been concealed. When the term "Boston University" is used herein, it includes specific employees Provost Daniel Lee Kleinman, Dean Kenneth Elmore, Lorre Wolf, President Robert Brown, and Professor Jean Morrison as the likely violators. Plaintiff intends to amend this Complaint once the first round of discovery clarifies the particular individual or individuals who should be named as specific defendants from this list or the broader Boston University community.

Plaintiff Caitlin Corrigan is a student at Boston University, admitted through a competitive process, and is qualified to attend school at the University. Because she has a disability, however, the University has placed an insurmountable obstacle preventing her from participating in her studies. All students at Boston University are required to be tested regularly to exposure to SARS-CoV-2 ("Covid testing"), the virus associated with Covid-19 but are offered only one protocol for this testing requirement, despite the widespread availability of alternative methods of Covid testing. Plaintiff has a documented, disabling medical condition. Although this disabling condition does not affect her ability to pursue her degree at Boston University, her doctors have advised her that she will likely experience significant harm if she submits to the single University-approved Covid testing regimen. For the purposes of this Complaint, Plaintiff specifically denies that Boston University had any defined right to impose restrictions on Plaintiff as the testing scheme was not based on any extant justification as a matter of law or fact that compels a student to undergo an invasive medical procedure as a condition of participation of an academic program at Boston University. Plaintiff also denies that Boston University has a legal right to impose invasive medical procedures on a student which exceeds or conflicts with regulations propounded by the Department of Public Health relating to SARS-CoV-2.

Boston University, an educational institution located along Commonwealth Avenue in Boston, has enshrined its obligations under the Americans with Disabilities Act in its Notice of Non-discrimination, which states that "Boston University policy prohibits discrimination against any individual on the basis of....physical disability..." The University has direct knowledge of Plaintiff's disability, and her request for an alternative Covid testing procedure as a reasonable accommodation for her disability, but the University has instead opted to discriminate against her by denying her any accommodation for her disability. Plaintiff has agreed to be regularly tested, but is unwilling to sacrifice her health and well-being by submitting to the particular Covid testing method mandated by the University that she believes will cause her serious and permanent physical harm.

Since its inception in 1991, the Americans with Disabilities Act, through its statement of purpose and definitions, broadly construed, has impliedly anticipated two distinct and separate forms of disability—those that are de jure, meaning permanent conditions, and those that are de facto, meaning those that are temporary, but not transient, as defined as being of less than 6 months in duration under Section 12102 and the Act's "purposes; under Section 12101(b), which includes under (b)(1) the notion that the Act is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Left unsaid, or at least undefined, is that no one may create a disability, and then discriminate based upon that artificial disability. As the academic hypothetical renders the distinction, de jure discrimination occurs when an actor places a stumbling block before the blind, thereby requiring that actor to remove the block as a matter of law. De facto discrimination occurs when the actor places a stumbling block before the sighted and then turns off the lights. Under both scenarios, the actor is mandated by the Americans with Disabilities Act to prevent discrimination on the basis of the

block (which creates the instrumentality of harm), whether or not the party impacted is disabled by law or disabled by the actions of the actor in interjecting an instrumentality that renders a person unable to engage in a major life activity.

Until the onset of the alleged SARS-CoV-2/COVID-19 pandemic of 2020 ("the Alleged Epidemic"), it has been difficult to imagine a case of de facto disability and de facto discrimination, as the notion of an actor intentionally creating disability, and then intentionally discriminating upon the basis of its own act, is so contrary to American law and constitutional protections that it has remained a hypothetical question of response and remedy.

This case presents the legal and factual situation in which Boston University, one of the birthplaces of civil rights, has now made itself the epicenter and epitome of discrimination. Boston University, acting under its alleged superintendency power, established a testing regimen for its students that mandates not just a testing regime for SARS-CoV-2/COVID-19, but mandates a specific anterior nares PCR testing protocol which is dangerous to Plaintiff. Boston University simply refuses to permit a safe alternative.

Plaintiff in this case holds a prestigious Fellowship scholarship to attend Boston University's School of Theology, the same school attended by Dr. Martin Luther King, Jr. It is worth noting that Dr. King attended the School of Theology because Boston University's respect for civil rights and non-discrimination was once a hallmark of Boston University.

Plaintiff notified Boston University that, having engaged in a consultation with her medical provider, she should be medically exempt not from the testing regime, but from the dictated particular test, of which there are many options and alternatives. Rather than comply with the legal obligation of a good faith interactive process, Boston University simply disputed the findings of multiple treating physicians. Instead of simply working with Plaintiff to find a

reasonable medical testing protocol that satisfied the school's objectives (which are not stipulated herein to be reasonable or necessary), she was suspended from her educational program. The University has not only denied Plaintiff's requested accommodation to select another testing method but has denied even that she is a person with a disability who is entitled to an accommodation. It is noteworthy that the Boston University response to Plaintiff's simple request has been "its way or the highway," rejecting the standard legal process of recognizing and accommodating the needs of a person with a disability. The University's hostile response to Plaintiff's rights violated the Americans with Disabilities Act. Boston University must be held accountable for this unlawful action, including the deprivation of federal aid and funds that fuel its operations.

JURISDICTIONAL AUTHORITY OF THE COURT

- 1) This action is brought pursuant to 28 U.S.C. §§ 1331 and 1343, and 28 U.S.C. §§ 2201, 2202, 42 U.S.C. §§ 12102 et seq. This Court has jurisdiction specifically delegated to it by the United States Congress in the Americans with Disabilities Act. This action seeks to redress the deprivation under federal law of rights, and the privileges, and immunities secured by the United States Constitution and the laws of the United States.

PARTIES TO THIS ACTION

- 2) Plaintiff, Caitlin Corrigan, ("the Plaintiff") currently resides in Patchogue, New York. She is currently a resident of the State of New York, after her suspension from Boston University. She had previously been a resident of Boston, Massachusetts.

- 3) Defendant, Boston University, is a non-profit institution with a principal corporate address at 606 Congress Street, Boston, Suffolk County in the Commonwealth of Massachusetts. It is a primarily privately-funded University.

FACTUAL BACKGROUND TO THIS CLAIM

- 4) Plaintiff was a student at Boston University's School of Theology where she continued her studies until her status as a student at the University was suspended following Boston University's misconduct with regard to SARS-CoV-2 testing. She was barred from the campus as well as excluded from participating in classes remotely and locked out of the University's electronic network.
- 5) The suspension was invoked under the University- initiated policy with the stated but disputed objective of addressing the spread of SARS-CoV-2, the virus associated by some with Covid-19, among students, faculty, and staff. As one component of this new policy, all students, faculty, and staff were required to undergo testing for SARS-CoV-2 using one particular method of testing. This is known as "virus theater" or "virtue signaling," and it has no therapeutic benefit other than relieving the latent anxiety of frightened people.
- 6) The method selected was contraindicated as confirmed by Plaintiff's physicians as due to its potential and very real adverse effects on Plaintiff.
- 7) Plaintiff at all times relevant to this matter was not able to perform her major life functions in terms of impacting biological functions with substantial risk and, thus, Plaintiff is a person with a disability under the ADA.
- 8) Plaintiff was and is a qualified individual with a disability within the meaning of the

ADA, as she was physically present in Boston and was otherwise qualified to participate in or benefit from the programs or services offered by Boston University. She is eligible for educational services provided by the University and, by virtue of her disability, is qualified for the protections of Title III of the ADA.

- 9) Defendant had apparently retained an unknown individual known as Dr. Wolf, a person of unknown qualifications or judgment, as its agent to review disability issues pertaining to Plaintiff was therefore required to ensure that Plaintiff, a qualified individual with a disability, was (i) afforded the opportunity to participate in the programs, services and activities offered by Boston University without being discriminated against and (ii) make reasonable modifications in policies, practices, or procedures when necessary to avoid disability-related discrimination.
- 10) Boston University is obligated under Title III of the ADA to accommodate students with disabilities, including adjusting those policies that have the effect of discriminating against students with disabilities attending the University.
- 11) Boston University receives substantial federal funding, meaning that Boston University must absolutely comply with the Americans with Disabilities Act and is within the scrutiny of federal authorities in its policies and practices.
- 12) Plaintiff advised Boston University of her disability and the proposed accommodation. This accommodation was to be tested using an alternate means to be agreed upon by Plaintiff, her physicians, and Boston University, as part of the mandated interactive process required under the ADA.
- 13) On October 14, 2021, Plaintiff received a Notice of University Suspension Due to Non-Compliance with Covid-19 Testing Mandate. Rejecting the professional conclusions from

her physicians that the particular testing protocol would be harmful to Plaintiff (See, Exhibit A), the University refused to acknowledge Plaintiff's well-documented disability or to engage in an interactive process to determine an appropriate and reasonable accommodation, as required under the ADA.

- 14) Boston University, notified Plaintiff that if she could not receive one particular test, she would be considered to be non-compliant with the Testing Mandate, and would be suspended from the University. The University informed her that she could return to campus only after she consented to submit to a testing procedure that was likely to cause her serious harm, due to her disability.
- 15) Boston University created a circumstance in which Plaintiff was barred from participating in a major life function because she could not accept the one medical test demanded by Boston University over other, approved, testing regimens.
- 16) Boston University's conduct created a "de facto" disability, meaning that Plaintiff was disabled from her participation at Boston University not because of actual inability to function, but because of a regulation created by rule and which would terminate when the rule was terminated.
- 17) The FDA recognizes a number of testing protocols. The method demanded by Boston University was not by any means the only testing protocol authorized by the federal government for the purposes of the University's Covid Testing Mandate. (See, Exhibit B.) Plaintiff expressed her willingness to comply with the University's mandate utilizing another method of Covid testing, one that would not endanger her health but would yield the same quality of testing results.
- 18) The letter of October 14, 2021, from the University in response to Plaintiff's requested

accommodation was simply that "... [compliance]... with Boston University's COVID-19 protocols applies to all members of the BU community, *without exception*." No other testing options would be accepted by the University. In making this declaration, Boston University disregarded specific findings of the Department of Public Health which confirmed that an individual, even one with SARS-CoV-2, did not constitute a direct threat to the community and that providing the requisite accommodation would create an undue hardship to Boston University. In short, Dr. Wolf apparently pledged her allegiance to Boston University's policy, not the ADA.

- 19) Plaintiff does not refuse to be tested, but merely seeks an alternative method to achieve the same results. Without engaging in any kind of iterative process to reach an agreement on a reasonable accommodation, Boston University took it upon itself to reject the medical determination from Plaintiff's qualified treating physician sua sponte. It did not request any further information to confirm her physician's conclusions nor did it offer evidence that might counter his medical opinion in support of the University's policy. In so doing, the University declared itself beyond the legal reach of the ADA.
- 20) On November 5, 2021, Boston University affirmed the suspension after Plaintiff appealed the University's initial decision. Curiously, the denial of this Appeal followed no investigation or interactive process. (See, Exhibit C). As noted in the bottom of paragraph 2 of this document, Boston University took the position that its obligation to "accommodate" Plaintiff's disability and allow her to safely attend the University was limited to an offer to have a University physician (Dr. Wolf) demonstrate the anterior nares testing protocol..."
- 21) The arrogant response of University officials to Plaintiff's appeal simply dismissed the

expertise and qualifications of Plaintiff's physician in recommending against the nares testing protocol. The University refused to acknowledge that Plaintiff is a person with a disability seeking a reasonable accommodation, instead arguing that Plaintiff was simply ignorant about the protocol and that her physician had failed to adequately explain it to her.

- 22) Under the law, it is not up to the University to determine whether Plaintiff has a disability, although it can request documentation to confirm Plaintiff's assertions about her physical condition. The University simply rejected without remark the evidence from Plaintiff's well-qualified treating physician, duly licensed and practicing in the Commonwealth of Massachusetts, disclosing that Plaintiff has a disability and would be harmed if coerced to undergo testing using the method mandated by the University's inflexible policy.
- 23) Had the University engaged in an ADA-compliant iterative process, officials could have weighed Plaintiff's physician's recommendation and her requested accommodation of using an alternative testing method that would provide the same results as the method mandated by Boston University. Such an accommodation would place no additional burden on the University but would allow Plaintiff to continue her studies without sacrificing her health. The duty to accommodate would include investigating alternative testing protocols and recommending an alternative one. Curiously, the November 5, 2021 denial of Plaintiff's appeal stated only that the use of a different FDA-authorized testing protocol (a saliva test) "does not constitute a reasonable accommodation...", without explaining why this readily available alternative was unreasonable. This conclusory objection does not constitute engagement in an iterative process but instead expresses the

University's unwillingness to fairly assess the reasonableness of Plaintiff's proposed accommodation.

- 24) The November 5, 2021 denial of Plaintiff's accommodations request denied Plaintiff the opportunity to even engage in a process to reach an agreement on a reasonable accommodation. As a matter of law, the University must engage in such an iterative, interactive process and cannot rely on its own unsubstantiated rejection to suffice as a considered evaluation of her proposed accommodation.
- 25) On November 17, 2021, frustrated with the stonewalling from the university officials, Plaintiff, through counsel, sent a letter to the President of Boston University (as permitted by the grievance procedure) asking for a more appropriate process for addressing Plaintiff's request for an accommodation, as permitted by Boston University's grievance policy. (Exhibit D, with permission to apply to the president highlighted). Plaintiff provided a series of questions that should be addressed in a meaningful process as required under the ADA to reach accommodations that would allow Plaintiff to attend the University safely. In particular, Plaintiff sought a basis for the University's insistence on one FDA-authorized test over any other, in the absence of any evidence to support that insistence. The questions in Exhibit D express the factual issues that will be adjudicated in this case in any event
- 26) The only response the University provided to Plaintiff's detailed request for a more flexible iterative process was a demand that her counsel refrain from sending letters to the President. The University did not provide any factual or policy basis for rejecting her accommodation request and effectively cut off any recourse to further deliberation by the University.

- 27) The final appeal was denied on January 6, 2022, see, Exhibit E. The University asserted in this final decision only that its November 5, 2021 denial letter, which addressed none of the relevant issues but simply denied Plaintiff's disability and request for accommodation. In addition to corrupting the concept of reasonable accommodations by substituting its own policy for "reasonableness," the University engaged in the obfuscation method popularly recognized as "gaslighting." Using this method, the University posits an obvious falsehood as the simple and obvious truth, with the intention of making Plaintiff doubt his or her sanity and intellectual capacity. Although the November 17, 2021 letter sent to the President of Boston University specifically requested engagement with Defendant in an iterative process as required under the ADA, the University's response was to simply claim that no interactive process would occur because the University's position was self-evidently reasonable. The University's unilateral decision-making was substituted for the required process to reach a reasonable accommodation.
- 28) It is expected at deposition and trial, when the questions raised on November 17, 2021, are put to Boston University officials under oath for an explanation that the statements in the November 5, 2021, letter are demonstrably unsupportable, lazy, and meaningless, as most gaslighting statements usually are revealed to be under the glare of courtroom scrutiny.
- 29) On January 21, 2022, counsel for Boston University acknowledged that the appeals process "has been exhausted." (Exhibit F) There was to be no interactive process and the University would simply discriminate against a student with a disability, with no offer of accommodation.

- 30) The recent case of Rivera v. Altranais Home Care LLC 19 cv 30139, in the US District Court for the District of Massachusetts, with a thoughtful decision by Magistrate Judge Robertson dated January 18, 2022, affirms that the obligation of the interactive process is alive and well in ADA doctrine, and the question of whether the process was followed is one of fact for the finder of fact.
- 31) Under the doctrine of Rivera, the interactive process would have included demonstrably more information about Boston University's testing policy, which would have provided Plaintiff and her physician an opportunity to review and respond to the concerns of Boston University. Although the informed opinion of Plaintiff's physician may not be determinative for resolving the outstanding issue, the bald assertions of Boston University employees do not constitute a careful consideration of Plaintiff's accommodations request nor do they allow for an interactive exchange between medical professionals and between Plaintiff and Defendant.
- 32) The questions posited to Boston University in the lengthy November 17, 2021 letter to Boston University's President reflect the very basic questions that one would expect to be addressed in an interactive process. In refusing to address these basic questions, Boston University effectively and emphatically refused to engage in any process whatsoever to arrive at a reasonable accommodation.

COUNT I
(VIOLATION OF THE AMERICANS WITH DISABILITIES ACT)
(DEJURE DISABILITY)

- 33) Plaintiff restates paragraphs 1-32 and specifically incorporates them herein.
- 34) Title III of the Americans with Disabilities Act ("ADA") mandates that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of

the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” 42 U.S.C. § 12172(a).

35) Further, the ADA bans the particular actions of Boston University and its employees:

“An individual or entity shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration...that have the effect of discriminating on the basis of disability. 42 U.S.C. § 12172(b)(D)(i).

36) Under the ADA, discrimination against a person with a disability exists when “a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations...” 42 U.S.C. § 12182(b)(2)(A)(ii).

37) Plaintiff has a disability as defined under the ADA because she has “a physical or mental impairment that substantially limits one or more major life activities.” 42 U.S.C. § 12102(1)(a). An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

38) Plaintiff has requested a simple accommodation, as recommended by her treating physician after a review of her medical history and current condition. Without objecting to the University’s Covid Testing Mandate as such, Plaintiff has requested the use of an alternative method for Covid testing that is authorized by federal regulations rather than that specific testing method required by the University. The Covid testing method

required by the University is but one of several Covid testing methods authorized under federal regulations. The Covid testing method required by the University is likely to cause serious physical harm to Plaintiff, in the opinion of and as documented by Plaintiff's treating physician.

- 39) Providing an accommodation as requested by Plaintiff would not require Defendant to fundamentally alter the nature of the activities of the University or present an undue burden on the University, while providing the same information that could be gathered through the University's required testing method.
- 40) Under the ADA, Boston University is required to provide an accommodation to the Plaintiff that reasonably achieves the same goals as under the required policy, but which does not present potential harm to Plaintiff in light of her disability. Plaintiff has proposed a reasonable alternative to the Covid testing method mandated by Boston University which was simply ignored.
- 41) Defendant has offered no alternative accommodation to the one proposed by Plaintiff and has refused to engage in any interactive process to reach an accommodation that will protect the health of Plaintiff while also meeting the requirements of the University under its Covid Testing Mandate. Defendant has demanded that Plaintiff simply accept a harmful testing regimen over the objections of Plaintiff and her physician without Under the ADA, Defendant must demonstrate that a person with a disability poses a significant risk of substantial harm to the health or safety of others in the school environment if provided a requested accommodation. Defendant here cannot successfully support a defense that Plaintiff presents a unique threat to the health or safety of others

42) Although Plaintiff is unable to comply with the University's Covid Testing Mandate

without accommodation, the Defendant denied her the requested accommodation without offering her an alternative and suspended her registration as a student at Boston University.

43) Under the ADA, Defendant must demonstrate that a person with a disability poses a

significant risk of substantial harm to the health or safety of others in the school environment if provided a requested accommodation. Defendant here cannot successfully support a defense that Plaintiff presents a unique threat to the health or safety of others because the requested accommodation presents no risk of harm to the health and safety of others in the school environment if provided.

44) At no time did any individual with any competence or understanding of the medical

issues make any effort to engage with Plaintiff to better understand the specific medical issues or the impact on Plaintiff in light of her disability if she were to agree to the required testing method. Defendant made no alternative offer of accommodation, in concert with participation by Plaintiff, through the interactive process mandated by the ADA.

45) The proposed accommodation was not intended to exempt Plaintiff from compliance with

the University's rules or regulations, but instead as a means to comply with University rules while also safeguarding her own health and well-being as a person with a disability. The proposed accommodation would have no potential impact on any viable public health objective underlying the University policy.

46) As a result of this failure by Boston University, Plaintiff was denied her right of access

required by the Americans with Disabilities Act and was otherwise harmed by being

suspended from her educational program and barred her even from participating in University programs remotely.

COUNT II
(VIOLATION OF THE AMERICANS WITH DISABILITIES ACT)
(DECLARATORY JUDGMENT)

- 47) Plaintiff restates paragraphs 1-46 and specifically incorporates them herein.
- 48) Plaintiff had been otherwise qualified to participate in her educational program at Boston University without limitations or any need for additional accommodation.
- 49) Boston University's inflexible Covid testing policy itself had the effect of discriminating against Plaintiff and preventing her from pursuing her academic course of study.
- 50) Boston University created the testing policy in blatant disregard to the obvious fact that the policy would not be safe for all students, and yet created no exemptions even for students with a variety of disabilities, including the disability suffered by Plaintiff.
- 51) Any problem that Boston University can create which creates disability obligates Boston University under federal law to remediate its own misconduct.
- 52) Any disability created under the Americans with Disabilities Act was, therefore, a result of Boston University's action, not a preexisting de jure disability; by definition, it is the testing policy itself that leads to disability, and that would evaporate with the termination of the policy or exemption to it.
- 53) This de facto disability, in which Boston University first acted, then discriminated, is viewed under a higher standard of review, as opposed to "reasonable accommodation."
- 54) Boston University cannot show that that it is within its rights to cause harm, much as a landowner cannot place booby traps to ensnare a trespasser.

- 55) Boston University cannot show that its extreme policy represented any kind of compelling need, as the University is an urban university in which students are out in public and not under the control of Boston University even as they walk from a test site to the classroom; Boston University's policy is nothing more than virus-theater.
- 56) Even if a compelling public health need existed, and even if Boston University had superintendency power to act, both of which Plaintiff denies, and which it is Boston University's obligation to prove at trial, there was no nexus between the University's need and the extreme policy as crafted.
- 57) Even if a compelling public health emergency existed, and even if the University had superintendency power to act, and even if there was a nexus between the public need and the policy as crafted, all of which Plaintiff denies, and it Boston University's obligation to prove at trial, the policy was not narrowly tailored to meet the nexus, as the policy was overly broad in the equivalent of using a meat cleaver to split a grape.
- 58) Even if a compelling public health emergency existed, and even if Boston University had superintendency power to act, and even if there was a nexus between the public need and the policy as crafted, and even if the policy was narrowly tailored to meet the nexus, all of which Plaintiff denies, and it is the University's obligation to prove at trial, the policy was still invalid in that it was wildly under inclusive, as it was aimed at a particularly narrow medical issue, and did not represent a purposeful health measure aimed at more dire medical circumstances. As was recently noticed in Logan Albright's recent book, *Conform or be Cast Out*, p. 151, "the amount of lives we could save by taking swift and decisive action to ban cars, planes, pools, sports, pets, stairs, hamburgers, sex, beer, cigarettes, electricity, and pillows, is incalculable. The reason we don't ban those things

comes from a recognition that life is inherently risky, and a life which minimized every conceivable danger would not be one worth living.”

59) The University’s policy of an exemption-free testing protocol that provides no possibility of accommodation for students with disabilities is illegal, unconscionable, and factually unsupportable. The most reasonable and readily achievable accommodation for Plaintiff that would allow her to participate as a student at Boston University is to simply allow another method of testing to achieve the same results as the single Covid testing method mandated under University policy.

60) Plaintiff has been harmed by denial of access under the Americans with Disabilities Act based upon University action, creating de facto disability.

61) By denying Plaintiff her access rights protected by law, Plaintiff has been harmed.

62) Plaintiff requests declaratory judgment that Defendant’s strict Covid testing policy as implemented at the University violates Title III of the ADA.

COUNT III
(VIOLATION OF THE AMERICANS WITH DISABILITIES ACT)
(DEJURE DISABILITY)
(DECLARATORY JUDGMENT OF UNENFORCEABILITY)

63) Plaintiff restates paragraphs 1-62 and specifically incorporates them herein.

64) Boston University violated the Americans with Disabilities Act by refusing to offer any accommodation at all.

65) Boston University violated the Americans with Disabilities Act by refusing to engage in a meaningful interactive process.

66) Boston University violated the Americans with Disability Act by willfully refusing to engage in a fair and open process, and by structuring a non-participatory appeals process that was arbitrary, capricious and designed to hinder and delay.

66. As a result of this conduct, Plaintiff has been harmed in a manner which not only requires equitable remedy but financial damages, as well in an amount to be determined at trial.

WHEREFORE, Plaintiff does pray and request as follows:

1. That the Court declare that Defendant violated Plaintiff's rights as a person with a disability under the Americans with Disabilities Act by denying her reasonable accommodation request and refusing to engage in an interactive process to secure an alternative accommodation that would permit Plaintiff to continue as a student at Boston University.
2. Order Defendant or others so situated to accept Plaintiff's proposed accommodation or in the alternative to engage in a truly interactive process with Plaintiff to secure a reasonable accommodation that meets the needs of Plaintiff without undue burden to the University.
3. Find that Defendant's Covid testing policy as implemented at Boston University is void and unenforceable as a matter of law because it violates the specific requirements of the Americans with Disabilities Act.
4. That this Court award Plaintiff her damages, costs, and attorney's fees in an amount to be determined; and
5. Any other relief deemed appropriate by this Court.

PLAINTIFF DEMANDS A TRIAL BY JURY ON ALL ISSUES SO TRIABLE

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Respectfully Submitted,

Caitlin Corrigan

By her attorney,

Robert N. Meltzer, BBO #564745
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Wheelhouse at the Bradford Mill
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Concord, MA 01742
Phone: (978) 254 6289
inbox@mountainstateslawgroup.com

Dated: March 22, 2022

EXHIBIT A

Boston University Dean of Students

Kenneth Elmore
Associate Provost and Dean of Students
775 Commonwealth Avenue
Boston, Massachusetts 02215
T 617-353-4126 F 617-353-4225



October 13, 2021

VIA ELECTRONIC MAIL: ca1t3@bu.edu

Caitlin Corrigan-Orosco
59 Chestnut Avenue
Patchogue, NY 11772

Caitlin,

I am following up on your attorney's October 3, letter, to me, regarding your request to be exempted from the University's COVID-19 anterior nares PCR testing process. Through further conversations between your attorney and the University's attorney, you raised the specific concern about the swab manufactured by Puritan that is used in the University's testing process. The University has thoroughly and carefully analyzed the documentation that you, your mother, and your health care provider have provided, and we have again consulted, as necessary, with the University's public, occupational and environmental experts regarding your request and documentation. However, the University is unable to grant the accommodation you are seeking.

The medical documentation you have provided does not support the existence of a disability or medical condition that preclude you from following the University's anterior nares testing protocol using the Puritan swab, and it is not a reasonable accommodation to switch the mode of testing to saliva PCR testing. The documentation you have shared does not provide relevant and applicable scientific data, medical data, or evidence to call into question a risk of harm based upon the limited use of weekly anterior nares testing (while classes are in session and for so long as the University's COVID-19 testing protocols are in place).

Please begin complying with the testing protocol immediately. Please let me know by 5 p.m. today that you plan to begin participating in our testing and daily health survey system immediately. If I do not hear from you by that time, my office will be in touch with you by the close of business today regarding your continued enrollment at the University.

Sincerely,

A handwritten signature in black ink, appearing to read "K. Elmore", with a long horizontal stroke extending to the right.

Kenneth Elmore

Boston University Dean of Students



Kenneth Elmore
Associate Provost and Dean of Students
775 Commonwealth Avenue
Boston, Massachusetts 02215
T 617-353-4126 F 617-353-4225

October 14, 2021

VIA ELECTRONIC MAIL: cait3@bu.edu

Caitlin Corrigan-Orosco
59 Chestnut Avenue
Patchogue, NY 11772

RE: Notice of University Suspension Due to Non-Compliance
with COVID-19 Testing Mandate

Dear Caitlin:

Effective for the Fall 2021 academic year, regular [COVID-19 testing is required](#) for all students at Boston University who are enrolled in on-campus programs. The expectation for complying with Boston University's COVID-19 protocols applies to all members of the BU community, without exception. Our records indicate that you have not complied with these requirements.

Despite receiving notification of noncompliance prior to your access deactivations on September 22, 2021, you have remained out of compliance with the University's expectations.

Considering your inaction, I am imposing sanctions that I deem appropriate. Effective immediately, you are suspended from Boston University until December 31, 2021. During this period, you are prohibited from entering any property owned, operated and/or controlled by Boston University for any reason without advance written permission from this office. Please be advised that failure to comply with the terms of these sanctions may result in additional sanctions which may include your expulsion from the University. Please also be aware that it is University policy that no student while on university suspension may make any progress towards their degree. The University will not accept, for credit, courses taken at another institution during any period while you are suspended.

Re-admission to the University

On or after November 15, 2021, if you wish to return for the spring 2022 semester, please notify me of your plans by emailing dos@bu.edu.

Appeal Procedures

Caitlin Corrigan-Orosco
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You have the right to appeal the sanctions and conditions I've imposed. If you wish to contest this administrative suspension, you may appeal to Dr. Jean Morrison, the University Provost and Chief Academic Officer. This appeal must be received by Dr. Morrison within 5 business days and can be submitted via this link: <https://www.bu.edu/dos/covid-19-non-compliance-sanction-appeal-form/>

I regret the necessity of this action. If you have any questions concerning this matter or your rights under the Code of Student Responsibilities, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. Elmore', with a horizontal line extending to the right.

Kenneth Elmore
Associate Provost and Dean of Students

Information Regarding Your Student Account

It is important to note that tuition and fees are not cancelled once the semester has begun. Please reach out to [Student Financial Assistance](#) to learn more about how this disciplinary action may affect your account.

EXHIBIT B

Testing Frequency

The University's COVID-19 testing frequency for students, faculty, and staff is based on guidance from public health authorities. Please see below for information on how often you should complete testing.

Students

Status	Testing Frequency
All undergraduate students (excluding MET)	Once a week
BU Academy students	
All other students taking classes on the Charles River, Medical, and Fenway Campuses.	Once a week
This includes:	
<ul style="list-style-type: none"> All graduate students MET undergraduate students Students in Online Programs, taking at least one class on campus Nondegree, Exchange, or Consortium students 	
Students who have been identified by their schools and colleges as coming to campus infrequently.	Test upon arrival on campus; test once every seven days thereafter when on campus
Students who are not taking classes on the Charles River, Medical, or Fenway Campus and are not coming to campus for any other reason.	No BU testing required
This includes:	
<ul style="list-style-type: none"> Online Programs Study Abroad Programs Students in a Clinical/Field Placement, Student Teaching, or doing dissertation research off-campus 	

Undergraduate students studying on campus who need to leave campus for more than four days, and graduate students studying on campus who need to leave for more than seven days, may request a change to your testing frequency [here](#). Students do not have to submit change of residence forms for holiday weekends or breaks. The request will be reviewed by the Dean of Students office and, if approved, you will be removed from your

Campus Life: Undergraduates →

BU Community Health & Safety

COVID-19 Self-Monitoring, Test Contact Tracing

Testing Frequency

Self-Monitoring

Testing

Contact Tracing

Face Masks

COVID-19 Vaccination Informat

COVID-19 Vaccine Booster

Compliance (Students)

Quarantine & Isolation Guidanc

Classrooms, Residences & Office

Your Overall Well-Being

Health Information Privacy

Dining, Catering & Events

Fitness & Recreation Centers

Visitors & Travel Policies

Shuttle & Transit Safety

EXHIBIT C

Boston University Office of the Provost

Daniel Lee Kleinman, Associate Provost for Graduate Affairs



One Silber Way
Boston, Massachusetts 02215
T 617-358-8737 F 617-353-6580
dlkein@bu.edu

November 5, 2021

VIA ELECTRONIC MAIL: cait3@bu.edu

Caitlin Corrigan-Orosco
59 Chestnut Avenue
Patchogue, NY 11772

Dear Ms. Corrigan-Orosco:

I am writing in response to your October 19, 2021 appeal to the Office of the Provost of the decision to deny your request to offer you an alternative to the means of COVID-19 testing that we use at Boston University. Boston University uses a self-administered COVID-19 anterior nares PCR testing process, and you requested we allow you to use a saliva PCR testing process. In your appeal, you argue that BU "has failed to provide appropriate accommodations under the Americans with Disabilities Act as required under Federal Law." You request an evidentiary hearing and the right to cross-examine witnesses.

You submitted a request for an exemption based on medical conditions to the Office of Disability & Access Services in late September 2021. Your request and the supporting materials indicated that the sensitivity of your nasal cavities requires that you be provided "a reasonable accommodation to do another test that doesn't involve shoving something into my nasal cavities." Lorre Wolf, Director of the Office of Disability and Access Services and the 504 Coordinator for Boston University, reviewed the materials you and your healthcare providers submitted and had a meeting with you via Zoom on September 28, 2021 to review your request. During the meeting, you stated that the University's test was a nasopharyngeal swab test. Dr. Wolf indicated that BU does not use a nasopharyngeal swab test, but an anterior nares test, which requires only shallow nasal swabbing. After Dr. Wolf offered to demonstrate the anterior nares testing protocol for you during the call, you raised concerns about stress from taking the test and limiting chemicals in your body.

Based on Dr. Wolf's review of the materials you submitted and your Zoom meeting, she communicated the denial of your request for an accommodation on the basis of disability by email dated September 29, 2021. In her email, Dr. Wolf acknowledged that you had been diagnosed with "several potentially disabling medical conditions" and that you have personal medical concerns about the effect of inserting a swab into your nostrils, including concerns about stress and introducing chemicals into your system. Dr. Wolf concluded that your medical conditions and concerns did not substantiate "any connection between a disability and an associated need" for an exemption to the anterior nares testing protocol. She noted further that there is no alternative to the BU testing protocol to ensure the health and safety of the BU

community, but she offered to discuss other adjustments that might assist you in complying with the self-administered anterior nares testing requirement.

In early October 2021, you provided additional materials in support of your request for an exemption from the anterior nares testing, specifically based on concerns about the presence of ethylene oxide in Puritan swabs used for anterior nares testing. These materials were also reviewed by Dr. Wolf and the University's Chief Health Officer and Executive Director of Student Health Services at Boston University, Judy Platt, MD. After further consideration of these materials by Drs. Wolf and Platt, your request was denied again; this decision was communicated to you by Dean of Students Kenneth Elmore on October 13, 2021, as follows:

The medical documentation you have provided does not support the existence of a disability or medical condition that preclude you from following the University's anterior nares testing protocol using a Puritan swab, and it is not a reasonable accommodation to switch the mode of testing to saliva PCR testing. The documentation you have shared does not provide relevant and applicable scientific data, medical data, or evidence to call into question a risk of harm based on the limited use of the weekly anterior nares testing... (Elmore email to Corrigan-Orosco, October 13, 2021).

After reviewing your appeal and the documentary material provided by the Office of Disability & Access Services and the Dean of Students Office, I find no basis for overturning the denial of your request for an exemption. Your request that you be allowed to substitute a saliva test for BU's anterior nares PCR test does not constitute a reasonable accommodation (a requirement under the American for Disabilities Act).

I note that the self-administered anterior nares PCR test is part of an integrated COVID-19 public health system at Boston University, which involves multiple elements including immunization, daily health surveys, contact tracing, isolation and quarantine, and wearing masks. The ability to process thousands of tests every week in a timely manner to maintain the University's operations and the safety of the University community depends on the self-administered anterior nares test; this testing protocol utilizes the University's internal laboratory technology, which is linked to a system used to record testing results, to communicate them in a timely way to students, faculty and staff, and to monitor the presence of COVID-19 infections on campus. A key component of BU's COVID-19 public health protocols is a quick turnaround time for COVID-19 testing (under 14 hours on average since mid-August), as compared to the oral/salivary COVID-19 tests from external testing entities, which have a much longer turnaround time (48 hours or longer). Delay in receiving COVID-19 test results significantly increases the risk to the BU community, because it could mean that a potentially infected individual is on campus interacting with members of the BU community for significantly longer than that person would be if the BU anterior nares test were used. Dr. Wolf and other BU officials have offered to explore alternate means for you to use the self-administered anterior nares test that would address some of your concerns, but you have not expressed a willingness to do so.

On the matter of a hearing, including cross-examination, we have a well-established and clearly outlined [process for appeal](#) consistent with the Americans with Disabilities Act, and our process

Boston University Office of the Provost



Professor Jean Morrison, University Provost and Chief Academic Officer

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T 617-353-2230 F 617-353-6580
www.bu.edu/provost

January 6, 2022

Caitlin Corrigan-Orosco
59 Chestnut Avenue
Patchogue, NY 11772

Sent via email: Cait3@bu.edu; Caitlin.corrigan.orosco@gmail.com

Dear Ms. Corrigan-Orosco:

Per the [Student Grievance Procedure in Cases of Alleged Disability Discrimination](#), I am writing regarding your appeal, received by this office on December 9, 2021, of Associate Provost Daniel Kleinman's November 5, 2021 decision not to overturn the University's decision to deny your request for an alternative to the COVID-19 anterior nares PCR testing protocol as an accommodation under the Americans With Disabilities Act. I have now had the opportunity to review your underlying October 19, 2021 grievance, Associate Provost Kleinman's November 5, 2021 response, and your December 9, 2021 appeal (and the November 17, 2021 letter enclosed therein), and to carefully consider the concerns and requests you have raised.

In your December 9 appeal, you put forward several concerns regarding the original decision by the Dean of Students and Disability & Access Services Offices to deny your request to use saliva testing as an alternative means of testing and Associate Provost Kleinman's November 5 response to your grievance. Specifically, you focus on three claims: 1) that the University improperly denied your request for an alternative to its anterior nares testing protocol as an accommodation for your "medical needs" under the Americans with Disabilities Act; 2) that the University denied you "due process" in the evaluation of your request for an alternative testing methodology; and 3) that the University created a disability and then imposed punishment.

Addressing the first point you raised in your appeal, contesting the denial of your request to utilize an alternative testing methodology rather than the University's methodology of testing (anterior nares), I find no reason to grant your appeal on this basis. Associate Provost Kleinman's November 5 determination thoroughly addresses the concerns you have raised around the anterior nares testing method utilized by the University and the careful evaluation by the University's Dean of Students and Disability & Access Services Offices of your request as well as the medical information and other data you provided in support of your request. Associate Provost Kleinman's letter also noted that you were offered alternative accommodations, outlined the integrated nature of the University's testing protocol, and specified why participation in the University's onsite PCR protocol is necessary in support of the health and safety of the BU community.

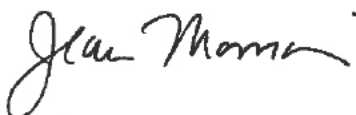
Regarding your second point, that the appeal process failed to meet any form of due process, the University's established Grievance Procedure calls for an investigation which may include interviews, appropriate inquiries, and the judgments of subject matter experts. The investigation was conducted by

Associate Provost Kleinman according to the University's established Grievance Procedure which, as he pointed out in his letter, does not include any form of evidentiary hearing or process involving cross-examinations. Therefore, I find no reason to grant your appeal on this basis.

Finally, your appeal letter describes the creation of public health protocols related to the COVID-19 pandemic as the "imposition of mask mandates, vaccine mandates and test mandates, in which 'orders' have been issued that create disability and then exclusion." This argument is unpersuasive as a basis for appeal. In response to the ongoing COVID-19 pandemic, the University established public health protocols for our community based on guidance from the CDC as well as an evolving understanding of the virus from the larger scientific community. The very intention of the mandates and protocols put in place is to create an environment which includes the many members of the BU community (including students, faculty, and staff) in the University's vibrant academic and research activities while minimizing transmission, quickly identifying and isolating infections, and ultimately mitigating risk of the ongoing COVID-19 pandemic to the community.

Based upon my review of your October 19, 2021 grievance, Associate Provost Kleinman's response, and your December 9, 2021 appeal, I am denying your appeal. I hope that you will reconsider your refusal to comply with the University's testing protocol such that you will be able to join the University as a member of our community in the Spring 2022 semester.

Regards,

A handwritten signature in black ink, appearing to read "Jean Morrison". The signature is fluid and cursive, with a small dot at the end.

Jean Morrison
University Provost and Chief Academic Officer

Cc: Lorraine Wolf, Director, Disability & Access Services
Kenneth Elmore, Associate Provost and Dean of Students
Daniel Kleinman, Associate Provost for Graduate Affairs

EXHIBIT D

Boston University prohibits discrimination against any individual on the basis of physical or mental disability. This policy extends to all rights, privileges, programs, and activities, including housing, employment, admissions, financial assistance, and educational and athletic programs. It is also the policy of Boston University to provide reasonable accommodations to persons with disabilities unless such accommodations would impose an undue burden or fundamental alteration to the program in question. The purpose of these procedures is to ensure that all complaints of discrimination based on disability are thoroughly and fairly investigated by the authorized units of the University. Boston University will conduct a fair and impartial investigation of all allegations of discrimination, with due regard for the rights of all parties. Retaliation against any individual who has filed a complaint of discrimination, or who has cooperated in the investigation of such a complaint, is unlawful and in violation of Boston University policy.

When a student believes that they have been discriminated against on the basis of disability, they may file, in writing, a formal grievance with the Director of Disability Services, who is the University's compliance officer for Section 504 of the Rehabilitation Act of 1973. The statement should be as specific as possible regarding the actions(s) or inaction(s) that precipitated the grievance: date, place, persons involved, efforts made to settle the matter informally, and the remedy sought.

If a student with a grievance alleging disability discrimination is also employed by the University, and the grievance arises out of the student's employment, the grievance may be filed under the University's Complaint Procedures in Cases of Alleged Unlawful Discrimination or Harassment. If the Director of Disability Services receives a grievance which appears to allege disability discrimination arising out of a student's employment, the grievance may be referred to the appropriate office to be handled under the policy applicable to employees.

Where the grievance arises out of a decision made by Disability Services regarding a student's eligibility for academic or other accommodations, the grievance will be forwarded for investigation to the Provost. Grievances otherwise involving academic matters, for example, cases in which grades are disputed, will also be forwarded to the Provost, who will determine which office(s) should conduct the investigation. Otherwise, the Director of Disability Services shall investigate the matters set forth in the written grievance. In conducting this investigation, the investigator may forward a copy of the grievance statement to the persons whose actions (or inactions) are the subject of the grievance, and may request a written response from appropriate individuals in the University. The investigator may also choose to interview witnesses, to meet with concerned parties, to receive oral or written statements, and to make other appropriate inquiries.

After completing the investigation, the investigator will forward a copy of a report and recommendation to the appropriate University official. If the complaint arises out of an academic unit, the report will be forwarded to the dean of the appropriate school or college, unless they are the subject of the grievance. In such cases, the report will be sent to the Provost. If the complaint arises from a nonacademic unit, the report will be forwarded to the administrative head of the unit, unless they are the subject of the grievance. In such cases, the report will be forwarded to the Dean of Students, who will forward it to the appropriate officer of the University.

Within sixty (60) days of the filing of the grievance, the Provost, dean, or administrative head will render a decision on the merits of the student's complaint. If resolution is not possible within sixty (60) days, the Provost, dean, or administrative head shall inform the student of the status of the investigation.

Copies of the decision by the Provost, dean, or administrative head will be sent to the student, the Provost (when not issued by the Provost), and the Director of Disability Services. A copy may also be sent to the department and/or the persons whose actions (or inactions) are the subject of the grievance, as appropriate.

In the event that the student is not satisfied with the resolution of the grievance, an appeal may be made. The appeal should be filed with Disability Services, which will direct the appeal and all appropriate records to the appropriate office of the University for review and disposition.

Copies of the decision will be maintained in the Office of the Provost and Disability Services.

These procedures shall constitute the grievance procedure mandated by regulations implementing Section 504 of the Rehabilitation Act.

Questions about the University's Student Grievance Procedure in Cases of Alleged Disability Discrimination should be addressed to Disability Services.

Exceptions to these procedures may be granted by the President, University Provost, Medical Campus Provost, or the Senior Vice President, General Counsel.

Robert N. Meltzer

Attorney At Law

November 17, 2021

Dr. Robert A. Brown
Office of the President of Boston University
One Silber Way, 8th Floor
Boston, MA 02215

Re: Medical Exemption/Compliance with Title III of the Americans With Disabilities Act/
Caitlin Corrigan-Orosco/Request Pursuant to the Student Grievance Procedure

Dear Dr. Brown:

This office has been retained by Caitlin Corrigan-Orosco, a Boston University fellowship student who has been suspended by the Boston University School of Theology based upon the School's refusal to address her inability to comply with certain testing procedures arising from the alleged Covid 19 Pandemic on the advice of her physician. To be clear, Ms. Corrigan-Orosco has not refused to be tested as required by the School, but she has identified her inability to participate in a particular methodology, and the School has refused, without cause, to accommodate her medical needs by accepting an alternative testing procedure. This conduct constitutes a violation of the Americans with Disabilities Act.

My client contends that the process of accommodation consideration was flawed, leading to the attached letter of October 14, 2021 from Dean Kenneth Elmore and the appeals letter of November 5, 2021 from Provost Daniel Kleinman.

What is striking about these two letters is that it is abundantly clear that neither Dean Elmore nor Provost Kleinman have the slightest idea of the laws, practices and procedures relating to this situation, and that the appeals process utterly failed to meet any form of due process as mandated by the Student Grievance Procedure in Cases of Alleged Disability. Of particular concern is that rather than address the particular disability, both Dean Elmore and Provost Kleinman have demonstrated a persistent reliance on hearsay statements of Judy Platt, of Boston University, in which statements Platt simply becomes argumentative about my client's medical condition. I should not need to point out that the proper question was not whether one doctor or another was factually correct, but how and by what means Boston University could accommodate what my client had been told by her physician. Both the original suspension and the "appeal" letter are silent on the primary and sole issues. Of equal import, my client has been denied the right to examine Ms. Platt as to her hearsay statements, which apparently serve as the basis of suspension. Lastly, the appeal denied my client the right to examine Boston University's employees about their efforts to find a reasonable accommodation.

In my 30 years of pursuing claims under the Act, I have rarely seen such a kangaroo court, in which all the elements of both law and medicine have been utterly disregarded.

The Student Grievance Procedure in Cases of Alleged Discrimination provides that “exceptions to these procedures may be granted by the President...” This is what we request—that your office review what has transpired here, and provide for a proper and legal sufficient resolution to this issue by proper due process and administrative remedy. If we cannot resolve this dispute in this final administrative step, then we can proceed to argue the matter to a federal judge.

In this letter, I intend to provide to you some background on the legal structure which I believe applies to this case, noting that the alleged Covid 19 pandemic has presented some long dormant questions of law surrounding the Americans with Disabilities Act that, thanks to this alleged-epidemic, are likely to provide the US Supreme Court to consider these questions. It appears that Boston University is volunteering to be a test case.

When the Americans with Disabilities Act was first created 30 years ago, it was noted that it contained a number of oddities in American law that were noteworthy. One constitutional law scholar who was deeply fascinated by the Act (the first irony of the ADA is that it contains the word “disabled,” thereby enshrining its own discrimination on the basis of biological deviation from the population mien in the title. The ADA is often referred to as the Americans with Differences Act, as a term like “disabled” should never be affixed to the likes of Stephen Hawking.)

Charles Reich, formerly of Yale University School of Law and author of the Greening of America, had recently relocated to the University of San Francisco, and had gathered together a group of law students to analyze the ADA in minute detail over the course of 10 seminar sessions, trying to determine exactly where in the legal zoo the ADA should reside. Specifically, from Dr. Reich’s perspective, he was trying to ascertain how the philosophical foundations of the ADA fit in to his famous book, with its reliance of Consciousness I, Consciousness II and Consciousness III. These various categories reflected shifts in sociological vision in the United States. By way of example, the Civil Rights Act of 1964 was placed within Consciousness II, the growing awareness of individual rights outside of a constrained social framework of traditional practices.

Professor Reich noted five primary characteristics of the ADA which, at least as he stated to his students, (including me), indicated that the ADA was, in fact, Consciousness I, a pre-counterculture consciousness that was firmly embedded in 19th century traditional norms. These five points were as follows:

First, Congress could have chosen to amend the Civil Rights Act to simply ban discrimination on the basis of perceived disability, but did not. Second, Congress made the statute pro-active and mandatory on all entities providing public accommodation or access without exception, making access seamless across society as a whole. Third, denying accommodation for disability was extremely restricted, making it difficult for any provider to opt out of the legal requirements of the ADA. Fourth, that the burden of alleviating harm by way of

discrimination should be on the provider, not the claimant, making accommodation almost absolute; none of this would constitute counterculture thinking. I'll cover the fifth observation in a moment. But the outcome of the ADA over the past 30 years has been such an utterly seamless integration of these concepts in to our society that we no longer even notice them. A person in a wheelchair who wishes to go shopping at a strip mall need not call each store in advance to request access; it is presumed. A person cannot be denied the opportunity to vote in person because of lack of access; the established rights of participation in public society are on par and intertwined with the right of access.

For these reasons, Professor Reich concluded that the ADA was not simply an amendment to the Civil Rights Act, but a coda to the Fifth Amendment of the United States Constitution, that recognized that ownership of a right to access was no different from any other form of property, that this right could not be taken without compensation, and that it was not limited to government actors. What the ADA did, in fact, was provide an equitable remedy for the taking of rights whereas the 5th Amendment simply provided for compensation. As such, the ADA does not create rights for the disabled, as much as it recognizes, by act of Congress, a broader definition of remedies contained within the 5th Amendment and 5th Amendment jurisprudence.

The fifth observation was that the ADA enshrined two distinct kinds of disability. The first he termed *de jure* disability, a person who is permanently incapable of engaging in activities in the same manner as a person of the biologic mien. A person missing a limb and who will still be missing that limb for the remainder of his or her life is *de jure* disabled, and must be provided reasonable accommodation for access. The second category was more esoteric, the notion of *de facto* disability. *De facto* disability occurs when a person is thoroughly capable of functioning within the biologic mien, but is rendered incapable of doing so because of an act of a third party, a disability which will dissolve if and when the third party action ceases.

It may be helpful to consider the following analogy. We are told that we may not place a stumbling block before the blind. This is an accommodation to the *de jure* disabled. But, equally, it is not permissible to put a stumbling block before the sighted, and then turn off the light. Much like a landowner cannot create booby traps for trespassers on his land without incurring liability, a third party actor cannot create disability in a non-disabled party and then escape liability for his or her acts.

Up until 18 months ago, this distinction was esoteric and hypothetical because instances in which a third party actor imposed disability on an American citizen were nearly impossible to imagine. All of this has changed with the imposition of mask mandates, vaccine mandates and test mandates, in which "orders" have been issued that create disability and then exclusion. This is the framework in which the situation with my client and Boston University must be considered.

Not to leave the solution to the problem to the very end, but the appropriate legal standard when *de facto* liability is imposed is not "reasonable accommodation" but rather that the party imposing the action must demonstrate a compelling public interest, subject to strict scrutiny, before the action will be deemed legal and still subject to remedy for the taking, as the

party engaging the taking of a recognized right of access is essentially engaged in eminent domain. For what it's worth, my client is entitled to both standards, and both of those standards have been ignored by Boston University. The confusion arises here because the issue is not "medical exemption" to Boston University's rule, which implies that the rule is the norm, but rather the obligation of Boston University to prevent foreseeable harm from its imposition of something which is not the norm.

While the phrase "medical exemption" seems to be commonly used, the Americans with Disabilities Act recognizes a federally protected right to be free of impositions of restrictions from employment or public accommodation based upon physical "differences" between the claimant and the more general population. The Americans with Disabilities Act clearly has led Boston University to a state of insensitivity to the need not only to accommodate individual needs, but to do so in a manner which respects the dignity, privacy and rights of the claimant. In a point of fact, my client is covered by the ADA because unlawful demands by Boston University have (1) created a disability and then (2) imposed punishment for disability outside the color of law.

Congress enacted 42 U.S. C. 1281-12189, in conjunction with §36 of Title 28, to provide protection to Americans from discrimination based upon disability, generally defined. During the course of the alleged Covid epidemic, the federal government, acting within its power under the US Constitution, enacted a number of laws that pertain to the alleged Covid virus and its spread and its consequences. These acts include:

- Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020 - March 2020
- Families First Coronavirus Response Act - March 2020
- Coronavirus Aid, Relief, and Economic Security Act (CARES Act), March 2020
- Paycheck Protection Program and Health Care Enhancement Act - April 2020
- Paycheck Protection Program Flexibility Act of 2020 - June 2020
- A bill to extend the authority for commitments for the paycheck protection program - July 2020
- Consolidated Appropriations Act, 2021, December 2020
- American Rescue Plan Act of 2021, March 2021

Although Congress had the option to modify the Americans with Disabilities Act for the duration of the alleged epidemic, not one of those bills modified the ADA, meaning that the federal laws continue to pre-empt any state law, or company policy. While legislating specifically to the so-called crisis, Congress declined to reduce the protections it had previously enacted to protect those with disabilities, which also includes the right to medical exemption. Executive Branch agencies regulating under the federal laws were careful to protect federal disability and medical privacy acts created by Congress. Most obviously, CDC recommendations did not demand medical records or private information to be compliant with regulations. For example, the CDC recommendation of face coverings specifically excluded

those “with breathing problems” from mask recommendations. Since the recommendation did not require a diagnosis and medical records, it acknowledged a medical exemption as a matter of “don’t ask, don’t tell.” Once a person identifies a “breathing problem,” that person cannot be denied service for failure to wear a face covering. Equally, the CDC has excluded certain categories of Americans from inoculation recommendations based upon medical condition without requiring disclosure of the condition. Just as a place of business cannot inquire why a person is in a wheelchair, an employer or place of public accommodation cannot demand information as to why, specifically, a person has not received or cannot engage in a particular medical procedure. Let’s be clear—a medical test is a medical procedure.

If Congress had wished to confer the power on Boston University, the states or the places of public accommodation to not only mandate a public procedure, but to determine its means and methods, it could have elected to do so, but it did not. Equally, Congress did not grant to educational institutions any authority to unilaterally pre-empt the terms of federal statutes as part and parcel of the alleged COVID epidemic. Boston University is subject to ADA. Not to be hyperbolic, but Boston University can no more demand that a student donate a kidney than it can mandate a particular medical procedure as a condition of enrollment.

Getting to the specifics of this situation, Boston University imposed a testing requirement for its students and mandated a particular test. My client has provided to Boston University a request for a different test based upon consultation with her doctor that the test selected by Boston University was not appropriate for this student. Other tests are available that would meet the objectives of Boston University’s rule. Rather than provide for an alternative that would meet the rule, Boston University’s employees became argumentative and hostile and then kicked my client out of school. Having created the rule, Boston University then used its own rule to deny my client her federally protected rights. Leaving all else aside, it is baffling that Boston University would treat a graduate student in the School of Theology with utter disdain. Finally, the appellate process that was provided simply did not address the legal or factual issues here:

1. How was the rule created?
2. What was the compelling public need?
3. What evidence supported the existence of a compelling public need?
4. Who provided the input for the analysis of the need?
5. What countervailing materials were provided to contradict the compelling need?
6. Did Boston University seek out a diversity of opinion?
7. Was the analysis inclusive?
8. Why was one test chosen over all others?
9. Were options to the single test considered?
10. What were the credentials of those who provided input?
11. Was flexibility of the rule considered to meet medical exemptions?
12. Was reviewed the policy after written?
13. Did it receive legal review?
14. Did the public have an opportunity for comment?
15. Why is it impossible for an alternative test to be used?
16. Why can’t accommodation be given?
17. What harm would be caused to Boston University by accommodation?

These are normal and commonsense questions that would have been and should have been addressed on appeal, and I guaranty you that they will be addressed once a federal lawsuit has been filed. Requesting an evidentiary hearing, as we did after receiving the Dean's letter, was not unreasonable or inappropriate.

At this juncture, my client is requesting that Boston University provide the opportunity for evidentiary hearing to address the issue of why lack of accommodation was appropriate and used as a basis for suspending a prized graduate student. Boston University will be asked those 17 questions eventually anyway, and at greater cost.

Under the Grievance policy, request is made that Boston University agree to an evidentiary hearing, and that your lawyers contact me forthwith to discuss the processes and procedures. For the record, my client would agree to a hearing using the American Arbitration Association's rules and discovery procedures.

I await your response.

Very truly yours,



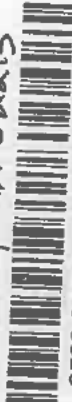
Robert N. Meltzer

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Dr. Robert A. Brown
Office of the President of
Boston University
One Silber Way 8th Floor
Boston, MA 02215



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2. Article Number (Transfer from service label)

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C. Date of Delivery 7/17/2021

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☐ Adult Signature Restricted Delivery
Postage \$ 93
Total Postage and Fees \$ 7.73

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Street and/or P.O. Box, or other No. Office of the President of Boston University
City, State, ZIP+4® One Silber Way, 8th Floor
Boston MA 02215

PS Form 3800, April 2015 PSN 7530-02-000-6047 See Reverse for Instructions

2760 847E 0000 0020 6702

EXHIBIT E

Boston University Office of the Provost

Professor Jean Morrison, University Provost and Chief Academic Officer



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January 6, 2022

Caitlin Corrigan-Orosco
59 Chestnut Avenue
Patchogue, NY 11772

Sent via email: Cait3@bu.edu; Caitlin.corrigan.orosco@gmail.com

Dear Ms. Corrigan-Orosco:

Per the [Student Grievance Procedure in Cases of Alleged Disability Discrimination](#), I am writing regarding your appeal, received by this office on December 9, 2021, of Associate Provost Daniel Kleinman's November 5, 2021 decision not to overturn the University's decision to deny your request for an alternative to the COVID-19 anterior nares PCR testing protocol as an accommodation under the Americans With Disabilities Act. I have now had the opportunity to review your underlying October 19, 2021 grievance, Associate Provost Kleinman's November 5, 2021 response, and your December 9, 2021 appeal (and the November 17, 2021 letter enclosed therein), and to carefully consider the concerns and requests you have raised.

In your December 9 appeal, you put forward several concerns regarding the original decision by the Dean of Students and Disability & Access Services Offices to deny your request to use saliva testing as an alternative means of testing and Associate Provost Kleinman's November 5 response to your grievance. Specifically, you focus on three claims: 1) that the University improperly denied your request for an alternative to its anterior nares testing protocol as an accommodation for your "medical needs" under the Americans with Disabilities Act; 2) that the University denied you "due process" in the evaluation of your request for an alternative testing methodology; and 3) that the University created a disability and then imposed punishment.

Addressing the first point you raised in your appeal, contesting the denial of your request to utilize an alternative testing methodology rather than the University's methodology of testing (anterior nares), I find no reason to grant your appeal on this basis. Associate Provost Kleinman's November 5 determination thoroughly addresses the concerns you have raised around the anterior nares testing method utilized by the University and the careful evaluation by the University's Dean of Students and Disability & Access Services Offices of your request as well as the medical information and other data you provided in support of your request. Associate Provost Kleinman's letter also noted that you were offered alternative accommodations, outlined the integrated nature of the University's testing protocol, and specified why participation in the University's onsite PCR protocol is necessary in support of the health and safety of the BU community.

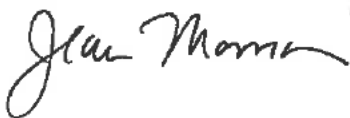
Regarding your second point, that the appeal process failed to meet any form of due process, the University's established Grievance Procedure calls for an investigation which may include interviews, appropriate inquiries, and the judgments of subject matter experts. The investigation was conducted by

Associate Provost Kleinman according to the University's established Grievance Procedure which, as he pointed out in his letter, does not include any form of evidentiary hearing or process involving cross-examinations. Therefore, I find no reason to grant your appeal on this basis.

Finally, your appeal letter describes the creation of public health protocols related to the COVID-19 pandemic as the "imposition of mask mandates, vaccine mandates and test mandates, in which 'orders' have been issued that create disability and then exclusion." This argument is unpersuasive as a basis for appeal. In response to the ongoing COVID-19 pandemic, the University established public health protocols for our community based on guidance from the CDC as well as an evolving understanding of the virus from the larger scientific community. The very intention of the mandates and protocols put in place is to create an environment which includes the many members of the BU community (including students, faculty, and staff) in the University's vibrant academic and research activities while minimizing transmission, quickly identifying and isolating infections, and ultimately mitigating risk of the ongoing COVID-19 pandemic to the community.

Based upon my review of your October 19, 2021 grievance, Associate Provost Kleinman's response, and your December 9, 2021 appeal, I am denying your appeal. I hope that you will reconsider your refusal to comply with the University's testing protocol such that you will be able to join the University as a member of our community in the Spring 2022 semester.

Regards,

A handwritten signature in cursive script, appearing to read "Jean Morrison".

Jean Morrison
University Provost and Chief Academic Officer

Cc: Lorraine Wolf, Director, Disability & Access Services
Kenneth Elmore, Associate Provost and Dean of Students
Daniel Kleinman, Associate Provost for Graduate Affairs