

Addressing the Digital Divide: Postsecondary Schools' Obligation to Provide Accessible Technology in the Classroom

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I. INTRODUCTION: THE INCREASING THREAT OF TECHNOLOGY IN CLASSROOMS FOR STUDENTS WITH DISABILITIES

Historically, children with disabilities were denied access to education.¹ Until the 1970s, there were no federal protections for students with disabilities. The passage of the Education of Handicapped Children Act of 1975, later amended to the Individuals with Disabilities Education Act (IDEA), established an affirmative “child find” obligation to identify students with disabilities and provide services for such students in elementary and secondary education.² While Section 504 of the Rehabilitation Act of 1973 was the first federal law that prohibited disability discrimination, the Act did not carry much weight for ensuring protections for students with disabilities until the passage of the Americans with Disabilities Act (ADA) of 1990.³ Section 504 and the ADA prohibit disability discrimination and require covered institutions to provide reasonable accommodations to qualified students with disabilities.⁴ Section 504 covers all postsecondary institutions that receive federal funding, while the ADA covers public and private colleges and universities.⁵ Because of the statutes’ expansive coverage, relatively all public, private, and religious colleges and universities are covered by one or both of the statutes. While the ADA and Section 504 apply at the K-12 level as well as the postsecondary level, the IDEA only applies to the K-12 level. And while the IDEA provides an affirmative obligation for states to find and provide students with disabilities educational services and accommodations, students in postsecondary education must self-identify to colleges and universities, which in turn are only responsible for providing certain accommodations.⁶

Due to this incongruence, students who received disability services and other accommodations under the IDEA may have a heightened expectation

¹ U.S. DEP’T OF EDUC., A HISTORY OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, <https://sites.ed.gov/idea/IDEA-History> (last visited Nov. 24, 2024).

² Education for All Handicapped Children Act of 1975, Pub. L. No. 94–142, 89 Stat. 773, *repealed by* Individuals with Disabilities Education Act of 2004, Pub. L. No. 91–230, *amended by* Pub. L. 108–446, 118 Stat. 2647 (codified as amended at 20 U.S.C. §§ 1400–1482); 20 U.S.C. § 1412(a)(3)(A).

³ Nina Golden, *Access This: Why Institutions of Higher Education Must Provide Access to the Internet to Students with Disabilities*, 10 VAND. J. OF ENT. AND TECH. L. 363, 369–70 (2020); Rehabilitation Act of 1973

§ 504, 29 U.S.C. § 794; 42 U.S.C. §§ 12131–12165; 42 U.S.C. §§ 12181–12189.

⁴ 42 U.S.C. § 12182(b)(2)(A)(ii); 42 U.S.C. § 12131(2); 45 C.F.R. § 84.68(b)(7).

⁵ Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794; Americans with Disabilities Act, 42 U.S.C. § 12131(1); Americans with Disabilities Act, 42 U.S.C. § 12181(7)(J).

⁶ Golden, *supra* note 3, at 369-70.

of receiving services when they enroll at a postsecondary institution. As such, lawsuits against colleges and universities for failure to accommodate may increase as students who grew up receiving assistive technology services under the IDEA (and during COVID-19) may have more expectations and aspirations for assistive technology services they should receive while enrolled in a postsecondary program. These expectations are only reasonable as technology and online learning have increasingly penetrated the education system. More and more public and private colleges and universities offer online courses, textbooks, and resources for students.⁷ While the incorporation of technology in the classroom has the opportunity to provide students with new opportunities to explore coursework and materials otherwise not available on campus or in physical form, this wave of digital offerings poses new challenges for students with disabilities which prohibit traditional Internet and technology use.⁸ Consequently, colleges and universities should consider the implications that providing online classes, coursework and other digital platforms may mean for their compliance with Section 504 and the ADA. Otherwise, postsecondary institutions may face the potential of complaints to the United States Department of Education's Office for Civil Rights ("OCR") or Department of Justice ("DOJ") and/or lawsuits for failure to reasonably accommodate such students and/or disparate impact claims as a result of their technology policies and procedures that disproportionately impact students with disabilities due to inaccessibility.⁹ As a result of the increasing role of technology in higher education, public and private postsecondary institutions should reconsider and, if necessary, revise their technology and digital accessibility policies and procedures to ensure that students with disabilities (where and when reasonable) receive the same benefits and educational opportunities as their peers.

II. THE DEVELOPMENT OF FEDERAL PROTECTIONS FOR STUDENTS WITH DISABILITIES

A. Supreme Court Decisions that Gave Rise to Legislative Protections for Students with Disabilities

In the 1954 *Brown v Board of Education* decision, the United States Supreme Court established the right to equal educational opportunities for all students.¹⁰ The Court stated, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."¹¹ While *Brown* specifically prohibited the segregation of Black

⁷ *Id.* at 384–85.

⁸ Amanda Lenhart, *The Ever-Shifting Internet Population: A New Look at Internet Access and the Digital Divide*, PEW RSCH. CTR. (Apr. 16, 2003), <https://www.pewresearch.org/internet/2003/04/16/the-ever-shifting-internet-population-a-new-look-at-internet-access-and-the-digital-divide/>.

⁹ See *Payan v. L.A. Cmty. Coll. Dist.*, 11 F.4th 729, 733 (9th Cir. 2021); *Nat'l Ass'n of the Deaf v. Harvard Univ.*, 2019 U.S. Dist. LEXIS 211335, at *2 (D. Mass. Nov. 5, 2019); *Nat'l Ass'n of the Deaf v. Mass. Inst. of Tech.*, 2020 U.S. Dist. LEXIS 53643, at *2 (D. Mass. Mar. 27, 2020); 42 U.S.C. § 12188(b)(3)–(5); 42 U.S.C. § 12133; 29 U.S.C. § 794(a).

¹⁰ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹¹ *Id.* at 493.

students in schools, the Court's equal opportunity reasoning inspired two federal court decisions that provided for the equal education of children with disabilities in those jurisdictions. In *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania (PARC)*, a consent decree enjoined the state of Pennsylvania from denying students with disabilities the opportunity to a free public education.¹² And in *Mills v. Board of Education of the District of Columbia*, the court decided that children with disabilities were not to be excluded from public schools in Washington, D.C.¹³ In light of these decisions, Congress decided to take legislative action, and in 1975 Congress passed the Education of Handicapped Children Act of 1975 which was amended to be the Individuals with Disabilities Education Act (IDEA) in 1997.¹⁴

B. Federal Protections for Students with Disabilities in Elementary and Secondary Education: individuals with Disabilities Education Act (IDEA) and Free Appropriate Public Education (FAPE)

The IDEA was amended in 1990 and later amended again in 1997 and 2004 to ensure additional protections for students with disabilities in elementary and secondary education.¹⁵ The IDEA aims to “ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.”¹⁶ Under the IDEA, “children with disabilities” are children “with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in [IDEA] as ‘emotional disturbance’), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities” and “who, by reasons thereof, [need] special education and related services.”¹⁷ A less precise definition is provided for children ages three to nine.¹⁸

Identifying whether a particular child is eligible for special education and other related services is determined through an evaluative process. IDEA provides for an affirmative obligation to find children with disabilities. This “child find” requirement means that “[a]ll children with disabilities residing in the State . . . regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated.”¹⁹ In the evaluation, local or state educational agencies must ensure that the “assessment tools and strategies .

¹² *Pa. Ass'n for Retarded Child. v. Pa.*, 343 F. Supp. 279 (E.D. Pa. 1972).

¹³ *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972).

¹⁴ Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773, *repealed by* Individuals with Disabilities Education Act of 2004, Pub. L. No. 91-230, *amended by* Pub. L. 108-446, 118 Stat. 2647 (codified as amended at 20 U.S.C. §§ 1400-1482).

¹⁵ *Id.*; U.S. DEP'T OF EDUC., A HISTORY OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, <https://sites.ed.gov/idea/IDEA-History> (last visited Nov. 24, 2024).

¹⁶ 20 U.S.C. § 1400(d)(1)(A).

¹⁷ *Id.* § 1401(3)(A).

¹⁸ *Id.* § 1401(3)(B).

¹⁹ *Id.* § 1412(a)(3)(A).

. . . directly assists persons in determining the educational needs of the child are provided.”²⁰ Without this affirmative obligation it is likely that children with disabilities may not receive the services they need.

Once a child is identified as needing special education services, local or state educational agencies are responsible for ensuring that each child is given an Individualized Education Plan (“IEP”). The IEP provides services that are narrowly tailored to the student’s particular educational needs based on data from the evaluation and input from the student’s IEP team.²¹ The IEP team consists of the child’s parents, educators, and others with relevant expertise.²² IEPs detail the child’s academic achievement and functional performance, set measurable goals, outline the child’s educational placement and detail the type of services the student will receive, for how long, and how often.²³ IEPs also include transition planning for when a student reaches the end of their secondary education. This planning helps students transition from school to adult life.²⁴ Services that are included under an IEP vary greatly and can include special education and other related services.²⁵ The IEP team is obligated to meet periodically, but not less frequently than annually, to determine whether the child’s annual goals are being met and if their IEP needs to be revised.²⁶ To ensure that every student with a disability has access to a free appropriate public education, the IDEA authorizes and provides formula grants to states who are then responsible for carrying out these policies and procedures.²⁷ As a result of the IDEA, 95% of children with disabilities receive special education services in public and private schools.²⁸

C. Federal Protections for Students with Disabilities in Postsecondary Education: The Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act

When a student with a disability turns 21 or enrolls at a postsecondary institution they are no longer protected by the IDEA.²⁹ However, when a student with a disability chooses to enroll at a postsecondary institution, that college or university is likely subject to the provisions of the Americans with Disability Act (“ADA”) of 1990 and Section 504 of the Rehabilitation Act of 1973 (“Section 504”).³⁰ While the IDEA imposes an affirmative obligation for local and state educational agencies to identify and provide children with disabilities services and accommodations to ensure their equal educational opportunity, the ADA and Section 504 merely require that

²⁰ *Id.* § 1414(b)(3)(C).

²¹ *Id.* § 1414(d)(1)(A)(i).

²² 20 U.S.C. § 1414(d)(1)(B).

²³ *Id.* § 1414(d)(1)(A).

²⁴ *Id.* § 1414(d)(1)(A)(i)(VIII).

²⁵ *See* 20 U.S.C. § 1401(26)(A); 20 U.S.C. § 1414(a)(1)(A).

²⁶ 20 U.S.C. § 1414(d)(4)(A).

²⁷ *See* 20 U.S.C. § 1411(a)(2).

²⁸ NAT’L CTR. FOR EDUC. STAT., FAST FACTS (2022), <https://nces.ed.gov/fastfacts/display.asp?id=59> (last visited Nov. 24, 2024).

²⁹ *See* 20 U.S.C. § 1412(a)(18)(A).

³⁰ Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794; Americans with Disabilities Act, 42 U.S.C. §§ 12131-12165 (2000); Americans with Disabilities Act, 42 U.S.C. §§ 12181-12189 (2000).

covered postsecondary institutions provide equal access to students with disabilities and those without disabilities.³¹ Without an affirmative duty for postsecondary institutions to find and provide students with disabilities accommodations, students with disabilities attending a college or university must self-identify to the school and request accommodations that the school is not necessarily required to provide.³² As such, colleges or universities may not have an obligation to provide accommodations to a student who received accommodations throughout their elementary and/or secondary education.

“[A] college, university, or other postsecondary institution, or a public system of higher education” are delegated as programs covered by Section 504.³³ Section 504 states that “[n]o otherwise qualified individuals with a disability . . . shall . . . be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”³⁴ Title II of the ADA covers all public colleges and universities. Title II of the ADA states that “no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.”³⁵ Title III defines undergraduate, or postgraduate private school, or other place of education as a place of public accommodation covered by the statute.³⁶ As such, Title III of the ADA applies to private colleges and universities. Title III of the ADA provides, “[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 . . .”³⁷ Altogether, most public and private colleges and universities are covered entities under Section 504 and/or the ADA.

What is an Individual with a Disability?

To receive reasonable accommodations under Section 504 and the ADA, a student must meet the statutory definition of disability. Under both Section 504 and the ADA, an “individual with a disability” is defined as someone who “has a physical or mental impairment that significantly limits one or more major life activities, or has a record of such impairment or is regarded as having such an impairment.”³⁸ An impairment that “substantially limits” a “major life activity” for the purposes of the ADA and Section 504 is an impairment that limits the ability of an individual to perform a major life activity as “compared to most people in the general population.”³⁹ When considering whether an impairment substantially limits

³¹ 20 U.S.C. § 1412(a)(3)(A); 42 U.S.C. § 12132; 42 U.S.C. § 12182(a).

³² Katherine Macfarlane, *Accommodation Discrimination*, 72 AM. U.L. REV. 1971, 1994 (2023).

³³ 29 U.S.C. § 794(b)(2)(A).

³⁴ *Id.* § 794(a).

³⁵ 42 U.S.C. § 12132.

³⁶ *Id.* § 12181(7)(J).

³⁷ *Id.* § 12182(a).

³⁸ *Id.* § 12102(1); 29 U.S.C. § 705(9).

³⁹ 28 C.F.R. § 36.105(d)(1)(v) (2016).

an individual's ability to engage in a given major life activity, the condition, manner, and duration under which an individual can perform that activity is considered.⁴⁰

Education-related activities including "learning," "reading," and "communicating" are specifically listed as major life activities under Section 504 and the ADA, however, these examples are not the only applicable major life activities that a student can use to establish their disability. Section 504 and the ADA define a major life activity as including, but 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, communicating, interacting with others, and working."⁴¹ "Major bodily functions" are also considered major life activities and include "functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions."⁴² A student who has an impairment, as defined above, and has a documented medical record of their impairment will be covered under Section 504 and/or the ADA.⁴³ An individual who is "regarded as having" an impairment will also be protected under these statutes if they are perceived to have the impairment by others.⁴⁴ An individual who has a transitory and minor impairment may not be protected under the ADA/Section 504. "A transitory impairment is an impairment with an actual or expected duration of 6 months or less."⁴⁵ Both Section 504 and the ADA specify that an individual must be "qualified" to receive protections under the statutes. In the area of education, a "qualified" student is a student with a disability who "meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity."⁴⁶

What is a Reasonable Accommodation?

Whether a student with a disability is entitled to reasonable accommodations depends on the individual circumstances of the request. All postsecondary institutions that receive federal funding are subject to Section 504. Section 504 requires covered institutions to provide reasonable accommodations and academic adjustments that are "necessary to ensure that such requirements do not discriminate or have the effect of discriminating."⁴⁷ Title II of the ADA applies specifically to public colleges and universities and provides students with a disability the ability to request "reasonable modifications to rules, policies, or practices, the removal of

⁴⁰ *Id.* § 36.105(d)(3).

⁴¹ 42 U.S.C. § 12102(2)(A).

⁴² *Id.* § 12102(2)(B).

⁴³ 29 U.S.C. § 794(a); 42 U.S.C. § 12131(2).

⁴⁴ 42 U.S.C. § 12102(3)(A).

⁴⁵ *Id.* at § 12102(3)(B).

⁴⁶ 34 C.F.R. § 104.3(1)(3) (2017).

⁴⁷ *Id.* § 104.44(a).

architectural, communication, or transportation barriers, or the provision of auxiliary aids and services.”⁴⁸ Although Title II statutorily refers to “reasonable modifications” to policies, practices, and procedures, postsecondary disability practice commonly refers to these protections as reasonable accommodations. As such, a public college or university has the obligation to provide reasonable accommodations to a student with a disability unless the request would “fundamentally alter” the program at issue “or would result in an ‘undue burden.’”⁴⁹ Again, only students who are “qualified” for the program or activity are entitled to reasonable accommodations.⁵⁰ Private colleges and universities are considered public accommodations that are subject to Title III of the ADA.⁵¹ Private colleges and universities must also provide reasonable accommodations to students with disabilities as long as the accommodation does not fundamentally alter the program or would result in an undue burden to the program.⁵² Religious postsecondary institutions are not covered by the ADA and are only subject to Section 504 of the Rehabilitation Act as described above.⁵³

Since reasonable accommodations are only available to “otherwise qualified” students under Section 504 and the ADA, postsecondary institutions are not required to provide accommodations to students with disabilities that would fundamentally alter any essential elements of their programs or activities such as attendance or GPA requirements.⁵⁴ Additionally, postsecondary institutions are not required to provide accommodations that would result in an undue financial or administrative burden to the college or university.⁵⁵ For postsecondary institutions, reasonable accommodations may include adjustments to practices, policies, or procedures that ensure equal access to activities and services for students with a disability.⁵⁶

Process Students Need to Follow

In theory, in order to obtain reasonable accommodations students need to first, identify themselves and their disability to the school, second, request reasonable accommodations, and third, submit documentation of their disability.⁵⁷ Typically, requests for reasonable accommodations should be evaluated on a case-by-case basis to determine whether the student provided the necessary documentation and to determine whether the accommodation

⁴⁸ *Id.* § 12182(b)(2)(A)(iii).

⁴⁹ *Id.* § 12182(b)(2)(A)(iii).

⁵⁰ *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 405 (1979).

⁵¹ 42 U.S.C. § 12181(7)(J).

⁵² 42 U.S.C. § 12182(b)(2)(A)(iii).

⁵³ Macfarlane, *supra* note 32, at 1994.

⁵⁴ *Se. Cmty. Coll. v. Davis*, 442 U.S. at 405.

⁵⁵ 42 U.S.C. § 12182(b)(2)(A)(iii).

⁵⁶ *Id.* § 12182(b)(2)(A)(ii).

⁵⁷ U.S. DEP’T OF EDUC., *Transition of Students with Disabilities To Postsecondary Education: A Guide for High School Educators* (Mar. 2007), <https://www.ed.gov/teaching-and-administration/supporting-students/transition-of-students-with-disabilities-to-postsecondary-education-a-guide-for-high-school-educators> (last visited Nov. 24, 2024).

is reasonable and appropriate based upon the student's disability.⁵⁸ Reasonable accommodations may look like "reduced course load, extra time on examinations, and the provision of auxiliary aids and services."⁵⁹ Auxiliary aids include "note-takers, readers, recording devices, sign language interpreters, screen-readers, voice recognition and other adaptive software or hardware for computers" and so on.⁶⁰ However, universities are not required to provide aids of a personal nature such as eyeglasses, tutors or attendants.⁶¹

III. WHEN POSTSECONDARY INSTITUTIONS FAIL TO PROVIDE REASONABLE ACCOMMODATIONS: MAKING A CLAIM UNDER SECTION 504 OR THE ADA

Internal Grievance Procedures

All postsecondary institutions that are covered by Title II of the ADA and Section 504 are required to have an internal grievance procedure. Therefore, if a student believes they have been discriminated against based on their disability the student may file an internal complaint with their college or university. Public entities including public colleges and universities that employ 50 or more persons are required to "designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to it alleging its noncompliance with this part or alleging any actions that would be prohibited by this part."⁶² Meanwhile, all federally-funded colleges and universities "that employ fifteen or more persons shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part" and employ at least one person to coordinate these efforts.⁶³ However, there is no requirement for public accommodations, which includes private colleges and universities, to have internal grievance procedures.⁶⁴

Administrative Review and Enforcement

Claims that are unable to be resolved internally by a college or university can be reviewed administratively by the federal government. Claims made under Title II of the ADA and Section 504 will be reviewed by the U.S. Department of Education, Office for Civil Rights (OCR), while claims made under Title III of the ADA will be reviewed by the Department of Justice (DOJ), Civil Rights Division. Once either office receives a complaint of discrimination, the office has the authority to undertake

⁵⁸ Macfarlane, *supra* note 32, at 1994.

⁵⁹ Golden, *supra* note 3, at 406.

⁶⁰ U.S. DEP'T. OF EDUC., *supra* note 57.

⁶¹ *Id.*

⁶² 28 C.F.R. § 35.107(a) (1991).

⁶³ 34 C.F.R. § 104.7.

⁶⁴ 42 U.S.C. § 12181(7)(J).

investigations and compliance reviews of the alleged conduct at the institution.⁶⁵ Following an investigation or compliance review, the Attorney General of the DOJ may file suit to enforce the requirements of the ADA and Section 504.⁶⁶ If the college or university is found to have violated the ADA or Section 504, the school could face sanctions including financial penalties.⁶⁷

Private Lawsuits

In addition, claims of disability discrimination may be brought as private lawsuits. Claims brought by students under the ADA or Section 504 are often brought to redress a postsecondary institution's discrimination against an individual student. These suits are either brought on a theory of disparate treatment, failure to accommodate, harassment, or retaliation.⁶⁸ However, a disparate impact theory may be used to redress discrimination against a group of disabled students.⁶⁹

Failure to Accommodate Claims

The increased use of technology in college and university classrooms has brought about increasing claims of individual failure to accommodate and disparate impact where disabled students seek redress for digital inaccessibility.⁷⁰ In a typical failure to accommodate claim, the student has been refused a reasonable accommodation.⁷¹ In order for a student to prevail on a failure to accommodate claim under Section 504 and the ADA the student must prove by a preponderance of the evidence that (1) they are a qualified individual with a disability, (2) the covered institution knew of the student's disability and (3) that the institution failed to provide a reasonable accommodation for the known disability.⁷² The burden is on the student to

⁶⁵ U.S. DEP'T OF JUSTICE, *ADA Designated Investigative Services* (Feb. 2017), <https://archive.ada.gov/investag.htm>;

42 U.S.C. § 12188(b)(1)(A).

⁶⁶ 42 U.S.C. § 12188(b)(1)(B); 42 U.S.C. § 12133; 29 U.S.C. § 794(a).

⁶⁷ 42 U.S.C. § 12188(b)(3)-(5); 42 U.S.C. § 12133; 29 U.S.C. § 794(a); *see* U.S. DEP'T OF JUSTICE: DISABILITY RIGHTS SECTION, ENFORCING THE ADA: A STATUS REPORT FROM THE DEP'T OF JUSTICE (Jan.–Mar. 2008), <https://archive.ada.gov/janmar08.pdf>.

⁶⁸ *See* *Novak v. Bd. of Trs. of S. Ill. Univ.*, No. 12-cv-7-JPG-PMF, 2014 U.S. Dist. LEXIS 90871, at *17–18 (S.D. Ill. July 3, 2014) (disparate treatment); *Choi v. Univ. of Tex. Health Sci. Ctr. at San Antonio*, 633 Fd. Appx. 214, 215 (5th Cir. 2015) (failure to accommodate); *Guckenberger v. Boston Univ.*, 957 F. Supp. 306, 313 (D. Mass. 1997) (harassment); *Dickinson v. Univ. of N.C.*, 91 F. Supp. 3d 755, 769 (M.D.N.C. 2015) (retaliation).

⁶⁹ *See* *Payan v. L.A. Cmty. Coll. Dist.*, 11 F.4th 729, 733 (9th Cir. 2021); *Nat'l Ass'n of the Deaf v. Harvard Univ.*, 2019 U.S. Dist. LEXIS 211335, *2 (Mass. 2019); *Nat'l Ass'n of the Deaf v. Mass. Inst. of Tech.*, 2020 U.S. Dist. LEXIS 53643, *2 (Mass. 2020).

⁷⁰ Courtney Mullin, Rob Gould & Sarah Parker Harris, *Research Brief: Digital Access for Students in Higher Education and the ADA*, ADA NAT'L NETWORK KNOWLEDGE TRANSLATION CTR., https://adata.org/research_brief/research-brief-digital-access-students-higher-education-and-ada (last visited Nov. 24, 2024).

⁷¹ Macfarlane, *supra* note 32, at 2009; *contra* *Enica v. Principi*, 544 F.3d 328, 343 (1st Cir. 2008) (court ruled in employment case that if an employee repeatedly complains that their accommodation is not being implemented or enforced, the employer acts unreasonably if it fails to take steps to ensure that the accommodation is provided).

⁷² *Choi*, 633 Fd. Appx. at 215.

prove each of these elements to establish a prima facie case in a failure to accommodate claim.⁷³

After a student establishes a prima facie case, the burden shifts to the college or university to demonstrate that the accommodation was unreasonable.⁷⁴ In *Wynne v. Tufts University School of Medicine*, the court developed a test for determining whether an academic institution adequately investigated the availability of reasonable accommodations. The court reasoned that “[i]f the institution . . . considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring substantial program alteration . . . the institution had met its duty of seeking reasonable accommodation.”⁷⁵ Therefore, a university seeking to defend against a claim of failure to accommodate can assert either that the accommodation would require a fundamental alteration to the program or service or would result in an undue burden to the college or university.⁷⁶

Postsecondary institutions are not required to provide accommodations that would fundamentally alter any essential elements of their programs or activities including attendance or GPA requirements.⁷⁷ In *Guckenberger v. Boston University*, a district court ruled that neither Section 504 or the ADA would “require a university to provide [an accommodation] that the university rationally concludes would alter an essential part of its academic program.”⁷⁸ If the student requires an accommodation that would alter the essential elements of the program, they are not a qualified student and a university does not have to provide that accommodation.⁷⁹ Postsecondary institutions are also not required to provide accommodations that would result in an undue burden. An undue burden is an accommodation that is significantly difficult or expensive.⁸⁰ ⁸⁰ Factors that determine whether an accommodation would be an undue burden are: (1) the nature and cost of the accommodation, (2) overall financial resources of the site and the effect of this accommodation on those expenses and resources, (3) the administrative or fiscal relationship of the site in question, (4) if applicable, the overall financial resources of the entity, and (5) if applicable, the overall operation of the entity.⁸¹

Generally, if a college or university follows their established accommodation policies, then courts will defer to the postsecondary institution for what qualifies as a reasonable accommodation at that

⁷³ Macfarlane, *supra* note 32, at 2009.

⁷⁴ *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19, 23 (1st Cir. 1991).

⁷⁵ *Id.* at 26.

⁷⁶ *See Se. Cmty. Coll. v. Davis*, 442 U.S. at 405.

⁷⁷ *Id.*

⁷⁸ *Guckenberger v. Boston Univ.*, 974 F. Supp. 106, 149 (D. Mass. 1997).

⁷⁹ *Mershon v. St. Louis Univ.*, 442 F.3d 1069, 1076, 1078 (8th Cir. 2006) (“Mershon [a student who is wheelchair-bound and sight-impaired from complications of cerebral palsy] has not demonstrated that he was otherwise qualified, with reasonable specific accommodations, to meet the prerequisites for admission into the graduate school program”).

⁸⁰ 28 C.F.R. § 36.104 (2007).

⁸¹ *Id.*

particular institution.⁸² While public and private colleges and universities are potentially liable for student claims of failure to accommodate made under the ADA, all federally funded institutions are liable under Section 504 for any failure to accommodate claims.⁸³

Disparate Impact Claims

In a disparate impact claim, the student must present a prima facie case, as well. In order to do so, the student must: (1) identify a college or university policy or practice that is facially neutral and (2) demonstrate that the policy or practice has a significantly adverse or disproportionate impact on the student or students with a disability.⁸⁴ In order to prove such a claim, the student will likely have to provide statistical evidence.⁸⁵ The university can then respond by either arguing that the student's claim fails to establish a prima facie case of disparate impact or by demonstrating that the school made sufficient reasonable accommodations for the student with a disability in compliance with Section 504 and the ADA.⁸⁶

In *D.E. v. Regents of University of California*, a student argued that UCLA's "incomplete" policy had a disparate impact on students with disabilities in violation of Title II of the ADA.⁸⁷ First, the student identified UCLA's policy that is facially neutral, the university's "incomplete" policy. Under UCLA's "incomplete policy," a student who does not complete a course timely receives an "incomplete" mark on their transcript. Even after a student completes the course, the incomplete indicator remains on their transcript with a letter grade showing that the coursework was not timely completed, at least at first.⁸⁸ Second, the student identified how this facially neutral policy had a disproportionate impact on students with disabilities. The plaintiff argued that UCLA's "incomplete" policy "disproportionately affects disabled students, punishing them for requesting reasonable accommodations by permanently 'flagging' their transcripts with incomplete marks."⁸⁹ In reviewing the complaint, the court held that the plaintiff must provide evidence to support a claim of disparate impact, and simply stating the presence of a disparate impact is insufficient to establish a claim.⁹⁰

⁸² *Amir v. St. Louis Univ.*, 184 F.3d 1017, 1029 (8th Cir. 1999) (the court determined that the three accommodations that a medical student with obsessive compulsive disorder requested were not reasonable considering the institution's policies).

⁸³ 42 U.S.C. § 12182(b)(2)(A)(ii); 42 U.S.C. § 12131(2); 45 C.F.R. § 84.68(b)(7) (2024).

⁸⁴ See *Doherty v. Bice*, 2020 U.S. Dist. LEXIS 169545, *16 (S.D.N.Y. 2020).

⁸⁵ See *Borwick v. Univ. of Denver*, 2013 U.S. Dist. LEXIS 37763, *36 (Colo. 2013).

⁸⁶ See *Payan v. L.A. Cmty. Coll. Dist.*, 11 F.4th 729, 733 (9th Cir. 2021); 42 U.S.C. § 12182(b)(2)(A)(ii); 42

U.S.C. § 12131(2); 45 C.F.R. § 84.68(b)(7) (2024).

⁸⁷ *D. E. v. Regents of the Univ. of Cal.*, 2023 Cal. Super. LEXIS 46821, *3 (Cal. Super. 2023).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at *4.

IV. THE INCREASED PRESENCE OF TECHNOLOGY AND THE INTERNET IN POSTSECONDARY CLASSROOMS AND ITS IMPACT ON STUDENTS WITH DISABILITIES

A. Federal Efforts to Address the Rise of the Internet and Protect People with Disabilities

The rise of the widespread use of the Internet occurred around the same time that the ADA was signed into law.⁹¹ As a result, the ADA provides no requirements for accessibility in technology making the responsibility for accessibility in technology fall on newer statutes, executive agency advisement, and case law. While the federal government has taken steps to enforce protections for people with disabilities, these measures have been largely ineffective especially in postsecondary education.

In 1996, the Department of Justice issued an Opinion Letter which obligated covered entities to provide “effective communications” for people with disabilities. The Opinion Letter stated that the ADA required state governments and places of public accommodation to provide effective communication for people with disabilities regardless of whether they communicated through “print media, audio media, or computerized media such as the Internet.”⁹² In 1998, the Rehabilitation Act was amended to address technology. Section 508 was added to the Act and required all federal employers to make their electronic information technology (EIT) accessible to people with disabilities.⁹³ In 1998 Congress passed the Assistive Technology Act, amended in 2004 to The Improving Access to Assistive Technology for Individuals with Disabilities Act (“The Tech Act”), which provided federal funding through the Department of Education to states to improve accessible technology for people with disabilities. The Tech Act was enacted to promote awareness and access to assistive devices and services so people with disabilities could more fully participate in society.⁹⁴ Then the Communications and Video Accessibility Act (CVAA) was signed into law in 2010 and required telecommunications and video programming to be accessible to people with disabilities, including text messaging, email, instant messaging, and video communications.⁹⁵ While these laws illustrate a good faith effort on the part of the federal government to address the ever-increasing presence of the Internet and technology in society, these efforts were outpaced by the growth of technology especially in postsecondary education. As universities failed to meet the requirements of accessible technology in their classrooms, the Department of Justice and Department of Education responded with a series of “Dear Colleague” Letters in 2010 and 2011.⁹⁶ While “Dear Colleague” Letters do not set legal

⁹¹ Golden, *supra* note 3, at 383.

⁹² Letter from Deval L. Patrick, Assistant Att’y Gen., C.R. Div., to the Hon. Tom Harkin, U.S. Senator (Sept. 9, 1996), <https://www.justice.gov/crt/foia/file/666366/dl>.

⁹³ Workforce Investment Act of 1998, Pub. L. No. 105-220, 112 Stat. 936 (codified at 29 U.S.C. § 794(d)).

⁹⁴ Assistive Technology Act of 2004, 29 U.S.C. § 3001(b)(1).

⁹⁵ Twenty-First Century Communications and Video Accessibility Act of 2010, 47 U.S.C. § 613.

⁹⁶ OFF. FOR C.R., U.S. DEP’T OF EDUC. & C.R. DIV., DEP’T OF JUST., DEAR COLLEAGUE LETTER (June 29, 2010), <https://www.ed.gov/media/document/colleague-20100629pdf> [hereinafter 2010 Dear Colleague Letter]; OFF. FOR C.R., U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER (May

precedent, they inform the higher education industry about the Department of Justice and Department of Education's ("DOE") stance on major legal issues as well as the standards and requirements that universities should follow to comply with federal law.⁹⁷

To address digital inaccessibility in higher education, the DOJ and DOE OCR released a joint Dear Colleague Letter in 2010 to all university presidents.⁹⁸ The 2010 letter advises university presidents that their institutions cannot require the use of emerging technology in the classroom that is inaccessible to an entire group of individuals with disabilities; doing so is discrimination prohibited by Title II and Section 504, unless the university provides those individuals with accommodations that allow them to receive all the benefits provided by the technology in an "equally effective and equally integrated manner."⁹⁹ OCR issued an additional Dear Colleague Letter in 2011 to provide further clarification on substantially equivalent use of technology in the classroom.¹⁰⁰ The 2011 letter states that "as the use of emerging technologies in the classroom increases, schools at all levels must ensure equal access to the educational benefits and opportunities afforded by the technology and equal treatment in the use of the technology for all students, including students with disabilities."¹⁰¹ The letter was issued in response to complaints against several universities who were using electronic book readers that were inaccessible to students who were blind or had low vision. Furthermore, the letter advises postsecondary institutions that both the ADA and Section 504 prohibit a college or university from requiring electronic book readers in the classroom that are not fully accessible to students with disabilities unless those individuals are provided with accommodations that allow them to receive the same educational benefits.¹⁰² Despite these advisory letters, public and private colleges and universities throughout the country have failed to make their technology accessible even as technology has become an ever-increasing presence in schools, especially after the COVID-19 pandemic.¹⁰³

B. The Digital Divide: How Internet and Technology in the Classroom are Harming Students with Disabilities

Today, 96% of teens use the Internet every day, and the share of teens that report being online "almost constantly" has almost doubled from 24% ten years ago in 2014-2015 to 46% in 2024.¹⁰⁴ This Internet use is not

26, 2011), <https://www.ed.gov/sites/ed/files/about/offices/list/ocr/letters/colleague-201105-ese.pdf> [hereinafter 2011 Dear Colleague Letter].

⁹⁷ See 2010 Dear Colleague Letter, *supra* note 96; 2011 Dear Colleague Letter, *supra* note 96.

⁹⁸ 2010 Dear Colleague Letter, *supra* note 96.

⁹⁹ *Id.*

¹⁰⁰ 2011 Dear Colleague Letter, *supra* note 96.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Golden, *supra* note 3, at 384-85; DeVan L. Hankerson & Lydia X. Z. Brown, *Technology as a Civil Right and a Move Toward Disability Justice: Ensuring Digital Access for Disabled Students in the Pandemic*, 13

DREXEL L. REV. 869, 890 (2021).

¹⁰⁴ *Teens and Internet, Device Access Fact Sheet*, PEW RSCH. CTR. (last visited Nov. 24, 2024), <https://www.pewresearch.org/internet/fact-sheet/teens-and-internet-device-access-fact-sheet/>.

exclusively at home, today the Internet is used regularly in classrooms and especially in higher education. In fact, a vast majority of college students bring and/or use a laptop computer in the classroom.¹⁰⁵ Technology use is not only condoned by many educators in higher education but encouraged as many college educators consider Internet use and related technology a key part of their teaching practices. In fact, many professors use digital materials, websites, online databases and communicate with students via email to run their courses.¹⁰⁶ As a result of the Internet and technology in the classroom, students can collaborate on work in real time and engage with media and course materials with more flexibility and access than ever before.¹⁰⁷

While computer use, digital materials, electronic readers, and other technological resources that educators use can improve the educational experience of students, technology and Internet use in the classroom poses the risk of making education inaccessible for students with disabilities. And while the growth of technology has brought about assistive technology services for students with disabilities, the development of technology is outpacing the development of accommodations. As a result, students with disabilities may be left behind by their colleges and universities who increasingly use digital resources and technology that are inaccessible. Consequently, a digital divide has arisen for students with disabilities in postsecondary education.¹⁰⁸

All too often, postsecondary institutions still fail to provide students with disabilities technological accommodations when they incorporate technology and the Internet into the classroom.¹⁰⁹ Many professors use web pages and require online research as a part of their courses (whether online or in person), however, many of these websites and even university and library webpages are not accessible for students with disabilities.¹¹⁰ Since the Internet and related technology are such fundamental tools in postsecondary education, students whose disabilities prohibit them from using the Internet in a traditional manner are limited in their ability to actively participate in assignments and social groups, conduct research, and gain access to basic course information.¹¹¹ Without access to the same digital resources, online research, and college and university websites that their classmates have, students with disabilities are left at a disadvantage.

As noted in the 2010 and 2011 Dear Colleague Letters, the ADA and Section 504 apply to computer accessibility and technological resources.¹¹²

¹⁰⁵ HARVARD UNIV., THE DEREK BOK CENTER FOR TEACHING AND LEARNING, DEVICES IN THE CLASSROOM,

<https://bokcenter.harvard.edu/technology-and-student-distraction> (last visited Nov. 24, 2024); Kristen Purcell, Judy Buchanan & Linda Friedrich, *Part III: Bringing Technology into the Classroom*, PEW RSCH. CTR. (Feb. 28, 2013), <https://www.pewresearch.org/internet/2013/02/28/part-iii-bringing-technology-into-the-classroom/> (In 2013, teachers reported not only computers but “cell phones, digital cameras and recorders, e-readers and tablet computers being part of the learning experience”).

¹⁰⁶ Golden, *supra* note 3, at 384–85.

¹⁰⁷ *Id.*

¹⁰⁸ Lenhart, *supra* note 8.

¹⁰⁹ Golden, *supra* note 3, at 384–85.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 386.

¹¹² OFF. FOR CIV. RTS., U.S. DEP’T OF EDUC. & CIV. RTS. DIV., DEP’T OF JUST., *supra* note 96; OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., *supra* note 96.

As such, colleges and universities who fail to provide Internet and technological accommodations for students with disabilities may face legal challenges under a failure to accommodate or disparate impact theory. Despite this risk, many colleges and universities' still fail to comply with the ADA and Section 504 when it comes to web accessibility in the classroom.¹¹³ As a result, compliance reviews and litigation against colleges and universities in recent years has addressed this very obligation.

C. Recent Compliance Reviews and Litigation Addressing the Digital Divide and Postsecondary Schools' Obligations to Provide Reasonable Accommodations in the Realm of Technology

Despite federal laws and guidance, colleges and universities are still failing to provide accessible technology to students with disabilities in violation of the ADA and Section 504. As students who received technology accommodations under IDEA have matriculated to postsecondary institutions, litigation against several prominent universities has arisen. These lawsuits evidence clear civil rights violations against students with disabilities and emphasize the need for change in university and college policies and procedures regarding technology accommodations for students with disabilities.

In 2014 and 2015, OCR came to resolutions with two universities bringing inaccessible IT to the forefront of postsecondary institutions' attention.¹¹⁴ In both resolutions, OCR found that the universities were in violation of the ADA and/or Section 504 for failing to provide accessible technology to students with disabilities at their respective institutions.¹¹⁵ In 2014, OCR released a letter in resolution of its compliance review with the University of Cincinnati addressing the university's web accessibility.¹¹⁶ This letter was important for two reasons. First, the letter indicated a wide range of online services that the university had to update to be in compliance with Title II of the ADA and Section 504. OCR identified web-accessibility policies and training, distance learning, and Blackboard as online services that needed to be reviewed by the university. In particular, OCR pointed out the university's lack of alternative text on images, documents not being posted in accessible formats, lack of captioning on videos, improperly formatted data tables and form fields, and improper color contrasts as violations.¹¹⁷ However, the letter does not merely identify these technical deficiencies, it second, explains how these deficiencies impact students with

¹¹³ Golden, *supra* note 3, at 384–85.

¹¹⁴ Resolution Agreement, University of Cincinnati, Case No. 15-13-6001, Off. for Civ. Rts., U.S. Dep't of Educ. (Dec. 8, 2014), <https://www.ed.gov/sites/ed/files/documents/press-releases/university-cincinnati-letter.pdf>; Resolution Agreement, University of Phoenix, Case No. 08-15-2040, Off. for Civ. Rts., U.S. Dep't of Educ. (June 12, 2015), <https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/investigations/more/08152040-b.pdf>.

¹¹⁵ *Id.*

¹¹⁶ Resolution Agreement, University of Cincinnati, Case No. 15-13-6001, Off. for Civ. Rts., U.S. Dep't of Educ. (Dec. 8, 2014), at 6–11, <https://www.ed.gov/sites/ed/files/documents/press-releases/university-cincinnati-letter.pdf>.

¹¹⁷ *Id.*

disabilities, thereby humanizing the legal standards.¹¹⁸ For example, the letter states “[c]aptioning for the audio portion of a video is important, as individuals who are deaf or hard of hearing may not be able to hear the auditory content.”¹¹⁹ To remedy the ADA and Section 504 violations, the university adopted web accessibility policies, provided training to relevant staff, and conducted reviews of its websites, including a third-party certification to ensure web accessibility going forward.¹²⁰

Similarly, in June of 2015, OCR submitted a resolution letter to the University of Phoenix at the conclusion of an investigation that originated from a student complaint alleging that the university discriminated against her and others on the basis of their disabilities by moving to an inaccessible online platform, “New Classroom,” in violation of Section 504.¹²¹ This letter is important because it referenced the Web Content Accessibility Guideline (WCAG) 2.0 standards as the standard that universities must measure their web accessibility up against. WCAG 2.0 was the international standard for web accessibility at the time.¹²² In finding that the university did not abide by the standards of WCAG 2.0, OCR mandated the university audit existing content and functionality, develop a corrective action plan, establish a Disability Technology Help Desk, hire IT Disability Coordinators, and train relevant staff on web accessibility. Not only did the resolution with University of Phoenix call for future remedies, but OCR called for retroactive remedies for students who may have suffered due to the university’s lack of web accessibility since its switch to “New Classroom.” As such, the resolution put in place remedies for students who experienced web inaccessibility due to their disabilities and allowed them the opportunity to redo courses at cost to the university.¹²³

While these resolutions paved the way for enforcement of web accessibility in higher education, many universities failed to update their own web accessibility policies and procedures leading to litigation brought by individuals with disabilities. The first prominent lawsuit involving a university failing to provide accessible Internet and technology accommodations to people with disabilities was in 2015 when the National Association of the Deaf filed two class action lawsuits against Massachusetts Institute of Technology (MIT) and Harvard University.¹²⁴ While these lawsuits were not brought by students, both lawsuits represent landmark legal challenges calling for technological accommodations to be provided to people with disabilities by colleges and universities.

In *National Association of the Deaf v. Harvard University, et al.* and *National Association of the Deaf et al. v. Massachusetts Institute of*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 9.

¹²⁰ *Id.* at 12.

¹²¹ Resolution Agreement, University of Phoenix, Case No. 08-15-2040, Off. for Civ. Rts., U.S. Dep’t of Educ. (June 12, 2015), at 1, <https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/investigations/more/08152040-b.pdf>.

¹²² *Id.* at 2.

¹²³ *Id.* at 3–7.

¹²⁴ *Nat’l Ass’n of the Deaf v. Harvard Univ.*, 2019 U.S. Dist. LEXIS 211335, at *2 (D. Mass. Nov. 5, 2019); *Nat’l Ass’n of the Deaf v. Mass. Inst. of Tech.*, 2020 U.S. Dist. LEXIS 53643, at *2 (D. Mass. Mar. 27, 2020).

Technology, et al., the National Association of the Deaf sued Harvard and MIT alleging that both universities made a variety of content available to the public via their university websites that were inaccessible to people who were deaf or hard of hearing. The claimants alleged that by failing to provide captioning for audio and audiovisual content, Harvard and MIT deprived deaf and hard of hearing people the benefits of its online content in violation of Title III of the ADA and Section 504.¹²⁵

In 2015, the DOJ filed a statement of interest in both cases stating that the “Plaintiffs’ claim falls squarely within the protections afforded by the ADA and Section 504. Both the ADA and Section 504 currently obligate (MIT and Harvard) to provide effective communication to ensure equal access to its online programming services.”¹²⁶ In 2019, the National Association of the Deaf settled with Harvard, and in 2020 with MIT.¹²⁷ The settlements set out two of the most comprehensive sets of online accessibility requirements in higher education. Both settlements require the institutions to provide quality captioning services for all online content that are accessible to the public through the universities’ websites.¹²⁸ ¹²⁸ It is important to note that these cases were brought on a general public accessibility theory and not brought by a qualified student who was unable to access an equitable education due to web inaccessibility. While there is a significant difference in these theories, the importance of these settlements cannot be overstated; these settlements represent landmark civil rights victories for people with disabilities and set a precedent for academic institutions to analyze whether their own online content is accessible to people with disabilities and especially their own students.

Despite these historic settlements, litigation and administrative investigations continue today against colleges and universities who continue to violate Section 504 and the ADA by failing to accommodate students’ disabilities in the realm of technology.

In 2021, a student at John Jay College of Criminal Justice, a component college of the City University of New York (“CUNY-JJCCJ”) filed a complaint with the Department of Justice alleging that the university violated Title II of the ADA.¹²⁹ The student with a vision-related disability alleged that the university failed to provide timely and adequate reasonable accommodations and auxiliary aids to them particularly in regards to

¹²⁵ *Id.*

¹²⁶ U.S. Statement of Interest at 3, Nat’l Ass’n of the Deaf v. Mass. Inst. of Tech., No. 3:15-cv-300024-MGM (D. Mass. 2015), <https://www.cohenmilstein.com/wp-content/uploads/2023/07/NAD-v-MIT-DOJ-Statement-of-Interest-06252015.pdf>.

¹²⁷ Nat’l Ass’n of the Deaf v. Harvard Univ., 2019 U.S. Dist. LEXIS 211335, at *2 (D. Mass. Nov. 5, 2019); Nat’l Ass’n of the Deaf v. Mass. Inst. of Tech., 2020 U.S. Dist. LEXIS 53643, at *2 (D. Mass. Mar. 27, 2020).

¹²⁸ Consent Decree, Nat’l Ass’n of the Deaf v. Mass. Inst. of Tech., No. 3:15-cv-300024-MGM (D. Mass. 2020), <https://www.cohenmilstein.com/wp-content/uploads/2023/07/Order-Final-Approval-of-Settlement-NAD-v-MIT-07212020.pdf>; Consent Decree, Nat’l Ass’n of the Deaf v. Harvard Univ., No. Case 3:15-cv-30023-KAR (D. Mass. 2020), <https://www.cohenmilstein.com/wp-content/uploads/2023/07/Consent-Decree-NAD-v-Harvard-02262020.pdf>.

¹²⁹ U.S. Dep’t of Just., Press Release, Voluntary Compliance Agreement Between the United States of America and The City University of New York at 2 (2022), <https://www.justice.gov/crt/case-document/file/1559471/dl>.

technology in the classroom. As such, the DOJ investigated the allegations made in the complaint.¹³⁰

At the conclusion of the investigation, the DOJ found that the student was excluded from full participation in the university's science and mathematics course offerings including Calculus I, Software Office Management, Discrete Structures, and Linear Algebra in violation of the ADA. Other than failing to make available to the complainant qualified notetakers, proctors, tutors and other reasonable accommodations and auxiliary aids, CUNY-JJCCJ excluded the student by failing to make technology in its courses accessible.¹³¹ Specifically, CUNY-JJCCJ's Discrete Structures course where instructors assigned students to use WebAssign, a third-party online learning product, to complete assignments and other coursework online, caused the student difficulty in completing course assignments because the website was not capable of fully reading out mathematical and scientific equations and symbols. Additionally, the complainant did not receive usable versions of required textbooks and other course materials in a timely manner when courses began. Consequently, the DOJ determined that the student was not provided equal opportunities and benefits by the university in violation of Title II of the ADA.¹³²

The DOJ determined that the university did not have adequate policies and procedures to vet websites during procurement and to ensure that accommodations including a usable version of coursework was provided to students in a timely manner. As a result, the DOJ found the student received poor grades in Calculus I, Software Office Management, Discrete Structures, and Linear Algebra and was delayed in taking more advanced coursework due to the failure of the university to provide adequate accommodations to the student.¹³³

Consequently, CUNY entered into a comprehensive Voluntary Compliance Agreement with the United States. CUNY agreed to adopt and implement CUNY-wide policies to ensure the availability of notetakers, proctors, tutors and other relevant individuals with course-specific training and competency in courses, including technology courses, when necessary to provide reasonable accommodations and auxiliary aids to students with visual impairments.¹³⁴ The agreement also required the adoption of a CUNY-wide policy to ensure all course materials are available to a student registered with the College's Office of Accessibility Services by the first meeting of the course or within two weeks of the first meeting of the course. And lastly, the university system agreed to implement CUNY-wide policies that ensure third party online learning products, platforms, and applications utilized in CUNY courses are accessible to students with disabilities. Furthermore, the agreement also required CUNY to conduct training and to report compliance with the agreement, Section 504, and the ADA to the DOJ

¹³⁰ *Id.*

¹³¹ *Id.* at 3.

¹³² *Id.*

¹³³ *Id.* at 3–4.

¹³⁴ *Id.* at 4.

for two subsequent years following the resolution.¹³⁵ Not only was CUNY obligated to make these changes, but the student received \$10,000 in compensatory damages and a revision of their grades in Calculus I, Software Office Management, Discrete Structures, and Linear Algebra to pass/fail grades.¹³⁶ While this failure to accommodate complaint was resolved administratively, other claims are litigated in court.

In 2023, a jury in Los Angeles, California awarded two blind students compensatory damages and injunctive relief in their lawsuit against the Los Angeles Community College District (“LACCD”) for its failure to provide accommodations in the realm of technology.¹³⁷ Originating from a 2017 complaint, *Payan v. Los Angeles Community College District* arose when students Roy Payan and Portia Mason sued LACCD under Section 504 and Title II of the ADA for failing to accommodate their visual disabilities.¹³⁸ Payan and Mason alleged that LACCD discriminated against them by failing to provide each of them with accessible online course materials and software. Upon their enrollment at LACCD, the plaintiffs registered for disability accommodations through the college’s Office of Special Services (OSS). Both students received approved accommodations including tape-recorded lectures, preferential seating, materials in electronic text and test-taking accommodations. Of note, both students used the screen reading software “JAWS” to read electronic text in their courses. JAWS works by converting text and images into audio descriptions or a braille display.¹³⁹ Despite receiving approved accommodations, both students experienced individual inaccessibility barriers and barriers that extended to all blind students. Both students claim that online (1) class materials, (2) textbooks, (3) education technology, (4) websites, (5) computer applications and research databases at the LACCD library were all inaccessible to them.¹⁴⁰

Firstly, both Payan and Mason alleged that they took LACCD classes where they were not provided in-class materials including handouts and PowerPoint presentations in an accessible format at the same time as their peers as required by the school’s Alternative Media Production Policy (“AMPP”). Secondly, both students alleged that they were unable to access certain textbooks required for their LACCD courses despite the AMPP’s affirmative duty to proactively evaluate the accessibility of its instructional material. In the case of Payan, OSS’s inability to digitize his math textbook led him to fall behind in the course.¹⁴¹ Thirdly, despite the AMPP requirements and his approved accommodations, Payan took multiple LACCD courses that utilized inaccessible computer programs to facilitate class work. For example, in one math course, Payan was required to complete and submit homework on a website called MyMathLab which was

¹³⁵ *Id.* at 4–6.

¹³⁶ *Id.* at 6.

¹³⁷ Brown, Goldstein & Levy, BGL Team Secures \$240,000 Jury Verdict for Blind Students in Discrimination Lawsuit Against the Los Angeles Community College District (June 2, 2023), <https://browngold.com/news/bgl-laccd-verdict-lawsuit-victory/>.

¹³⁸ *Payan v. L.A. Cmty. Coll. Dist.*, 11 F.4th 729, 733 (9th Cir. 2021).

¹³⁹ *Id.* at 732.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

not compatible with screen reading software, causing him to fall behind on his course work. Fourthly, both students identified several of LACCD's website resources that were inaccessible to students with visual impairments including LACCD's front-facing website and its student portal. Fifth, the plaintiffs identified that many of LACCD's library databases for student research were not compatible with screen reading software like JAWS. Mason alleged she was unable to complete a psychology research paper because the professor required use of an inaccessible research database for the assignment.¹⁴²

After a two-day bench trial, the district court found that LACDD violated the ADA and Section 504 and entered a permanent injunction and final judgment for the plaintiffs. The plaintiffs were awarded \$40,000 in compensatory damages. The injunction required that LACCD (1) come into compliance with its Alternative Media Production Policy, (2) evaluate its library databases for accessibility and establish alternatives for students with vision disabilities, (3) designate a Dean of Educational Technology, (4) make the LACCD website accessible to students with vision impairments, and (5) assess educational materials for accessibility before acquisition.¹⁴³

The resolutions and cases involving the University of Cincinnati, University of Phoenix, Harvard, MIT, CUNY, and LAACD are important reminders to colleges and universities that they are accountable under Section 504 and the ADA when it comes to providing accessible technology and digital resources to students. As a result of these cases and others like them, the DOJ and DOE released a "Dear Colleague" Letter on May 19, 2023.¹⁴⁴ The letter identifies various digital technologies and content that need to be accessible for students with disabilities to have equal access to higher education. The letter indicates that websites, third-party online platforms, learning platforms like edX, Coursera, and Kadenze, podcasts and videos, social media, third-party platforms like YouTube, Spotify, and Apple Podcasts, and content including lectures, conferences, sporting events, admissions information, and graduation ceremonies should be provided in accessible formats to students and the public with disabilities.¹⁴⁵ The letter advises colleges and universities that they are obligated to provide equal opportunities for people with disabilities to participate and benefit from their online services, programs, and activities.¹⁴⁶ Despite this guidance, student claims of inaccessibility in coursework, textbooks, university websites, and third-party platforms will continue if postsecondary institutions fail to update their policies and procedures to be in compliance with Section 504 and the ADA.

¹⁴² *Id.* at 732–33.

¹⁴³ *Id.* at 733.

¹⁴⁴ U.S. Dep't of Just., Civil Rights Division & Dep't of Edu., Office for Civil Rights, Dear Colleague Letter on Online Accessibility at Postsecondary Inst. (May 19, 2023), <https://www.justice.gov/crt/case-document/file/1584491/dl>.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

V. HOW POSTSECONDARY INSTITUTIONS CAN PROVIDE ACCESSIBLE TECHNOLOGY TO STUDENTS WITH DISABILITIES IN THE CLASSROOM

To prevent against costly litigation, federal fines, and provide students with disabilities their civil right to an equal education, private and public colleges and universities are well advised to rethink and, if necessary, revise their policies and procedures to provide digital accessibility for students with disabilities. While the University of Cincinnati, University of Phoenix, MIT, Harvard, CUNY and LACCD revised their policies and procedures in order to provide digital accommodations and accessible technology to people with disabilities because of complaints brought against them, postsecondary institutions may benefit from reevaluating and changing their web accessibility policies and procedures proactively. Comprehensive and detailed policies and procedures regarding technology and digital accessibility will provide clear direction for a school's administration, faculty, and students to ensure that all students with disabilities have access to an equal education as required by Section 504 and the ADA.

Additionally, colleges and universities are well-advised to revise their policies due to new developments in law and regulations. In 2024, “[t]he U.S. Department of Justice . . . formally added new language to Title II of the Americans with Disabilities Act that — for the first time — lays out specific technical standards for web content that public colleges and other government entities need to meet.”¹⁴⁷ Therefore, public colleges and universities will need to remedy their existing digital content to meet the new standards. In fact, many schools were only given a year and a half to implement the internationally recognized Web Content Accessibility Guidelines (“WCAG”) 2.1, published in 2018.¹⁴⁸ Changing regulations from the U.S. Department of Health and Human Services will also affect private colleges who receive their funding and require those schools to implement the same WCAG 2.1 accessibility standards.¹⁴⁹ Therefore, by establishing clear web accessibility policies and procedures colleges and universities can avoid governmental sanctions, costly litigation, and provide students with disabilities their civil right to an equitable education.

Proactive Policy Implementation

A model example of proactive policy implementation is the California State University (“CSU”) system. In 2018, the Chancellor of CSU announced the adoption of a system wide initiative to ensure access to technology for people with disabilities called the “Accessible Technology Initiative” (“ATI”) as a part of Executive Order 1111 (“E.O. 1111”).¹⁵⁰ E.O.

¹⁴⁷ Taylor Swaak, *Colleges Must Revise Millions of Web Pages. It Will Be 'Painful.'*, THE CHRON. OF HIGHER EDUC. (Dec. 6, 2024), <https://www.chronicle.com/article/colleges-must-revise-millions-of-web-pages-it-will-be-painful>.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Timothy P. White, Executive Order 1111, CALIFORNIA STATE UNIVERSITY (May 23, 2018) <https://www.calstatela.edu/sites/default/files/eo-1111.pdf>.

1111's purpose was to "make information technology resources and services accessible to all CSU students, faculty, staff, and the general public regardless of disability."¹⁵¹ The initiative marked a complete overhaul of CSU's system. E.O. 1111 instituted policies to ensure that CSU's websites, apps, and all digital content CSU deploys systemwide are accessible.¹⁵² As a part of E.O. 1111, CSU also developed a procurement process to ensure that all Information and Communication Technology ("ICT") the university system acquires is accessible. Additionally, CSU's Accessible Procurement process requires an integrated Information Technology ("IT") review which conducts a comprehensive check of each system's functionality and accessibility. CSU also instituted vendor requirements to ensure compliance with its ICT policies. In addition to implementing new accessible policies, E.O. 1111 called for funding, resources, and training to be provided to its faculty, staff, and third parties to ensure compliance with the new policies.¹⁵³

Not only did CSU completely revamp its policies and procedures regarding accessible technology, but its Northridge campus holds an annual CSUN Assistive Technology Conference to provide an interactive setting for researchers, educators, users, and other participants "to share knowledge and best practices in the field of assistive technology."¹⁵⁴ The conference highlights cutting edge technology and solutions to allow for the full participation of persons with disabilities in all settings including education. With over 5,000 people attending in 2019, prior to the COVID-19 pandemic, the conference is the largest of its kind internationally.¹⁵⁵ Overall, CSU represents a quintessential example of proactive web accessibility policymaking that a college or university can do to ensure compliance with Section 504 and the ADA.

When revising their technology and disability accommodations policies and procedures, colleges and universities may benefit from considering adding several elements to combat the digital divide and ensure digital accessibility for students with disabilities. First, colleges and universities should include a provision that defines and states the university's obligations under Section 504 and the ADA relating to technology and digital accessibility for students with disabilities. Next, the university should adopt the international web accessibility standard, WCAG 2.1. Thereby, the university should establish a policy and procedure for auditing its own websites and those third-party websites and platforms used by professors and other faculty to ensure that they are accessible or that an alternative platform can be offered to students with disabilities. Additionally, the institution should implement a procurement policy and procedure to determine whether websites, platforms, and other digital resources are accessible or whether an alternative platform can be offered to students with

¹⁵¹ *Id.* at 6.

¹⁵² *Id.* at 2–5.

¹⁵³ *Id.*

¹⁵⁴ California State University Northridge, *Conference*, [HTTPS://WWW.CSUN.EDU/COD/CONFERENCE](https://www.csun.edu/cod/conference).

¹⁵⁵ *40th Anniversary of the CSUN Assistive Tech. Conf.*, CSUN (last visited March 11, 2026), <https://www.csun.edu/academic-affairs/office-provost/provosts-newsletter/provosts-newsletter-march-2025/40th-anniversary-csun-assistive-technology-conference>.

disabilities before procuring that website or platform. More generally, the school should ensure that it has a clear policy for registering for and requesting disability accommodations. Relatedly, the school should provide a clear and reasonable timeframe as to when a student can expect to receive modified digital materials or textbooks if an accommodation is approved after a course has begun. Institutions should also create an office of compliance within their disabilities services offices to ensure compliance with Section 504, the ADA, and the institution's own internal policies while also providing a clear contact for students should they need assistance navigating disability accommodations, especially regarding web accessibility.

Overall, the rise of the Internet and technology has impacted every aspect of society, especially education. As more and more colleges and universities move their class materials, textbooks, research databases, and classes online, postsecondary institutions need to consider the impact of web inaccessibility on students with disabilities. To combat the digital divide and ensure compliance with Section 504 and the ADA, public and private postsecondary institutions need to reconsider and, if necessary, revise their technology and digital accessibility policies and procedures to ensure that students with disabilities receive the same educational benefits and opportunities as their peers.