Access This: Why Institutions of Higher Education Must Provide Access to the Internet to Students with Disabilities

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ABSTRACT

No one questions whether the ADA applies to institutions of higher education. Title II applies to public colleges and universities, while Title III applies to private ones. With some exceptions, colleges and universities must make their programs and services accessible by providing reasonable accommodations to students with disabilities. What is significantly less clear, and thus the topic of dispute among courts and commentators, is whether the ADA requires colleges and universities to provide access to the Internet to students with disabilities. Much of the dispute revolves around the meaning of the term “place of public accommodation.” Some courts have required that a “place” be a physical structure, while others have not. This article will argue that regardless of the ADA’s applicability to the Internet, institutions of higher education must ensure that students with disabilities have access to the Internet. Part of a school’s obligation to make programs or services accessible includes providing access to the Internet to students with disabilities whenever Internet use is necessary to complete a course’s requirements, conduct research, or access information about the school itself.

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   A. *Students with Disabilities are Covered by the ADA and Section 504 of the Rehabilitation Act, Thereby Obligating Institutions of Higher Education to Provide*
For over fifteen years, people with disabilities have enjoyed easier access to buildings, protection against employment discrimination, and access to services provided by the government and private entities operating public accommodations. People with disabilities have had the right to demand that they not be discriminated against on the basis of their disabilities in a multitude of situations since the passage of the Americans with Disabilities Act of 1990 (ADA).1 In the area of education, both public and private institutions of higher learning have the obligation to be accessible to and provide reasonable accommodations to students with disabilities. Yet, the disabled community still faces significant discrimination in one major arena: access to the Internet. “The Internet has become the hub of business, commercial, civic, and even social interaction. In today’s world, the ADA’s application to the Internet is arguably as important and may be more important than access to parking spaces for the disabled.”2 While there are websites that are accessible to people with all types of disabilities, many, if not most, are not. Some courts have found that the ADA applies to the Internet, while others have not.

This article will discuss the applicability of the ADA to institutions of higher education and the dispute over the application of the ADA to the Internet. Part I will review applicable disability law, including what constitutes a disability and reasonable accommodation. Part II will briefly discuss the importance of the Internet in higher education.3 Part III will provide an overview of the circumstances under which Internet websites must be made accessible, as well as arguments for and against applying Title III of the ADA to the Internet. In conclusion, this article will argue that, in the absence of clear direction from the courts or the legislature, it is the responsibility of colleges and universities to provide reasonable

3. A comprehensive and exhaustive discussion of the importance of the Internet in general, and the impact the Internet has had on higher education in particular, is beyond the scope of this article.
accommodations to students with disabilities so that they may have the same access to the Internet as do students without disabilities.

I. INSTITUTIONS OF HIGHER EDUCATION HAVE A DUTY TO PROVIDE REASONABLE ACCOMMODATIONS TO STUDENTS WITH DISABILITIES


In 1973, Congress enacted section 504 of the Rehabilitation Act. For the first time, otherwise qualified people with “handicaps” (now termed disabilities) were protected from discrimination, though only in programs receiving federal financial assistance, because of their disabilities. Since most institutions of higher learning receive federal funds, section 504 prohibited public and private schools alike from discriminating against people with disabilities. The enactment of the Civil Rights Restoration Act of 1987 clarified that, even if only one of the school’s programs received federal funds, section 504 would apply to the entire institution.

Unfortunately, section 504 did not have a significant impact on higher education until a number of years after its enactment. There was a five-year delay in the promulgation of implementing regulations. Additionally, there was virtually no enforcement mechanism to ensure that schools were actually following section 504’s mandate not to discriminate against otherwise qualified individuals with disabilities. Finally, the Education for All Handicapped Children Act, now known as the Individuals with Disabilities Education Act (IDEA), was not passed until two years after the enactment of section 504. The IDEA required that all

children with disabilities receive a free and appropriate education.\textsuperscript{9} Because it would take years for the children who had received a free and appropriate education to reach college level, initially there simply were not significant numbers of otherwise qualified people with disabilities on college campuses.\textsuperscript{10}

In 1990, President George H.W. Bush signed into law the most sweeping civil rights legislation for people with disabilities that had ever been passed: the Americans with Disabilities Act. The ADA contained five major sections,\textsuperscript{11} two of which are pertinent to students at institutions of higher education. Title II of the ADA—Public Services—prohibits all state and local government entities from discriminating against individuals based on their disabilities.\textsuperscript{12} Specifically, Title II extends the prohibition stated in section 504 to include government entities that do not receive federal financial assistance. Title II provides that “no qualified individual with a disability shall, by reason of such 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 such entity.”\textsuperscript{13} Therefore, Title II applies to state universities and community colleges since they are public entities. Those institutions will then utilize Title II to determine whether or not a student should receive a reasonable accommodation.\textsuperscript{14}

Title III of the ADA—Public Accommodations and Services Operated by Private Entities—prohibits places of public accommodation from discriminating against people with disabilities.\textsuperscript{15} Title III provides 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.”\textsuperscript{16} Title III states that if a private entity affects commerce and falls into one of twelve listed categories, then it provides public accommodations and is

\begin{itemize}
    \item \textsuperscript{9} Id.
    \item \textsuperscript{10} Rothstein, Higher Education, supra note 6, at 243.
    \item \textsuperscript{12} Americans with Disabilities Act Title II, 42 U.S.C. §§ 12131-12132.
    \item \textsuperscript{13} Id. § 12132.
    \item \textsuperscript{14} See 28 C.F.R. §§ 35.101-.104 (2006).
    \item \textsuperscript{15} Americans with Disabilities Act Title III, 42 U.S.C. §12182(a).
    \item \textsuperscript{16} Id.
covered by the ADA. Included in the list are undergraduate and postgraduate private schools, as well as other places of education.  

Therefore, as places of public accommodation, private institutions of higher education must not discriminate against students with disabilities and must ensure that those students enjoy the same goods, services, facilities, privileges, advantages, or accommodations as students without disabilities. Private colleges and universities have the obligation to “make ‘reasonable modifications’ in their practices, policies or procedures, or to provide ‘auxiliary aids and services’ for persons with disabilities, unless such modifications would either ‘fundamentally alter’ the nature of the goods, services, facilities or other benefits offered or would result in an ‘undue burden.’”  

The passage of the ADA did not significantly change the protections afforded to students with disabilities in higher education. What did change by 1990, however, was the public’s awareness of disability discrimination. Students and their parents had fifteen years in which to learn how to receive free and appropriate education. As more students with disabilities received services over the years, more students became qualified to attend colleges and universities. In recent years, it has been estimated that one out of eleven college freshmen self-identifies as having a disability—triple the number reported in 1978. This change necessitated that colleges and universities provide reasonable accommodations to a greatly increased number of qualified individuals with disabilities.

B. Definition of an Individual with a Disability

1. Definition of “Disability”

The ADA provides three ways in which an individual can meet the definition of “disability.” A disability, as defined in the ADA, is “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” Physical disabilities include blindness, deafness,
paraplegia, and quadriplegia, among others.\textsuperscript{22} “Mental impairments” found among the student population in institutions of higher education frequently include some type of learning disability.\textsuperscript{23} Dyslexia, which causes difficulty with reading, is the most common cognitive impairment reported by students in higher education, though they report other disorders as well, such as dyscalculia (difficulty with math), dysgraphia (difficulty with writing), Attention Deficit Disorder (ADD), and Attention Deficit Hyperactivity Disorder (ADHD).\textsuperscript{24} Major life activities include “caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”\textsuperscript{25} Courts have expanded that list to include activities such as reproduction\textsuperscript{26} and reading.\textsuperscript{27}

One of the issues facing students with disabilities in higher education is the shift from being covered under the IDEA to being covered under the ADA. The IDEA requires states wishing to receive federal funding for special education to provide a free and appropriate education to all students with disabilities.\textsuperscript{28} Additionally, the local educational agency has the responsibility to identify students who are eligible for such services.\textsuperscript{29} In sharp contrast, the ADA, which has nondiscrimination and reasonable accommodation provisions, contains none of the affirmative actions required of secondary schools to provide specialized services and individualized education plans to students with disabilities.\textsuperscript{30} Eligible students in secondary schools are identified by the school system and receive a wide variety of services, including evaluations to determine the extent of their disabilities, physical therapy, and tutoring, for free.\textsuperscript{31} Unlike the IDEA, the ADA

\begin{itemize}
\item \textsuperscript{23} Rothstein, \textit{Higher Education}, supra note 6.
\item \textsuperscript{24} Suzanne Wilhelm, \textit{Accommodating Mental Disabilities in Higher Education: A Practical Guide to ADA Requirements}, 32 \textit{J.L. & Educ.} 217, 223 (2003); see also Buhai, \textit{supra} note 22, at 155.
\item \textsuperscript{25} 34 C.F.R. § 104.3(j)(2)(i) (2006).
\item \textsuperscript{26} Bragdon v. Abbott, 524 U.S. 624, 625 (1998).
\item \textsuperscript{27} Bartlett v. N.Y. State Bd. of Law Exam’rs, No. 93 Civ. 4986 (SS), 2001 U.S. Dist. LEXIS 11926, at *140 (S.D.N.Y. Aug. 15, 2001).
\item \textsuperscript{28} Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C.S. § 1412(a) (LEXIS 2006).
\item \textsuperscript{29} Id. § 1412(a)(3)(A); see also Laura Rothstein, \textit{Disability Law and Higher Education: A Road Map for Where We’ve Been and Where We May Be Heading}, 63 \textit{Md. L. Rev.} 122, 130 (2004) [hereinafter Rothstein, \textit{Disability Law}].
\item \textsuperscript{30} Rothstein, \textit{Higher Education}, supra note 6, at 130-31.
\item \textsuperscript{31} Id.
\end{itemize}
and section 504 place the obligation on post-secondary students to inform institutions of higher education of the existence of their disabilities. The students have the responsibility to document their disabilities, pay for any necessary evaluations, and request accommodations. After years of having professionals manage all their educational needs, the shift to doing it themselves can present students with a difficult challenge.

Students who succeed in establishing that they have a physical or mental impairment must then show that the impairment substantially limits them in a major life activity. As was noted earlier, “major life activities” include “caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” While neither the ADA nor section 504 defines the term “substantially limits,” the preamble to the implementing regulations states: “A person is considered an individual with a disability . . . when the individual’s important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people.”

In 1999, the Supreme Court decided a trio of cases commonly referred to as the Sutton trilogy. The Court held that the use of mitigating measures, such as eyeglasses or blood pressure medication, must be considered when determining if an individual is substantially limited in a major life activity. However, an individual’s use of mitigating measures does not determine whether or not that individual has a disability. Rather, the appropriate test to determine if an individual is disabled is “whether the limitations an individual with an impairment actually faces are in fact substantially limiting.” Courts post-Sutton “have concluded that a court should only take into account mitigating measures or corrective devices that

32. Id. at 130-31, 137.
34. See infra Part I.B.2.
35. 28 C.F.R. pt. 35, app. A (2006); see also Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(2) (defining “disability” as “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment”).
37. See Albertson’s, Inc., 527 U.S. at 565-66; Murphy, 527 U.S. at 520; Sutton, 527 U.S. at 482.
38. Sutton, 527 U.S. at 488.
39. Id.
affect the individual’s ability to perform the major life activity the plaintiff alleges is substantially limited by his or her impairment.”

2. What Constitutes a “Substantial Limitation”?

In Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, the Supreme Court focused on the meaning of the term “substantially limits.” Stating that simply having an impairment does not meet the definition of disability under the ADA, the Court addressed the issue of what a plaintiff must show to establish that she is substantially limited in the major life activity of performing a manual task. Specifically, the Court considered whether an employee of an automobile manufacturing plant who had carpal tunnel syndrome had a disability within the meaning of the ADA because she was substantially limited in performing a particular set of manual tasks. Her eligibility for accommodation under the ADA depended on her having an impairment that substantially limited a major life activity, which her employer claimed she did not have.

Examining the plain meaning of the term, the Court stated that:

“Substantially” in the phrase “substantially limits” suggests “considerable” or “to a large degree.” The word “substantial” thus clearly precludes impairments that interfere in only a minor way with the performance of manual tasks from qualifying as disabilities.

“Major” in the phrase “major life activities” means important. “Major life activities” thus refers to those activities that are of central importance to daily life.

In sum, the Court held that “to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives. The impairment’s impact must also be permanent or long-term.” The Court emphasized that “these terms need to be interpreted strictly to create

41. 534 U.S. 184 (2002).
42. See id. at 195-96.
43. Id. at 187-88.
44. Id.
45. Id. at 196-97 (internal citations omitted).
46. Id. at 198 (citing 29 C.F.R. § 1630.2(j)(2)(ii)-(iii) (2001)).
a demanding standard for qualifying as disabled." It also stressed the importance of making an individualized assessment as to whether or not an individual’s impairment constituted a disability, particularly when the severity of the impairment, such as carpal tunnel syndrome, could vary greatly among different people. Ultimately, the Court concluded that, because the worker in *Toyota* was still able to do a variety of manual tasks despite some limitations, her impairment was not so limiting as to constitute a disability as a matter of law. It therefore reversed the Court of Appeals’ grant of partial summary judgment finding that the worker was substantially limited in performing manual tasks.

C. What Constitutes a Reasonable Accommodation for a Student with a Disability?

1. Who is a “Qualified” Individual with a Disability?

Once individuals have shown a disability within the meaning of the ADA, they must show that they are otherwise qualified individuals before they may request an accommodation under Title II or section 504. In order to be qualified, an individual with a disability must meet the eligibility requirements for admission to, or participation in, programs provided by a public entity. The individuals are still qualified even if the public entity provides them with special assistance that enables them to meet the requirements. Special assistance may take the form of physically modifying a public entity’s location or providing an auxiliary aid, such as a note taker, an interpreter, or Braille materials.

Title II expands on section 504’s definition of an “otherwise qualified individual” by including as a qualified individual someone who can meet the eligibility requirements, with or without reasonable

47. *Id.* at 197 (noting that this interpretation is confirmed by the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2000)).
48. *Id.* at 199.
49. *Id.* at 202.
50. *See* Americans with Disabilities Act of 1990 Title II, 42 U.S.C. § 12131(2) (2000). A “qualified individual with a disability” is defined as:

an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

*Id.*
State colleges and universities are considered public entities, as noted above. Most individuals attending private colleges and universities would also have to meet the “otherwise qualified” requirement of section 504. Theoretically, such students would only have to show they were individuals with disabilities (as opposed to qualified individuals with disabilities) under the ADA, since Title III does not include the “qualified” requirement, as does Title II. However, since most disability plaintiffs in higher education cases would likely bring claims under both section 504 and the ADA, the distinction between Titles II and III likely would not be a significant one.

2. The Evolution of Reasonable Accommodations

When addressing the issue of who is an “otherwise qualified” individual with a disability under section 504, courts initially held that an individual must meet the requirements of a given program “in spite of” any disability. The Supreme Court held in *Southeastern Community College v. Davis* that a school had no obligation to alter fundamentally its programs to accommodate a hard-of-hearing nursing school applicant. After the decision in *Davis*, lower courts only looked for a rational basis for institutions’ decisions that individuals with disabilities were not otherwise qualified, and no demand was made on those institutions to accommodate individuals with disabilities by making changes to their programs. The Supreme Court clarified its position regarding accommodations in *Alexander v. Choate*, stating that, to ensure access to a program or benefit, “reasonable accommodations in the grantee’s program or benefit may have to be made.” However, the Court made clear that, while an educational institution may be required to make reasonable accommodations, it need not make fundamental or substantial modifications to its standards or programs.

51. See Buhai, supra note 22, at 151.
56. Id. at 410.
57. See Wynne v. Tufts University School of Medicine, 932 F.2d 19, 23 (1st Cir. 1991), for a discussion of lower courts’ decisions after *Davis*.
59. Id. at 300 (citing Se. Cmty. Coll., 442 U.S. at 410, 412-13).
In School Board of Nassau County, Florida v. Arline, an elementary school teacher brought suit claiming disability discrimination under section 504 when she was fired for having tuberculosis. The Supreme Court affirmed the appellate court's decision to remand the case because the trial court failed to investigate either how contagious her disease was or the feasibility of providing reasonable accommodations to her. Stressing the need for an individualized inquiry and findings of fact, the Court stated that judges give deference to the medical judgments of relevant public health officials. Ultimately, the Court cited a Third Circuit decision that enunciated the standard for “reasonable accommodation.” The Third Circuit had clearly stated that an individual with a disability “who cannot meet all of a program’s requirements is not otherwise qualified if there is a factual basis in the record reasonably demonstrating that accommodating that individual would require either a modification of the essential nature of the program, or impose an undue burden.”

A First Circuit decision specified exactly what test should be applied when determining whether an academic institution has met its burden of exploring reasonable accommodations for students with disabilities. In Wynne v. Tufts University School of Medicine, a medical student with dyslexia claimed discrimination under section 504 when the school failed to accommodate his reading impairment by modifying its multiple-choice exams. Acknowledging that Wynne would have a difficult time proving he was an “otherwise qualified” individual with a disability, the court nonetheless set aside the lower court’s granting of Tufts’s summary judgment motion because the school failed to investigate reasonable alternatives to multiple choice exams, did not explain the importance of that particular type of exam, and did not even indicate who participated in the decision on whether to accommodate Wynne.

The First Circuit court formulated an approach to determine if an academic institution has adequately explored the availability of reasonable accommodations for an individual with a disability:

61. Id. at 288-89.
62. Id. at 287-88.
63. Id. at 288 (citing Se. Cmty. Coll., 442 U.S. at 410-13; Alexander, 469 U.S. at 299-301).
64. Strathie v. Dep’t of Transp., 716 F.2d 227, 231 (3d Cir. 1983).
65. 932 F.2d 19, 20 (1st Cir. 1991).
66. Id. at 28.
If the institution submits undisputed facts demonstrating that the relevant officials within 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 court could rule as a matter of law that the institution had met its duty of seeking reasonable accommodation.\(^67\)

On remand, the lower court held that Tufts had met its burden under the above-stated approach, and granted the university’s summary judgment motion.\(^68\) Wynne appealed, and the circuit court affirmed the lower court’s decision.\(^69\) Tufts had successfully demonstrated why it could not change its format to accommodate Wynne, concluding that “no further accommodation could be made without imposing an undue (and injurious) hardship on the academic program.”\(^70\)

Private entities must also accommodate people with disabilities. They must “make reasonable modifications in [their] policies, practices, or procedures,” or provide “auxiliary aids and services” for persons with disabilities, unless “such modifications would fundamentally alter the nature of [the] goods, services, facilities” or other benefits offered, or “would result in an undue burden.”\(^71\) As discussed above, private schools not covered by Title II would be covered by Title III.\(^72\) Private colleges and universities have the same obligation as public ones do to provide reasonable accommodations to students with disabilities, with the same caveat: the accommodations must be provided unless they constitute either a fundamental alteration of the programs offered or an undue burden on the institution.\(^73\) In Mershon v. St. Louis University, the Eighth Circuit affirmed the lower court’s granting of the defendant–university’s motion for summary judgment.\(^74\) The appellate court found that the University did not fail to provide reasonable accommodations to a student who was wheelchair-bound and sight-impaired due to complications from cerebral palsy.\(^75\)

In reaching its decision, the Mershon court stated that discrimination under Title III of the ADA specifically includes failing

\(^{67}\) Id. at 26.
\(^{68}\) See Wynne v. Tufts Univ. Sch. of Med., 976 F.2d 791 (1st Cir. 1992).
\(^{69}\) Id. at 796.
\(^{70}\) Id. at 795.
\(^{72}\) Id. § 12182(a).
\(^{73}\) See id. § 12182(b)(2)(A)(i)-(iii).
\(^{74}\) 442 F.3d 1069, 1078 (8th Cir. 2006).
\(^{75}\) Id. at 1077.
to make reasonable modifications in policies, practices, or procedures to accommodate disabled individuals, unless such modifications would fundamentally alter the nature of the services. 76 Under section 504, a university must provide reasonable accommodations to otherwise qualified disabled students who would not otherwise have meaningful access to a university. 77 While Title III does not specifically refer to an “otherwise qualified” standard, since qualifications generally are not required to enjoy a public accommodation, the standard does become relevant in situations involving post-secondary education. 78

Noting that Title III does not require modifications of programs if in so doing the programs would be fundamentally altered, the Mershon court stated:

It is beyond question that it would fundamentally alter the nature of a graduate program to require the admission of a disabled student who cannot, with reasonable accommodations, otherwise meet the academic standards of the program. An educational institution is not required by the Rehabilitation Act or the ADA to lower its academic standards for a professional degree. 79

In the context of higher education, the court concluded that an individual with a disability alleging a failure to accommodate under both section 504 and the ADA must show:

(1) that the plaintiff is disabled and otherwise qualified academically, (2) that the defendant is a private entity that owns, leases or operates a place of public accommodation, for ADA purposes, or receives federal funding, for Rehabilitation Act purposes, and (3) that the defendant failed to make reasonable modifications that would accommodate the plaintiff’s disability without fundamentally altering the nature of the public accommodation. 80

Students have several hurdles they must overcome before they can allege that they are entitled to reasonable accommodations from a private or public college or university. First, students must meet the definition of disability. Second, students must show that they are academically qualified to attend the institution. Third, they must show that the institution is covered either by the ADA, section 504 of the Rehabilitation Act, or both. And finally, students must show that the institution could have accommodated their disability without fundamentally altering the nature of the school’s program or service. Once students have successfully completed all of these steps, they are entitled to receive reasonable accommodations from the college or

76. Id. at 1076.
77. See id. at 1076-77.
78. Id. at 1076 (noting that “the ‘otherwise qualified’ idea is implicit in Title III’s acknowledgement . . . that requested modifications need not be provided if they will fundamentally alter the nature of the program”).
79. Id.
80. Id. (internal citations omitted).
university enabling them to participate in the school’s programs and services.

3. Examples of Reasonable Accommodations and Limitations on Accommodations

Students in institutions of higher education who successfully meet the definition of disability are entitled to receive reasonable accommodations. Accommodations commonly provided to students with disabilities include extra time on exams and assignments, separate rooms for exams, waiver of courses, reduced course loads, interpreters, and readers.81

In the area of higher education, the Department of Education’s Office of Civil Rights (OCR) is the agency responsible for enforcing the ADA.82 To determine if a school discriminated against a student with a disability, the OCR will closely examine procedural issues, particularly if the school had a policy in place to address the needs of students with disabilities.83 In examining the facts of a particular case, courts will often utilize the OCR’s approach when deciding if the school acted appropriately on the issue of reasonable accommodations.84 The case of Guckenberger v. Boston University demonstrates how one court did so.85

In Guckenberger, a group of students with various disabilities (notably ADD, ADHD, and other learning disabilities) brought suit against Boston University for discriminating against them based on their disabilities.86 One disputed issue involved a change in the University's policy on providing accommodations.87 After minimal investigation and without consulting any experts on learning disabilities, the University's president, with no background in the disability field or expertise in developing accommodations, unilaterally abolished the University’s practice of allowing students with learning disabilities to substitute other courses in place of foreign language and math requirements.88 The University also instituted new standards requiring learning-disabled students, when requesting accommodations, to provide documentation of any disabilities that had

81. See Rothstein, Higher Education, supra note 6, at 255.
82. 49 C.F.R. § 1.70(g) (2006).
83. See Buhai, supra note 22, at 164.
84. Id. at 165.
86. Id. at 114.
87. Id. at 115.
88. Id. at 117-18.
been diagnosed within the last three years.\(^89\) Additionally, the University required that the professionals providing the documentation have a doctorate in psychology or be a licensed physician.\(^90\)

Reviewing the University’s policies, the appellate court ordered the University to stop implementing its rule requiring students with learning disabilities who had current evaluations by trained professionals to be retested by professionals with medical degrees, doctorate degrees, or licensed clinical psychologists in order to be eligible to receive reasonable accommodations. The court excluded those students with ADD or ADHD from the order, finding that the University did prove that a doctorate is necessary to evaluate those conditions.\(^91\) The court also stated that the University’s refusal to make any course substitutions for math or foreign language requirements could have been acceptable had the University followed the procedural guidelines established in Wynne.\(^92\) However, the University neither conducted a reasonable assessment of the viable options nor concluded that accommodations could not be provided based on professional judgment.\(^93\) The University failed to show, through a deliberative process, that a change in the course requirements would fundamentally alter the essential standards of its curriculum.\(^94\) Therefore, the court declined to extend deference to the University’s decision.\(^95\)

In other cases, however, courts have given great deference to decisions made by institutions of higher learning, particularly when deciding what constitutes a reasonable accommodation. For example, in Amir v. St. Louis University, a medical student with obsessive compulsive disorder requested three different accommodations, none of which the Eighth Circuit determined was reasonable.\(^96\) After struggling academically, Amir filed a complaint alleging, among other things, that St. Louis University failed to accommodate reasonably his disability.\(^97\) He had made several requests of the University, including that he be allowed to complete his psychiatry clerkship at a

\(^{89}\) Id. at 120.
\(^{90}\) Id. at 120-21.
\(^{91}\) Id. at 139-40, 154.
\(^{92}\) Id. at 148-49 (citing Wynne v. Tufts Univ. Sch. of Med, 976 F.2d 791, 795 (1st Cir. 1992); Wynne v. Tufts Univ. Sch. of Med., 932 F.2d 19, 27-28 (1st Cir. 1991)).
\(^{93}\) See id. at 117-18, 130, 149.
\(^{94}\) Id. at 149.
\(^{95}\) Id.
\(^{96}\) 184 F.3d 1017, 1028 (8th Cir. 1999).
\(^{97}\) Id. at 1024.
different institution and that he be assigned a passing grade in psychiatry after receiving a failing one. The school had a policy that did not allow students experiencing academic difficulties to take classes at other universities. The court determined that this policy was not unreasonable, and that Amir's requests did not constitute reasonable accommodations. The Eighth Circuit expressed its reluctance to interfere in the University's decision, stating that the policy did not appear "discriminatory or unreasonable," and therefore, it declined to "second guess [the University]'s academic policy."

In *Kaltenberger v. Ohio College of Podiatric Medicine*, the plaintiff was ultimately diagnosed with a learning disability, though not before being dismissed from the school for failing two courses. After being reinstated, Kaltenberger received nine of her eleven requested accommodations, including extra time on exams, but still failed a course for the second time. Kaltenberger acknowledged that allowing her to retake the exam for the course she failed twice would violate the College's standard policy, but she argued that the College had been involved in delaying her diagnosis and, therefore, owed her greater accommodations. The court rejected Kaltenberger's argument, agreeing with the district court's finding that the College in no way failed to reasonably accommodate her disability. Specifically, the court expressed its reluctance to intervene in academic decisions. It held that the College's refusal to waive its standard policy regarding the retaking of exams did not constitute a failure to provide reasonable accommodations for Kaltenberger's disability, particularly given the accommodations already provided to her.

98. *Id.* at 1028.
99. *Id.* at 1029.
100. *Id.*
101. *Id.*
102. 162 F.3d 432, 434 (6th Cir. 1998).
103. *Id.* at 436. Following her request for accommodations, Kaltenberger was "placed in a five-year program (which had a lighter course load during the first two years)." and was provided with "individualized tutoring in each class," "a place to sit in the front of the class," "permission to tape lectures," "extra time on tests," and "the opportunity to take the tests in a separate room from other students." *Id.* at 434-35. However, she was not permitted to retake biochemistry during the summer session (an abbreviated, remedial course with individualized instruction) and was not permitted to retake the biology exam after failing the course for the second time. *Id.* at 435.
104. *Id.* at 437.
105. *Id.*
106. *Id.*
107. *Id.*
On a summary judgment motion brought by the University of Massachusetts at Boston in *Darian v. University of Massachusetts Boston*, the University argued that it had reasonably accommodated a nursing student suffering from serious complications resulting from a difficult pregnancy.\footnote{108} The student, Rachel Darian, was enrolled in a clinical course required for the completion of her nursing degree.\footnote{109} The University had accommodated Darian by allowing her to take files home, to see only one patient per clinical day, to make up missed clinical time, to refrain from climbing stairs, and to observe, while sitting, how someone scheduled home health care visits.\footnote{110} The University also offered Darian an “incomplete” in the clinical portion of the course and a chance to graduate on schedule.\footnote{111} However, Darian turned down this offer, missed clinical days because she was allegedly reviewing patient charts at home, and was not permitted to withdraw administratively from the clinical course.\footnote{112} In addition to missing clinical days, Darian did not take the final exam, did not hand in her final paper, and did not participate in the group project; she subsequently received an “F” in the course.\footnote{113}

After finding that Darian’s complications did constitute a disability under the ADA, the court next considered whether the University excluded Darian from participation in a program because of her disability and if it made sufficient efforts to accommodate reasonably her disability.\footnote{114} The court relied on *Arline* for the proposition that reasonable accommodations are not required under all circumstances, particularly when they would constitute an undue burden or if they would fundamentally alter the nature of the program.\footnote{115} The court also applied the factors set forth in *Wynne* to reach the conclusion that the University did reasonably accommodate Darian.\footnote{116} The court held that any further accommodations “would have lowered its academic standards or substantially altered its academic requirements,” and ruled as a matter of law that the

\begin{footnotes}
109. *Id.* at 80.
110. *Id.* at 81, 82.
111. *Id.* at 83.
112. *Id.* at 82-84.
113. *Id.* at 84.
114. *Id.* at 87-88.
115. *Id.* at 88 (citing School Bd. v. Arline, 480 U.S. 273 (1987)).
116. *Id.* at 90-91 (citing Wynne v. Tufts Univ. Sch. of Med, 976 F.2d 791, 793, 795 (1st Cir. 1992); Wynne v. Tufts Univ. Sch. of Med., 932 F.2d 19, 22 (1st Cir. 1991)).
\end{footnotes}
University met its obligation to Darian regarding reasonable accommodations.117

D. Defenses

1. Fundamental Alteration

The ADA defines discrimination to include 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.118

A university can successfully defend itself against a student’s claim that it failed to accommodate reasonably that student’s request for modifications by showing that the modifications allowing the student access to its programs or services would fundamentally alter the nature of those programs or services.119 For example, if a particular educational program included a key visual or auditory component (e.g., examining the use of color in an art appreciation class or identifying certain symptoms by sound in a medical school class), without which the program could not be presented, any modification to those components would most likely fundamentally alter that program and the university would not be compelled to make the requested changes.120

The Supreme Court, in Southeastern Community College v. Davis, asserted that “[s]ection 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person.”121 In Zukle v. Regents of the University of California, the Ninth Circuit upheld the lower court’s decision that the learning-disabled plaintiff’s requests for accommodation were not reasonable.122 The court based its decision on a finding that Zukle’s requested accommodations would result in a

117. Id. at 88; see id. at 91.
120. For further discussion of the fundamental alteration defense in general, see Peter Blanck et al., Disability Civil Rights Law and Policy § 13.6(E) (2004).
121. 442 U.S. 397, 413 (1979).
122. 166 F.3d 1041, 1049 (9th Cir. 1999).
substantial alteration to the medical school’s program.\textsuperscript{123} And, in \textit{Guckenberger v. Boston University}, the district court noted that neither section 504 nor the ADA “require a university to provide course substitutions that the university rationally concludes would alter an essential part of its academic program.”\textsuperscript{124}

2. Undue Burden

While the reasonable modification requirement in Title II does not explicitly include an undue hardship or burden defense, courts have incorporated that defense into the fundamental alteration defense.\textsuperscript{125} When determining whether a modification would constitute a fundamental alteration, courts will consider whether that modification would create an undue burden—either financial or administrative—on the entity in question.\textsuperscript{126} An “undue burden” is a modification that is significantly costly or difficult.\textsuperscript{127} Factors used to determine when an action would be readily achievable, which by definition is the opposite of an undue burden, include:

1. The nature and cost of the action needed . . . ;

2. The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources . . . ;

3. The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;

4. If applicable, the overall financial resources or any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and

5. If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.\textsuperscript{128}

As noted above, in \textit{Wynne v. Tufts University School of Medicine}, Tufts was able to justify its decision not to provide accommodations to Wynne because to do so would overly burden the academic program.\textsuperscript{129}

\begin{itemize}
\item \textsuperscript{123} \textit{Id.}
\item \textsuperscript{124} 974 F. Supp. 106, 149 (D. Mass. 1997). As discussed above, however, because the University had no basis for claiming that course substitutions for certain requirements would fundamentally alter its curriculum, its use of the fundamental alteration defense failed. \textit{See supra} text accompanying notes 94-95.
\item \textsuperscript{125} \textit{See BLANCK ET AL., supra} note 120, at § 11.4(A).
\item \textsuperscript{126} \textit{Id.}
\item \textsuperscript{127} 28 C.F.R. § 36.104 (2007); \textit{see also Buhai, supra} note 22, at 153 n.87.
\item \textsuperscript{128} 28 C.F.R. § 36.104.
\end{itemize}
In summary, the current state of the law requires that before disabled students can receive accommodations to participate fully in educational programs and services, students in colleges or universities must first overcome the hurdle of proving that they are disabled. Next, they must show that they are otherwise qualified to participate in an educational program so that they may receive reasonable accommodations for their disability from the college or university. The institution of higher learning must then provide reasonable accommodations to those students so long as the accommodations do not fundamentally alter the educational program or service. Examples of common accommodations include providing an interpreter so that a deaf student can understand a professor’s lecture or translating a textbook into Braille so that a blind student can read the assigned material. The appropriate accommodation for less traditional modes of instruction, such as those incorporating use of the Internet into the course’s curriculum, do not necessarily have to be any more complicated. While there are significant differences of opinion surrounding the applicability of the ADA to the Internet, no such dispute surrounds whether a college or university must provide reasonable accommodations to its students with disabilities. Equally clear should be an institution of higher learning’s obligation to make the Internet accessible to its students with disabilities.

II. THE PREVALENCE AND IMPORTANCE OF THE INTERNET IN HIGHER EDUCATION

A. Internet Use on College Campuses and its Impact on Students with Disabilities

Developed as a research tool for universities in the 1970s and 1980s, the widespread use of the Internet began around the time that the ADA was signed into law. By the end of the 1990s, one researcher stated, “Use of the Internet as a teaching aid is literally exploding.” Another noted the many ways in which the Internet


could be used in the educational setting, such as placing course materials online, encouraging students to conduct research, and communicating with students via e-mail. A study conducted in 2004 showed a 45 percent increase in Internet use by teens since 2000, with 87 percent of all twelve- to seventeen-year-olds using the Internet, and 78 percent of them specifically using the Internet at school. Students are arriving at colleges well versed in, or at the very least familiar with, using a computer, and most grew up with the Internet, a technology as ordinary to them as a television or radio.

Once in college, students rely heavily on the Internet for both personal and educational purposes. Of particular note is the impact the Internet has had on students’ use of libraries. University libraries tracked by the Association of Research Libraries reported a significant decline in reference queries since the 1990s, which coincides with the growth and widespread use of the Internet as a research tool. A separate study showed that an overwhelming number of college students—73 percent—used the Internet more than the library, with many students using search engines and various websites to locate research material. When predicting the implications of college students’ use of the Internet, the same study suggested that they will continue to use the Internet as a primary information resource in the future, having greater trust in it than previous generations. “In short, the Web has become an information cornerstone for [college students].”

Professors are also using the Internet extensively. Results from a 2004 survey investigating the Internet’s impact on college faculty indicated that almost two-thirds of the respondents used the Internet from four to nineteen hours per week. The report summarizing the survey’s results indicated:

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135. See id. at 12.

136. Id. at 12-13.

137. Id. at 19.

More students are likely to encounter technology in all facets of their college educations (indeed, it is in some ways virtually unavoidable already), and many of our respondents think that institutions will need to be prepared to assist students as they encounter new technologies and to help faculty learn how to determine which technologies to use.139

One indication of the availability of new technologies is the seemingly never-ending stream of products available for college faculty members’ use. So many products have been developed for college instructors’ online use that “a cottage industry, made up of software developers, academic technologists, and instructors, has sprung up to help faculty members put their courses on line without having to learn intricate page-coding schemes.”140

However, some of the products may not be usable by students with certain disabilities. For example, CourseInfo allows professors to create course websites just by filling in forms on a web page, and enables professors to customize their web pages by “manipulating color schemes and buttons.”141 They also may “place images and audio files on their pages.”142 The color schemes and images could pose problems for students with seizure disorders and vision problems, while the audio files would be inaccessible to deaf students unless they were close captioned.

Another issue that arises when professors use web pages and require online research as part of their courses is the speed with which technology changes. While it makes sense that improving a technology product would include incorporating changes to make it accessible to all, unfortunately, this is not the case. “With Internet technology, newer does not mean more accessible. Web designers often ignore access, even when it’s easy to provide.”143 As professors strive to update their use of the Internet and online tools, they may be excluding students with disabilities from receiving and fully enjoying the benefits of the educational programs offered by colleges and universities.

Undeniably, the Internet has become an integral part of getting a college education. Whether they post their class material online, communicate with students via e-mail, or require students to conduct research online, professors are integrating the use of the Internet into

139. Id.
141. Id.
142. Id.
their classes. Several authors on the subject have highlighted how a limited ability to access the Internet has placed students with disabilities in a difficult position academically: “The Web is a fundamental tool in post-secondary education,” and students whose disabilities prevent them from using this tool “are limited in their ability to gather basic course information, conduct research, participate in assignments, and participate in the social community of others.”144 As a whole, people with disabilities are less likely to use the Internet because their disabilities make that use either difficult or impossible. Websites may be inaccessible to them for a range of reasons, from incompatibility with screen-readers to the prohibitive price of adaptive hardware.145 Without access to the same websites that their classmates have, students with certain disabilities are at a distinct disadvantage to their peers.

B. Instructional Materials are Covered by the ADA

Section 504 of the Rehabilitation Act prohibits institutions receiving federal financial assistance from discriminating against otherwise qualified individuals with disabilities.146 Title II of the ADA, which applies to public colleges and universities, requires that no qualified person with a disability be excluded from participating in programs or activities of a public entity, or be denied the benefits of the public entity’s services.147 Title III of the ADA, which applies to private colleges and universities, prohibits owners of public accommodations from discriminating against people with disabilities in the full and equal enjoyment of services provided by the accommodations.148

State colleges and universities must comply with Title II of the ADA and section 504 of the Rehabilitation Act, and therefore, must make their programs, services, and activities accessible to people with disabilities. In order to do so, state institutions of higher learning

must ensure that all students with disabilities have access to the same school-provided technology as the rest of the student population. If a school offers information about the institution and its programs on a website, that website must be accessible. If a professor operates a website for a class, that website must be accessible. Class materials provided to students via the Internet constitute one aspect of a program or service being provided by the college or university to the students. Requirements that students conduct online research make up another part of a college or university’s program or service. To avoid discriminating against students with disabilities in classes with Internet components and requirements, colleges and universities must ensure that the materials and relevant websites are accessible to all students.

III. INTERNET PROVIDERS/WEBSITES ARE NOT GENERALLY REQUIRED TO BE ACCESSIBLE TO PEOPLE WITH DISABILITIES

A. Applicability of Title II of the ADA and Section 504 of the Rehabilitation Act to the Internet

Title II of the ADA prohibits public entities from discriminating against qualified individuals with disabilities who participate in an entity’s program, service, or activity, and section 504 of the Rehabilitation Act prohibits recipients of federal funds from discriminating against those same individuals.149 However, at the time these laws were passed, technology and the Internet simply did not exist in their present forms, so neither statute specifically mentions access to websites, online resources, and other types of electronic and information technology.150 In 1996, the U.S. Department of Justice (DOJ) issued an opinion letter that stated:

Covered entities under the ADA are required to provide effective communication, regardless of whether they generally communicate through print media, audio media, or computerized media such as the Internet. Covered entities that use the Internet for communications regarding their programs, goods, or services must be prepared to offer those communications through accessible means as well.151

Since issuing this letter, the DOJ has shifted its focus to website accessibility. In 2003, the DOJ issued suggestions pertaining to how state and local governments can make their websites accessible and compliant with the ADA.152

According to the OCR, three components determine the “effective communication” referred to in the DOJ opinion letter: the timeliness of the delivery, the website translation’s accuracy, and the manner in which it is communicated, which should correspond to the abilities of the individual with a disability.153 The OCR also provides a preemptive response to a school that attempts to use an undue burden argument to defend against making its software or hardware accessible.154 Specifically, the OCR points out that the school could have addressed the accessibility issue when it initially acquired the equipment.155 If the school could have acquired accessible software or hardware when it first made the equipment purchase, it cannot later argue that the cost of making the equipment accessible would be an undue burden.156

One case that addressed the applicability of Title II and section 504 to information technology involved the accessibility of a mass transit system. In Martin v. Metropolitan Atlanta Rapid Transit Authority, several plaintiffs with disabilities brought a lawsuit alleging that Atlanta’s mass transit system (MARTA) discriminated against them on the basis of their disabilities.157 In addition to MARTA’s schedule and route information not being regularly available to passengers with disabilities, its website was not formatted in plain text format. This precluded blind passengers from using text reader software to access the website’s information.158 While the general public could easily access MARTA’s schedule and route information simply by going to any MARTA station, passengers with visual disabilities could not.159 Instead, their options were to call for information and be put on hold for long periods of time; to receive information in Braille (but only if they specified the exact date and

153. Myers, supra note 150, at 298.
154. Id. at 299.
155. Id.
156. Id.
158. Id. at 1366.
159. Id. Passengers with mobility impairments also experienced significant accessibility problems, particularly with wheelchair lifts, but their access issues did not involve information technology. Id. at 1366-67.
time they wished to travel); or to receive occasionally available information packets in Braille that contained no route or schedule information.\(^{160}\)

The district court determined that, by not making route and schedule information as available to passengers with disabilities as it was to the general public, MARTA violated the ADA mandate of “making adequate communications capacity available, through accessible formats and technology, to enable users to obtain information and schedule service.”\(^{161}\) Granting the requested preliminary injunction, the court ordered MARTA to continue its efforts to make its website accessible and to provide information to passengers with disabilities in an equal and timelier manner.\(^{162}\)

**B. Section 508 of the Rehabilitation Act Amendments of 1998**

In 1998, President Bill Clinton signed the Workforce Investment Act.\(^{163}\) This Act amended and strengthened section 508 of the Rehabilitation Act by mandating that all federal agencies make their electronic and information technology accessible to all federal employees, both with and without disabilities.\(^{164}\) The amended section 508 also required that members of the public with disabilities have the same access to information and services from federal agencies as those without disabilities.\(^{165}\) Unlike section 504 of the Rehabilitation Act of 1973,\(^{166}\) section 508 does not apply to all recipients of federal funds and does not directly regulate the private sector.\(^{167}\) More narrowly, it applies in a limited fashion to states receiving federal funds under the Assistive Technology Act of 1998,\(^{168}\) which repealed the Technology Related Assistance for Individuals with Disabilities Act of 1988.\(^{169}\)

Today, the Assistive Technology Act addresses the prevalence of digital access issues and the dearth of resources available at the

\(^{160}\) Id. at 1365.

\(^{161}\) Id. at 1377 (quoting 49 C.F.R. § 37.167(f) (2006)).

\(^{162}\) Id.


\(^{165}\) Id. § 794d(a)(1)(A).


\(^{167}\) 29 U.S.C. § 794d.


state level to address those issues.\textsuperscript{170} It provides financial assistance “to support State efforts to improve the provision of assistive technology to individuals with disabilities through comprehensive statewide programs of technology-related assistance, for individuals with disabilities of all ages.”\textsuperscript{171} Congress clarified the applicability of section 508 to the states when it reauthorized and amended the Assistive Technology Act in 2004.\textsuperscript{172} Now, when a state applies for funding under the Assistive Technology Act, the application must provide assurances that “activities carried out in the State that are authorized under this chapter, and supported by Federal funds received under this chapter, will comply with the standards established” under section 508.\textsuperscript{173}

In addition to agreeing to comply with section 508 when applying for Assistive Technology funds, a state would also be required to comply with section 508 if that state chooses to adopt a section 508-type statute. As of 2006, eighteen states had adopted section 508-type statutes.\textsuperscript{174} However, the level at which states comply with section 508 may vary. While most state statutes benefit all people with disabilities, some may only target those with visual disabilities.\textsuperscript{175} In those states that have adopted section 508-type statutes without limitation, state universities must comply with the requirements of section 508 so that both their own websites and the websites connected to course curriculum are accessible to all students.


\textsuperscript{171} Id.


\textsuperscript{175} See, e.g., COLO. REV. STAT. § 24-85-103 (requiring the maintenance of “nonvisual access standards for information technology systems employed by state agencies”); NEB. REV. STAT. ANN. § 73-205 (requiring that “input and output technology shall be capable of supporting modification and otherwise provide for equivalent access for both visual and nonvisual use”).
Congress has given authority to the Architectural and Transportation Barriers Compliance Board (Access Board) to develop and adopt accessibility standards for the federal government in the area of electronic and information technology. The Access Board is required to consult various individuals and organizations before developing its standards, which would then become part of the federal regulations implementing section 508. The Secretary of Education, the Secretary of Defense, and organizations involved with the electronic and information technology industry, as well as those representing individuals with disabilities, among others, are expected to confer with the Access Board regarding the standards. The Access Board released the final standards on December 21, 2000, and they became effective on February 20, 2001. Addressing more than just websites, the standards cover “the full range of electronic and information technologies in the Federal sector, including those used for communication, duplication, computing, storage, presentation, control, transport and production.”

Section 508 applies to federal agencies when they develop, maintain, procure, or use electronic and information technology. Electronic and information technology “includes, but is not limited to, telecommunications products (such as telephones), information kiosks and transaction machines, World Wide Web sites, multimedia, and office equipment such as copiers and fax machines.” It does not include “any equipment that contains embedded information technology that is used as an integral part of the product, but the principal function of which is not the acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information.”

Making an Internet website accessible requires the creation of a website that can be used by people with a variety of disabilities, such as blindness, deafness, mobility impairments, epilepsy, and

177. Id.
178. See id.
181. 36 C.F.R. § 1194.1.
182. Id. § 1194.4.
183. Id.
colorblindness. One key aspect of an accessible website entails the creation of an information technology system that does not depend only on a single sense or ability. Examples of accessible websites would include websites for which blind individuals can use screen-reader software programs, websites that close caption video segments for deaf individuals, and websites that do not use sudden, flashing images that could irritate those with seizure disorders.

Federal agencies need only make their websites and other information technology accessible to federal employees and members of the public, both with and without disabilities, if doing so would not constitute an “undue burden.” Undue burden is defined in the federal regulations as it is in the ADA and section 504—as a significant difficulty or expense—and all of an agency’s resources must be considered when making an undue burden determination. For example, when faced with a student with a disability’s request that a website be made accessible, a state college’s budget would not be examined to determine if doing so would constitute an undue burden. Rather, the state’s budget as a whole would be considered when making that determination. However, even if compliance with section 508 standards would create an undue burden, a federal agency must still provide its employees with an alternative means to access the information and data. The agency also does not have to alter a product fundamentally in order to make it accessible.

The Access Board’s standards exempt national security systems, intelligence activities, and weapons systems from its accessibility requirements. Also exempted is electronic and information technology acquired by a governmental contractor “incidental to a contract.” For example, if a federal agency contracts with an outside firm to develop the agency’s website, the firm’s own website does not have to comply with the accessibility standards applied to the federal agency. Only if contractors are conducting

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185. Id. (citation omitted).
187. See 36 C.F.R. § 1194.4.
189. 36 C.F.R. § 1194.3(e).
190. Id. § 1194.3(a).
191. Id. § 1194.3(b).
192. See id.
activities such as developing websites or manufacturing products to sell to the federal government must they comply with section 508.\textsuperscript{193}

Section 508’s goal is for the federal government to utilize accessibility features in its mainstream technologies so that the need for specialized accommodations will decline and to make those accommodations that are still needed more efficient.\textsuperscript{194} As the Internet arguably is the most important mainstream technology used today, the application of section 508 to Internet-related products should be straightforward.\textsuperscript{195} Minimally, with the government purchasing approximately 10 percent of information technology sold in a given year, private manufacturers of software and computer equipment have a financial incentive to make their products accessible.\textsuperscript{196}

While section 508 does not apply to private Internet sites, the Access Board’s standards may aid courts in applying the ADA to the Internet. Of note is the use of language in the federal regulations, such as “undue burden,” that is identical to the terminology used in the ADA and ADA regulations, indicating a connection between section 508 and the ADA.

C. Arguments in Favor of Title III of the ADA Applying to the Internet

The arguments both for and against the application of Title III of the ADA to the Internet revolve around several terms found in the Act itself, as well as some that the Act fails to mention. Questions and debate arise when interpreting the breadth of congressional authority to address discrimination faced by people with disabilities. More specifically, differences in opinion emerge when defining and interpreting terms such as “public accommodation” and “places of public accommodation.”\textsuperscript{197}

In enacting the ADA, Congress intended “to provide a clear and comprehensive national mandate for the elimination of discrimination

\textsuperscript{193} Myers, supra note 150, at 294.  
\textsuperscript{194} Bick, supra note 2, at 222.  
\textsuperscript{195} See id.  
\textsuperscript{197} See generally Colin Crawford, Cyberspace: Defining a Right to Internet Access Through Public Accommodation Law, 76 TEMP. L. REV. 225, 228 (2003) (arguing that “public accommodation law is an appropriate legal vehicle to establish a right of Internet access”); Matthew A. Stowe, Note, Interpreting “Place of Public Accommodation” Under Title III of the ADA: A Technical Determination with Potentially Broad Civil Rights Implications, 50 DUKE L.J. 297, 316-29 (2000) (arguing for broad construction of the ADA to apply to non-location-based membership organizations).
against individuals with disabilities,” as well as “clear, strong, consistent enforceable standards” to protect people from disability discrimination. The ADA aimed to “invoke the sweep of congressional authority, including the power to . . . regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.” People with disabilities had regularly experienced discrimination in places of public accommodation. Whether it was restaurants that did not have wheelchair ramps or hotels that did not have TDDs (Telecommunications Device for the Deaf) for their deaf guests, prior to the ADA, public accommodations discriminated against people with disabilities on a daily basis. Title III attempted to change that by prohibiting disability discrimination in places of public accommodation. However, at the time of the ADA’s enactment, the Internet and World Wide Web did not exist as they do today. Therefore, the legislation does not address, nor did the legislators likely contemplate, its applicability to these forms of communication.

What the legislation does clearly enumerate are twelve categories of “public accommodation.” They include restaurants, hotels, shopping centers, private schools, and places of recreation, exhibition, entertainment, or exercise. And, while the categories

199. Id. § 12101(b)(4).
201. Americans with Disabilities Act of 1990 Title III, 42 U.S.C. § 12181(7) (2000). This section states that a private entity provides public accommodations if it affects commerce and falls into one of the following categories:
   (A) an inn, hotel, motel, or other place of lodging . . . .
   (B) a restaurant, bar, or other establishment serving food or drink;
   (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
   (D) an auditorium, convention center, lecture hall, or other place of public gathering;
   (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
   (F) a laundromat, dry cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
   (G) a terminal, depot, or other station used for specified public transportation;
   (H) a museum, library, gallery, or other place of public display or collection;
   (I) a park, zoo, amusement park, or other place of recreation;
themselves are exhaustive, the examples given to illustrate each category are not. The lengthy list of categories indicates Congress’s intent to address disability discrimination in virtually all situations in which the public has contact with a business or entity.

The Internet is used regularly for business, commercial, civic, and social interaction. It enables users to form “virtual communities” that could be considered public places. “If the Internet is a new kind of public space, one can argue that the rights of the disabled should include meaningful Internet accommodation.” This leaves open the possibility, and opens the debate, that the Internet and its websites could fit into one of the twelve categories. Before that can occur, however, the courts or legislature must resolve the issue of what constitutes a place of public accommodation. Those in favor of applying Title III to the Internet argue that the statutory noun “place” is a term of convenience, not a term of limitation (in the sense of referring only to a tangible location), when interpreting an anti-discrimination statute. So, for example, if a place of entertainment could exist without being limited to a physical space, an Internet entertainment website would therefore be included in one of the twelve categories and be covered by the ADA.

In the first web access civil rights lawsuit, the National Federation of the Blind (NFB) filed suit against America Online, Inc. (AOL), the nation’s largest Internet service provider at the time. NFB charged that the software necessary to use AOL did not work with the screen-reader software necessary to translate computer

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

Id.

203. See Bick, supra note 2, at 208.
204. Id. at 214.
205. Id.
signals into Braille or synthesized speech. The complaint also alleged that AOL failed to remove communication barriers, which prevented blind people from using the site in the same manner enjoyed by sighted subscribers, in violation of Title III of the ADA. The parties ultimately settled the case, and the complaint was voluntarily dismissed. Without acknowledging any wrongdoing or admitting that the ADA applied to its services, AOL agreed to undertake “a number of voluntary measures,” including establishing a corporate policy regarding access and consulting with the disability community about accessibility.

In *Hooks v. OKbridge, Inc.*, rather than arguing that he could not access a website, the plaintiff argued that he had been prevented from using the online bridge tournament website because of his disability. Specifically, Hooks argued that OKbridge had terminated his membership because of his disability. The district court granted defendant’s motion for summary judgment on several grounds, including its finding that the website was not a place of public accommodation. The Fifth Circuit affirmed the trial court’s decision, but did not publish its opinion.

The DOJ filed an amicus brief in the *Hooks* appeal to the Fifth Circuit, arguing that the plain language of Title III referred to a place “of” accommodation, not a place “at” or “in” an accommodation. The latter interpretation would severely restrict the ADA’s coverage. In a subsequent case, the DOJ pointed out:

> [R]eading Title III to exclude the Internet, which neither existed nor was considered by Congress when the ADA was enacted, would be analogous to holding that freedom of speech and freedom of the press do not extend to electronic communications over the Internet since such communications were not mentioned in the First Amendment, or that the Fourth Amendment could not apply to the privacy of telephone conversations because telephone wires do not come within the

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207. See Mendolson & Gould, *supra* note 206, at 192.
208. *Id.* at 192-93 (citing Complaint, *supra* note 206)
209. *Id.* at 193
210. *Id.*
212. *Id.*
214. See *Hooks*, 232 F.3d 208 (affirming district court without opinion).
ordinary meaning of the words “persons, papers and effects” used in the Fourth Amendment.216

By enacting the ADA, the DOJ argued, Congress intended to address many areas in which people with disabilities experience discrimination.217 To interpret the ADA as only applying to the types of discrimination that existed when the statute was enacted would be short sighted. Such an interpretation would imply that Congress had no intention of preventing discrimination against people with disabilities in any situation other than those conceivable in 1990.

More than one circuit has refused to construe the scope of the ADA so narrowly. In *Carparts Distribution Center, Inc. v. Automotive Wholesaler’s Ass’n of New England, Inc.*, the First Circuit considered a case in which the plaintiffs claimed disability discrimination in the distribution of health insurance.218 The First Circuit disagreed with the district court’s interpretation of “public accommodation” as “being limited to actual physical structures with definite physical boundaries which a person physically enters for the purpose of utilizing the facilities or obtaining services therein.”219 Looking at the language of the statute, including the illustrative examples of different types of public accommodations, the circuit court concluded that the “plain meaning of the terms do not require ‘public accommodations’ to have physical structures for persons to enter. . . . [The phrase’s potential] ambiguity, considered together with agency regulations and public policy concerns, persuades us that the phrase is not limited to actual physical structures.”220 By listing “travel service” as an example of a service that Congress considered a public accommodation, the circuit court concluded that Congress intended to include service providers where customers do not have to enter a physical structure.221

The circuit court noted that a travel service can conduct business, whether by telephone or by mail, without ever requiring its customers to enter its physical place of business.222 “It would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or mail are not. Congress could not

216. See Mendelssohn & Gould, supra note 206, at 194 (citing Brief of the United States as Amicus Curiae in Support of Appellant, supra note 213).
217. See id. (citing Brief of the United States as Amicus Curiae in Support of Appellant, supra note 213).
218. 37 F.3d 12, 14-15 (1st Cir. 1994).
219. Id. at 18.
220. Id. at 19.
221. Id. at 19-20.
222. Id. at 19.
have intended such an absurd result.”

Noting the absence of any mention of physical boundaries or physical entry in either Title III itself or the implementing regulations, the circuit court pointed out:

Many goods and services are sold over the telephone or by mail with customers never physically entering the premises of a commercial entity to purchase the goods or services. To exclude this broad category of businesses from the reach of Title III and limit the application of Title III to physical structures which persons must enter to obtain goods and services would run afoul of the purposes of the ADA and would severely frustrate Congress’s intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public.

In this case, the court focused on how the ADA would be applied inconsistently depending on whether or not a customer obtained a good or service in person or by some other method. Such inconsistency would be in direct conflict with the ADA’s express purpose of making goods and services as accessible to people with disabilities as they are to any other member of the public.

In *Doe v. Mutual of Omaha Insurance Co.*, the Seventh Circuit also considered whether health insurance policies, which capped coverage for AIDS and AIDS-related complications, violated Title III of the ADA. In dicta, the court cited *Carparts Distribution Center, Inc.*, and noted that the plain meaning of Title III is that the owner or operator of a store, hotel, restaurant, dentist’s office, travel agency, theater, Web site, or other facility (whether in physical space or in electronic space) that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do.

Clearly, the court considered it both reasonable and logical to conclude that Title III should apply to all places of public accommodation, not just those that have a physical space.

In *Rendon v. Valleycrest Productions Ltd.*, plaintiffs with hearing and mobility impairments filed a class action suit alleging that the telephone selection process for the game show *Who Wants to Be a Millionaire* tended to screen out people with certain types of disabilities by not using easily available technology, such as a TDD, in violation of the ADA. The district court granted the defendants’

223. *Id.*
224. *Id.* at 20.
225. *Id.*
226. *Id.*
227. 179 F.3d 557, 558 (7th Cir. 1999).
228. *Id.* at 559 (citing *Carparts Distrib. Ctr., Inc.*, 37 F.3d at 19) (emphasis added).
229. 294 F.3d 1279, 1280-81 (11th Cir. 2002).
motion to dismiss, holding that Title III of the ADA did not apply because the screening process did not occur at a “palpable public accommodation.”\footnote{Id. at 1281.} The Eleventh Circuit overturned the lower court’s decision, concluding that the plaintiffs had stated a valid Title III claim.\footnote{Id. at 1280.} The Eleventh Circuit found nothing in the text of the ADA requiring that discriminatory screening or eligibility requirements take place on-site in order to violate the ADA.\footnote{Id. at 1283-84.} “[O]ff-site screening appears to be the paradigmatic example contemplated in [Title III]’s prohibition . . . . There would be little question that it would violate the ADA for the Defendants to screen potential contestants just outside the studio by refusing otherwise qualified persons because they were deaf or suffered from diabetes or HIV.”\footnote{Id. at 1285 (citing Americans with Disabilities Act of 1990 Title III, 29 U.S.C. § 12182(b)(2)(A)(i) (2000)).}

The Eleventh Circuit did reference those circuits that reached contrary conclusions regarding the meaning of a public accommodation (e.g., requiring a physical place of accommodation).\footnote{Id. at 1284 n.8 (citing Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114-15 (9th Cir. 2000); Ford v. Schering-Plough Corp., 145 F.3d 601, 612-13 (3d Cir. 1998); Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1011-14 (6th Cir. 1997)).} However, the court stated that, at most, those decisions required a nexus between the challenged off-site services or procedures and the public accommodation’s physical premises.\footnote{Id.} So long as a plaintiff can show that a nexus exists, they potentially can also show a Title III violation in the Eleventh Circuit.

In \textit{Pallozzi v. Allstate Life Insurance Co.}, the Second Circuit considered whether a married couple, where both husband and wife suffered from mental disabilities, had been discriminated against when the defendant–insurance company refused to grant them life insurance policies.\footnote{198 F.3d 28, 29, 30-31 (2d Cir. 1999), \textit{amended by} 204 F.3d 392 (2d Cir. 2000).} The Second Circuit found that Title III does regulate insurance underwriting practices, to some extent, and held that “Title III’s mandate that the disabled be accorded ‘full and equal enjoyment of the goods, [and] services . . . of any place of public accommodation,’ suggests to us that the statute was meant to guarantee them more than mere physical access.”\footnote{Id. at 32 (quoting Americans with Disabilities Act Title III, 29 U.S.C. § 12182(a)) (alteration in original).}

Still being considered by the U.S. District Court for the Northern District of California is \textit{National Federation of the Blind v. Target Corp.}, the most recent case to address the applicability of Title
III to the Internet.238 A blind customer, along with the National Federation of the Blind, brought a class action suit against the retail store Target, alleging that Target’s website was inaccessible to blind consumers in violation of the ADA and state law prohibiting discrimination against people with disabilities.239 In a motion to dismiss the complaint for failure to state a claim, Target argued that the ADA and state law only cover access to physical spaces.240 Therefore, Target asserted, the complaint did not state a claim because plaintiffs alleged discrimination in access to Target.com, which is not a physical space, as opposed to brick and mortar Target stores.241 Plaintiffs had stated in their complaint that, by denying them access to Target.com, Target was denying them access to all the goods and services offered by Target stores, which no one can dispute are places of public accommodations.242

Methodically reviewing the relevant case law from multiple circuits, the district court disagreed with Target’s argument that the discrimination must occur at the place of public accommodation.243 Noting the language of the statute itself (services of a public accommodation, not services in a public accommodation), the court stated: “To limit the ADA to discrimination in the provision of services occurring on the premises of a public accommodation would contradict the plain language of [Title III].”244 Target also did not persuade the court to accept its argument that the nexus theory only applies when individuals are denied physical access to places of public accommodation.245 Pointing out that “no court has held that under the nexus theory a plaintiff has a cognizable claim only if the challenged service prevents physical access to a public accommodation,” the court also noted that “it is clear that the purpose of the statute is broader than mere physical access—seeking to bar actions or omissions which

238. See 452 F. Supp. 2d 946 (N.D. Cal. 2006).
239. Id. at 949.
240. Id. at 950; Defendant Target Corp.’s Notice of Motion and Motion to Dismiss Amended Complaint or, in the Alternative, Motion to Strike, Nat’l Fed’n of the Blind, 452 F. Supp. 2d 946 (No. C 06-01802 MHP), 2006 U.S. Dist. Ct. Motions LEXIS 13253, at *21-22 [hereinafter Defendant’s Motion to Dismiss].
244. Id. at 953 (citing Americans with Disabilities Act of 1990 Title III, 42 U.S.C. § 12182(a) (2000)).
245. Id. at 953-55.
impair a disabled person’s ‘full enjoyment’ of services or goods of a covered accommodation.”

The court found unconvincing Target’s attempt to distinguish between services that interfere with an individual’s access to a physical place of public accommodation and those services that the facility offers. Accepting this interpretation, the court noted, “would effectively limit the scope of Title III to the provision of ramps, elevators and other aids that operate to remove physical barriers to entry.” The court denied Target’s motion to dismiss the portion of the plaintiffs’ claim arguing that the inaccessibility of Target.com constituted a denial of full and equal enjoyment of services offered at Target stores. It did, however, dismiss the portion of the plaintiffs’ claim that addressed aspects of Target.com not connected to Target stores.

In a footnote, the court suggested that it might be willing to change its opinion of what might be covered under the ADA after reviewing the website in question, particularly given that Target treats the website as an extension of the store. The court indicated that, if further evidence showed that the store and the website are part of an integrated merchandising effort by Target, a broader application of the ADA (other than only to physical places of public accommodation) to the website might be appropriate.

D. Arguments Against Title III of the ADA Applying to the Internet

As discussed, the primary arguments against applying Title III to the Internet generally focus on either the plain meaning of the statute itself, or a lack of nexus between the provided service and a

246. Id. at 953-54 (citing Americans with Disabilities Act Title III, 29 U.S.C. § 12182(a)).
247. Id. at 954-55.
248. Id. at 955.
249. Id. at 956.
250. Id.
251. Id. at 956 n.4.
252. Id. In a separate motion for class certification, the court amended the wording of the class definition of the nationwide class to be consistent with its previously stated nexus requirement between the use of Target.com and the Target stores. See Nat'l Fed'n of the Blind v. Target Corp., No. C 06-01802 MHP, 2007 U.S. Dist. LEXIS 30513, at *11-12 (N.D. Cal. Apr. 25, 2007). Unmoved by the declarations submitted by the potential members of the class, the court also indicated that in order to succeed as a class action, the plaintiffs would have to submit more compelling declarations regarding use of the website to access the stores. Id. at *15-16. On October 2, 2007, the district court did grant the plaintiffs' motion for class certification. Nat'l Fed'n of the Blind v. Target Corp., No. C 06-1802 MHP, 2007 U.S. Dist. LEXIS 73547 (N.D. Cal. Oct. 2, 2007).
physical place of public accommodation. The Third, Sixth, and Ninth Circuits did not agree with the First Circuit’s analysis in Carparts Distribution Center, Inc. regarding what should constitute a place of public accommodation and, thus, be covered by Title III of the ADA. In three different cases all involving insurance companies, those circuits denied the plaintiffs’ claims for relief. In Parker v. Metropolitan Life Insurance Co., the plaintiff claimed disability discrimination when her employer offered a different long-term disability insurance to cover mental disabilities than the policy offered for other disabilities. The Sixth Circuit held that an insurance company that issued a policy for an employer was not a place of public accommodation, and therefore, the plaintiff could not sue the company for violating Title III when the dispute was with the employer. The Sixth Circuit based its decision on the lack of nexus “between the disparity in benefits and the services that [the insurance company] offers to the public from its insurance office.”

Similarly, in Ford v. Schering-Plough Corp., the Third Circuit examined the plain meaning of Title III and determined that a public accommodation is, by definition, a physical place. In Ford, the plaintiff claimed that she was discriminated against based on her disability because her employer capped benefits for employees with mental disabilities at two years, where no such cap existed for employees with physical disabilities. However, since the plaintiff “received her disability benefits via her employment at Schering, she had no nexus to [the insurance company’s] ‘insurance office’ and thus was not discriminated against in connection with a public accommodation.” In Weyer v. Twentieth Century Fox Film Corp., the Ninth Circuit agreed with the reasoning of the Third and Sixth Circuits and found that the physical places listed as public accommodations in Title III suggested that “some connection between the good or service complained of and an actual physical place is required.”

253. 121 F.3d 1006, 1008 (6th Cir. 1997).
254. Id. at 1010.
255. Id. at 1011 (citing Stoutenborough v. Nat’l Football League, Inc., 59 F.3d 580, 582 (6th Cir. 1995) (noting that the Sixth Circuit has interpreted the terms “place of public accommodation” and “facility” as applicable to physical places, and finding that the service that the plaintiffs complained of—a live telecast of a football game—was not being offered by a public accommodation—the football stadium)).
256. 145 F.3d 601, 612 (3d Cir. 1998).
257. Id. at 603.
258. Id. at 612-13.
259. 198 F.3d 1104, 1114 (9th Cir. 2000).
In the first case in which a court ruled on whether the ADA applies to the Internet, Access Now, a non-profit, access advocacy organization for people with disabilities, along with a blind individual, filed a four-count complaint against Southwest Airlines (Southwest).\footnote{Access Now, Inc. v. Sw. Airlines, Co., 227 F. Supp. 2d 1312, 1314 (S.D. Fla. 2002).} The complaint alleged that Southwest’s website, southwest.com, violated Title III of the ADA by making goods and services that Southwest offers at virtual ticket counters inaccessible to people who are blind.\footnote{Id. Specifically, plaintiffs claimed that Southwest’s website violated the communication barriers removal provision of the ADA, the auxiliary aids and services provision of the ADA, the reasonable modifications provisions of the ADA, and the full and equal enjoyment and participation provisions of the ADA. Id. at 1316.} Plaintiffs based their allegation of discrimination on southwest.com’s failure to accommodate access to customers who use a screen reader, thus preventing those customers from making travel arrangements online.\footnote{Id. at 1316.} In granting Southwest’s motion to dismiss, the court found that the airline’s website was not a place of public accommodation because the “plain and unambiguous language” of the ADA and regulations did not specifically include Internet websites.\footnote{Id. at 1317-18.} Because Congress “created specifically enumerated rights” and intended to set forth “clear, strong, consistent, enforceable standards,” the court determined that, until Congress revised the standards that applied to those rights, it would have to follow the law as written.\footnote{Id. at 1318.} The court stated that, “to fall within the scope of the ADA as presently drafted, a public accommodation must be a physical, concrete structure. To expand the ADA to cover ‘virtual’ spaces would be to create new rights without well-defined standards.”\footnote{Id.} Ultimately, the court concluded that failing to establish a nexus between Southwest’s website and a physical place of public accommodation caused the plaintiffs to fail to state a claim under Title III of the ADA upon which relief could be granted.\footnote{Id. at 1321.}

It can be argued that the text of the ADA does not support an extension of accessibility requirements to the Internet because it does not include websites within Title III’s definition of “places of public accommodation.” Two canons of statutory interpretation dictate that “places of public accommodation” refers exclusively to physical
facilities: noscitur a sociis—a term should be interpreted within the context of the accompanying words, or the term is known by its associates—and ejusdem generis—when general words follow an enumeration of specific words, the general words are to be read as applying only to the same general kind of class as those enumerated. Nowhere in the ADA’s statement of purpose is the Internet or any other intangible place of public accommodation mentioned.

One of the primary purposes of the ADA was to end the segregation and unequal treatment experienced by people with disabilities. Historically separated from mainstream society by both physical barriers and direct discriminatory actions, the ADA provided legal recourse to people with disabilities to address these pervasive problems. However, the Internet was not a part of mainstream life in 1990. The absence of the Internet from the original debate over the ADA “raises serious issues of statutory interpretation” and calls into question the appropriateness of applying the ADA to the Internet. The statement of purpose in the text itself states the ADA is intended “to invoke the sweep of congressional authority . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities.” Read as a whole, “the entire statute implements the statement of purpose concerning public accommodations in purely physical terms. Thus, the purpose should be read to extend ‘comprehensively’ to ‘major areas’ of discrimination found in physical facilities or public accommodations.” The expansive ideas included in the ADA’s legislative history support not applying the ADA to the Internet. “The ADA’s purpose is to address a broad range of situations—but every situation in that broad range envisions a physical facility or place of public accommodation.”


269. See id. § 12101.

270. Maroney, supra note 267, at 199.


272. Maroney, supra note 267, at 200-01.

273. Id. at 201.
The legislature only listed physical structures as examples of places of public accommodation, and failed to list non-physical establishments in existence at the time. By not listing “then existing, non-physical establishments that offer goods and services to the public,” such as over-the-phone operations or mail order businesses, the legislature indicated that “entities not offering their services through physical structures were not contemplated as coming under the purview of Title III.”

Different courts’ interpretations of the applicability of the ADA to the Internet have resulted in inconsistent standards. If Congress actually intended to include the Internet as a public accommodation under the ADA, it should revise the current requirements categorically to include the Internet as a public accommodation. Congress has already, through section 508, required that all federal websites be accessible to people with disabilities. However, even if Congress does legislate that the Internet is a public accommodation, the amount of time and money that would be required to force each and every private website to comply would, most likely, be prohibitive. A more efficient and cost-effective solution would be to develop a program that shows how many people with disabilities use the Internet and how much more money could be made by websites if those websites were accessible to them. For websites that are not sustained by moneymaking concerns, a government subsidy could offset the cost of compliance and encourage more websites to become accessible.


276. Who would develop such a program is an open question. Disability rights advocates would likely be motivated to do so. Marketing consultants or researchers might be interested in doing the same thing strictly for economic reasons—an accessible website could be shown to be more profitable than an inaccessible one.

IV. INSTITUTIONS OF HIGHER EDUCATION MUST PROVIDE REASONABLE ACCOMMODATIONS FOR STUDENTS WITH DISABILITIES TO ACCESS THE INTERNET

A. Students with Disabilities are Covered by the ADA and Section 504 of the Rehabilitation Act, Thereby Obligating Institutions of Higher Education to Provide Them with Reasonable Accommodations to Access the Internet

Unlike the differences of opinion that surround applying the ADA to the Internet, the law is perfectly clear when addressing the obligations of public and private colleges and universities: they are prohibited from excluding students with disabilities from participating in programs and services they provide.278 Once students clear the hurdle of proving that they do have a disability, colleges and universities have the obligation to provide the students with reasonable accommodations.279 This assumes that the accommodations do not fundamentally alter the educational program or service being provided to the students.280 So, the question remains: Exactly what is the obligation of institutions of higher education to ensure that students with disabilities have access to the Internet?

The OCR provides guidance for students with disabilities and academic institutions regarding easing the transition from secondary to post-secondary education.281 Colleges may have to make academic adjustments to accommodate students with disabilities, such as a reduced course load, extra time on examinations, and the provision of auxiliary aids and services.282 Auxiliary aids and services include sign language interpreters, note-takers, “voice recognition and other adaptive software or hardware for computers, and other devices designed to ensure the participation of students with impaired sensory, manual or speaking skills in an institution’s programs and activities.”283 The OCR also lists the basic components of effective communication, which apply in every college course. They include “timeliness of delivery, accuracy of the translation, and provision in a

278. See supra Part I.A.-B.
279. See supra Part I.C.
280. See supra Part I.D.1.
282. See id.
283. Id. (citing 34 C.F.R. § 104.44(d) (2006); 28 C.F.R. § 35.104 (2006)).
manner and medium appropriate to the significance of the message and the abilities of the individual with the disability." 284 These basic components are designed to ensure that students with disabilities receive the same information, and ultimately the same education, as non-disabled students. 285

In addition to communication in general, the OCR stresses the importance of having students become familiar with computers prior to graduating high school. Acknowledging the primary role computers play in college life, the OCR noted that “it is essential that students learn to use computers if they are to be prepared for postsecondary education.” 286 When applying the effective communication test to college library resources, as well as the Internet, when applicable, the OCR stated:

When looking at exactly which of its resources a library is obligated to provide in an accessible medium, the short answer is any resources the library makes available to nondisabled patrons must be made accessible to blind patrons. This includes the library catalogue, the archived microfiche, daily newspapers, and the Internet (if that is a service provided to sighted patrons). 287

Addressing the specific needs of students with disabilities in the context of library study, the OCR mandates that “[a]rticles and materials that are library holdings and are required for course work must be accessible to all students enrolled in that course.” 288 It follows logically that if library holdings that are required for course work must be accessible, so must be websites that are necessary for students to perform required class assignments. However, complications arise when auxiliary aids provided by the college cannot make the website accessible.

Websites with new technology are often incompatible with screen readers or other adaptive software or hardware. This occurs because assistive technology tends to be reactive by design, and therefore frequently one step behind the technology being used

285. See id.
online. Websites with streaming audio may not be captioned. With the courts unable to agree on when a website must be accessible, students with disabilities would not likely succeed in compelling every website they need to use for a course to comply with the ADA by challenging each one in court. That leaves it for the college or university to ensure that the students have access to the necessary websites. This could be easily accomplished, for example, by having someone describe a website to a blind student or having a sign language interpreter interpret uncaptioned video. If utilizing a different website would not fundamentally alter the nature of the course, the instructor could simply assign an alternate website that could be made accessible, either by assistive technology or by some other means. Ultimately, it is the responsibility of the institution of higher learning to ensure that students with disabilities have the same access to websites as their peers.

B. The California State University Accessible Technology Initiative

One institution of higher learning has already begun the process of ensuring that students with and without disabilities have equal access to all of its programs and services, including information technology resources. In 2004, the Chancellor of the California State University system (CSU), the largest university system in the country with 23 different campuses and nearly 450,000 students, issued Executive Order 926 (EO 926). Effective January 1, 2005, EO 926 affirmed that, in accordance with state and federal law, “[t]he policy of the CSU is to make its programs, services, and activities accessible to students, faculty, staff, and the general public who visit or attend a campus-sponsored event, with disabilities.” Additionally, EO 926 explicitly stated that “[i]t is the policy of . . . CSU to make information technology resources and services accessible to all CSU students, faculty, staff, and the general public regardless of disability.” Items such as a professor’s webpage and websites used for class assignments


292. Id. at 2.

293. Id. at 4.
are included in the mandate to make information technology resources and services accessible to everyone.

In order to carry out EO 926 effectively, the CSU system embarked on a multi-phase Accessible Technology Initiative (ATI) to bring all CSU campuses into compliance with section 508. The office of the CSU Chancellor issued a memorandum on “Access to Electronic and Information Technology for Persons with Disabilities,” setting web accessibility as the top priority. Stating that “[c]reating and maintaining accessible websites will be an ongoing institutional responsibility,” the memorandum set forth an eleven step, non-inclusive implementation plan. The steps to implement the plan include developing a process for auditing, monitoring, and remediation of websites, and developing a strategy to ensure that new websites and web content incorporate accessibility in the design and authoring process. Other priorities in the memorandum include making instructional materials accessible and ensuring the accessibility of any electronic and information technology procured by CSU.

Complementary to the ATI is the annual Technology and Persons with Disabilities Conference, developed at California State University, Northridge (CSUN). The Center on Disabilities at CSUN serves more than 750 students with disabilities, offering accommodations ranging from providing a note-taker in class to converting textbooks from print to Braille. Stemming from the center’s outreach efforts, the conference highlights assistive technology and how it can mitigate the barriers faced by people with disabilities. Now in its twenty-second year, the most recently held conference hosted 4,500 attendees from around the world. As more students, educators, and administrators become aware of and involved in such conferences, colleges and universities can learn to better serve their students with disabilities.

CSU exemplifies how institutions of higher learning can work towards making information technology resources accessible to all students, and CSUN’s technology conference offers a wide variety of

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295. Id. at 2.
296. Id.
297. See id.
298. See id. at 3-5.
ways in which colleges and universities can reasonably accommodate students with disabilities without undue burden. The ATI demonstrates how a system-wide change can be implemented to address the accessibility needs of students. It also illustrates how universities can comply with section 508 and the ADA, meeting both accessibility and non-discrimination requirements, without fundamentally altering existing programs. CSU sets an example for other institutions of higher learning of how to respond to the intersection of technology, higher education, and anti-discrimination laws.

V. CONCLUSION

Section 504 of the Rehabilitation Act and Titles II and III of the ADA prohibit colleges and universities from discriminating against individuals with disabilities. Institutions of higher education must make their programs and services accessible to students with disabilities, so long as by doing so they would not fundamentally alter the program or service provided or cause the institution to be unduly burdened. Once students have been identified as having a disability, the college or university must provide them with reasonable accommodations.

Although section 508 of the Rehabilitation Act, as amended in 1998, does not directly apply to private Internet sites, states that have adopted section 508-type statutes must comply with its requirements. Additionally, several factors indicate a connection between the ADA and section 508. The use of ADA terminology and the importance placed by the federal government on ensuring that federal websites are accessible to people with disabilities follows the ADA's general purpose of eliminating discrimination against people with disabilities. Section 508 could be used as a guide if the courts ultimately determine that the ADA does apply to the Internet.

In general, private universities have no section 508 compliance requirement. Conceivably, however, if a state gives money to a private university, the state could make section 508 compliance a condition of receiving the funds. Section 508 does apply to state institutions of higher learning in those states with section 508-type statutes, requiring them to make their websites accessible if it is readily achievable to do so and would not constitute an undue burden. CSU's ATI and CSUN's technology conference demonstrate how a system-wide change can be undertaken to comply with section 508 without imposing an undue burden.
Courts have failed to reach consistent conclusions regarding the applicability of the ADA to the Internet. They continue to disagree over what constitutes a “place” of public accommodation, and whether or not a nexus must exist between an Internet website and a physical public accommodation. To some extent, courts have erected their own barriers to entry, preventing people with disabilities from fully accessing the Internet.

Yet, where the Internet and disability law’s applicability to institutions of higher education intersect, the result should be clear: colleges and universities have an undeniable legal obligation to make their programs and services accessible to students with disabilities. In order to do so, they must make Internet sites that are available through the library, through course instruction, or directly from the institution itself accessible to all students. Just as institutions of higher learning were at the cutting edge of finding ways to use the Internet at the end of the last century, so too should they be at the cutting edge of making the Internet accessible to everyone.