**Summer Reading List[[1]](#footnote-1)**

**Post-Secondary Disability[[2]](#footnote-2)**

**Judicial and Regulatory Year in Review[[3]](#footnote-3)**

1. ***The Digital World: Alternate Media, Web-Site Access, and Adaptive Technology***

*1) Author’s Guild v. HathiTrust*

* 902 F.Supp. 2d. 445 (S.D.N.Y. 2012)
* An eloquent opinion holding that production of alternate media can qualify for the fair use exception to the Copyright Act and protection under the Chafee Amendment.
* Now on appeal to the Second Circuit. (Expect this one to go to the Supreme Court.) AHEAD's Amicus brief to the 2nd Circuit in support of Appellees HathiTrust and National Federation of the Blind posted at: <http://www.ahead.org/uploads/News%20and%20Notes/2013-06-04%20Amicus%20for%20AHEAD%2C%20et%20al%20%28filed%29.pdf>  
    
  + - 1. *2)* United States Department of Education, Office for Civil Rights (OCR) Resolution Letter and Agreement with South Carolina Technical College System
* OCR Compliance Review No. 11-11-6002 (Metro 2013)
* OCR findings letter is posted at: <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/11116002-a.doc>.
* OCR resolution agreement posted at: <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/11116002-b.pdf>.
  + OCR’s most important letter this year and the best letter in a long time on web-site accessibility under Title II of the ADA. Relies heavily on a “method of administration” analysis. Gives some good practical insight into what makes a web-site accessible or not.

3) Settlement between the United States Department of Justice (DOJ) and Louisiana Tech University and University of Louisiana System (2013)

* + DOJ press release posted at:

<http://www.justice.gov/opa/pr/2013/July/13-crt-831.html>

* + - Text of settlement posted at:

<http://www.ada.gov/louisiana-tech.htm>

* + The United States determined that the University’s exclusion of a student who is blind from its course offerings through the use of MyOMLab, “an inaccessible online learning product,” violates Title II of the ADA. The agreement prohibits the University from buying any inaccessible materials, and requires cooperation from faculty in ensuring that students with disabilities get what they need to access course content.
  + The matter also underscores what happens when a student with a disability is left to fend for him/herself in obtaining compliance with Section 504 and Title II. The remedial agreement provisions make clear that colleges and universities must have in place reliable systems to ensure that students who fail to receive necessary accommodations will have their concerns addressed promptly and effectively by the administration of the university.
  + Under the agreement the student/complainant will receive financial damages.

4) Settlement Agreement between Disability Rights Advocates (DRA), the University of California, Berkeley (UCB) and several named Students (2013)

* Fact sheet summary posted at:
* <http://www.dralegal.org/sites/dralegal.org/files/casefiles/factsheet_ucb.pdf>
* Settlement posted at: <http://dralegal.org/sites/dralegal.org/files/casefiles/settlement-ucb.pdf>
* Seven years in the making, a very comprehensive settlement concerning the management and production of alternate media, the availability and array of assistive technology, and the elements of accessible library catalogues and materials. This agreement is also notable for incentives to achieve faculty cooperation and compliance.
* The agreement contains specific timelines for the conversion of various types of materials into alternate media and back up plans for when timelines cannot be met. With proper, timely notice, 90% of textbooks are to be converted in 10 days and 90% of course readers in 17 days. It also encourages and enables students to produce some of their own alternate media. Some exceptions, for example for rare books the University may provide human-readers, are stated.
* This agreement underscores the degree to which multiple elements of a campus must all be meeting their responsibilities to students with disabilities in order to achieve compliance for students with print disabilities. It is an excellent source of best practice examples for making information accessible to students with disabilities.

1. *NAD v. Netflix*

* 869 F.Supp.2d 196 (D. Mass. 2012) or <http://dredf.org/captioning/>; consent decree: <http://dredf.org/captioning/netflix-consent-decree-10-10-12.pdf>
* “A federal district court in Massachusetts has rejected arguments by Netflix that its “Watch Instantly” streaming website is not a “place of public accommodation” under Title III of the Americans with Disabilities Act (“ADA”), and accordingly refused to dismiss the complaint in National Association of the Deaf v. Netflix seeking declaratory and injunctive relief to require closed captioning of videos at the site. The court also determined that the Communications Video Accessibility Act (“CVAA”) and implementing regulations recently adopted by the Federal Communications Commission (“FCC”) were intended to complement, not displace, the ADA, and consequently did not bar NAD’s suit.” http://[www.dwt.com/Federal-Court-Holds-in-ADA-Suit-That-Netflix-Web-Streaming-Can-Be-Place-of-Public-Accommodation-06-27-2012](http://www.dwt.com/Federal-Court-Holds-in-ADA-Suit-That-Netflix-Web-Streaming-Can-Be-Place-of-Public-Accommodation-06-27-2012)

1. *Greater Los Angeles Agency on Deafness (GLAD), et al. v. Time Warner, Inc*.

* No. 12-15807 (9th Cir. 2013) <http://instituteforpublicrepresentation.org/2012/12/06/ipr-files-amicus-brief-in-cnn-com-closed-captioning-case/>
  + - This matter is in litigation in the 9th Circuit. A question before the court is whether the First Amendment relieves the press (CNN) from responsibilities under the 21st Century Communications and Video Accessibility Act of 2010 to caption on-line video news broadcasts?
* Brief of GLADD in the 9th Circuit posted at: <http://instituteforpublicrepresentation.org/wp-content/uploads/2012/12/GLAD-Appellate-Brief.pdf>
* Brief of CNN in the 9th Circuit posted at:

<http://instituteforpublicrepresentation.org/wp-content/uploads/2012/12/CNN-Appellate-Brief.pdf>

1. ***“Necessary” as an Element of Proof in Accommodation/Adjustment Cases***
2. Introduction

* As anticipated following adoption of the ADAAA, more post-secondary cases are getting to the substantive question of whether discrimination has taken place; questions of qualification and accommodation.
* Some defendant institutions are now focusing attention on the question of whether the accommodation denied or inadequately provided was “necessary,” as articulated by the Supreme Court in *PGA v. Martin,* 532 U.S. 661, 121 S.Ct. 1879 (2001) or <http://scholar.google.com/scholar_>

case?case=10351658463927082423&hl=en&as\_sdt=2&as\_vis=1&oi=scholarr

* The question of whether an accommodation is “necessary” has been accepted by several courts as relevant to an inquiry into matters alleging an unlawful denial of an accommodation. Nonetheless, the particularly high standard for proving necessity articulated by the Court in *Martin,* has been distinguished and not applied by the appellate courts.

1. *Argenyi v. Creighton University*

* 703 F.3d 441 (8th Cir. 2013) or <http://media.ca8.uscourts.gov/opndir/13/01/113336P.pdf>
* The most important accommodation decision this year. This matter concerns a medical student (Argenyi) with bilateral cochlear implants who was denied by Creighton University computer-assisted real-time translation (CART) in the clinical and other school settings. The student alleged that this denial violated Section 504 and Title III of the ADA. The district courtgranted summary judgment to the University*.* Relying on *PGA v. Martin*, the district court required Argenyi to demonstrate that the CART was “necessary,” meaning that it was nearly impossible to participate in the clinical program without CART. The district court was also dismissive of Argenyi’s testimony on this point, characterizing it as “self-serving.”
* The Eighth Circuit reversed the district court, holding that its interpretation of “necessary” was too demanding. Rather, “necessary” is a comparative termconcerning what is necessary “for an equal opportunity to gain the same benefit[s]” as non-disabled persons. TheEighth Circuit also stated that the plaintiff’s direct testimony of his own educational experience and the reports of his personal physician were due much greater weight than had been accorded by the district court.
* The Eighth Circuit reversed and remanded the matter back to the district court. On remand, motion decisions to date seem favorable to Argenyi.

<http://journalstar.com/news/state-and-regional/nebraska/judge-limits-creighton-s-arguments-in-deaf-student-s-lawsuit/article_143b9e43-2bba-56d7-b51c-c56874f9153c.html>

* See additional discussion below concerning the *amicus* brief of the United States in this matter concerning accommodation decisions and deference to academic decision-making.

1. *Baughman v. Disney*

* Westlaw: 685 F.3d 1131 (9th Cir. 2012) or <http://www.ca9.uscourts.gov/datastore/opinions/2012/07/25/10-55792.pdf>
* Plaintiff, who had used a scooter in the past at Disneyland, subsequently wanted to use her Segway. The Ninth Circuit reversed a district court decision in favor of Disneyland, concluding that the district court had placed too great a burden of proof on the plaintiff with regard to showing that the proposed accommodation was “necessary.”
* *Quote of the year*: “[If the term “necessary,” is to be] read as Disney suggests, the ADA would require very few accommodations indeed. After all, a paraplegic can enter a courthouse by dragging himself up the front steps…. [A]nd no facility would be required to provide wheelchair-accessible doors or bathrooms, because disabled individuals could be carried in litters or on the backs of their friends.”
  + 1. *See also Ault v. Disney,* 692 F.3d 1212 (11th Cir. 2012) or <http://www.ca11.uscourts.gov/opinions/ops/201112013.pdf>. This case may produce a settlement agreement that will comprehensively address Segway issues at Disney parks.

1. ***Academic Adjustments and Auxiliary Aids (Accommodations)***

*1) DFEH v. LSAC*

* + Not yet decided as to the merits of the claim. 2012 WL 3583023 (N.D.Cal.) 8-20-12; 2012 WL 4119827 (N.D.Cal.) 9-18-12; 2012 WL 5077126 (N.D.Cal.) 10-18-12; 2013 WL 1703383 (N.D.Cal.) 4-19-13; 2013 WL 1739434 (N.D.Cal.) 4-22-13 or <http://www.callawyer.com/clstory.cfm?pubdt=201303&eid=927411&evid=1>
* Does flagging LSAT test scores by the Law School Admission Council, as argued in Section III of the brief of the United States, raise “issues of stigma, privacy, and discrimination against test takers with disabilities that implicate core tenets of the ADA….” because “[f]lagging … necessarily identifies the test taker as a person with a disability [in violation of Title III of] the ADA” [and because flagging perpetuates] “unfounded stereotypes and myths” …. “suggesting that [these test-takers] did not deserve the scores they received”? <http://www.justice.gov/crt/about/app/briefs/lsac2.pdf>

1. *Doe v. Samuel Merritt College*

* 2013 WL 428637 (N.D. Cal. 2013) *See also* <http://www.higheredmorning.com/if-at-first-student-wants-to-keep-taking-exam>
* In a successful motion for a preliminary injunction, a podiatric student raised a “serious question” as to whether “test-taking” is a major life activity in light of the ADAAA and Judge Sotomayer’s opinion in *Bartlett*.
* The duty to provide accommodations may include a duty to modify existing rules on the number of times a student may take a qualifying professional examination (Podiatric Medical Licensing Examination, Level I).
* *Compare Lipton v. NYU School of Dentistry*
* 2013 WL 28292 (2d Cir. 2013) *See also* <http://www.higheredmorning.com/student-fails-exam-four-times-sues-for-more>
* Summary judgment by district court against failing dental student affirmed by the Second Circuit. “We see no error in the district court's conclusion that Lipton's proposed accommodations-which simply request more opportunities to pass the NBDEP2 after having failed it four times - bears a tenuous relationship to his reading disability. Moreover, NYUCD's refusal to create such an exception to its graduation requirements is entitled to great deference.”

1. *Alexander v. New York University, Buffalo*

* 2013 WL 750133 (W.D.N.Y. 2013)

Nursing student with hearing impairment alleged that she withdrew from NYU because the University failed to provide her with reasonable accommodations.

The University’s motion for summary judgment was denied. A university can’t limit its accommodation duties to deaf students based on what its deaf services contractor does or does not provide.

This decision also contains a good discussion of sovereign immunity and application of the “deliberate indifference” standard. Delay in providing agreed upon, necessary accommodations can lead to a finding of deliberate indifference and consequently potential monetary liability.

4)  *Stebbins v. University of Arkansas*

* 2012 WL 6737743 (W.D.Ark.) or

<http://www.nacua.org/documents/Stebbins_v_UArkansas.pdf>

* The most important decision this year concerning discipline of students with emotional disabilities.
* The duty to accommodate students with disabilities does not include supporting a student with “intermittent explosive disorder” by not taking him seriously when he is “tactless” with faculty.
* Following an explicit step-by-step analysis of the student’s repeated, offensive misconduct incidents under the “direct threat” paradigm, the court concluded he should not be accommodated by readmission as he was not otherwise qualified.

5) *DOJ settlement with Lesley University*

* Settlement posted at: <http://www.ada.gov/lesley_university_sa.htm>
* Question and answer guidance posted at: [www.ada.gov/q&a\_lesley\_university.htm](http://www.ada.gov/q&a_lesley_university.htm)
* At a university with a mandatory meal plan, DOJ required extensive modification of food service provisions for students with dietary disabilities including individuals with Celiac Disease. Many best practices may be found in this agreement.
* This same level of accommodation may not be required in voluntary dining plans but some forms of accommodation will still be owed. **“**A restaurant may have to take some reasonable steps to accommodate individuals with disabilities where it does not result in a fundamental alteration of that restaurant's operations. By way of example only, this may include: 1) answering questions from diners about menu item ingredients, where the ingredients are known, or 2) omitting or substituting certain ingredients upon request if the restaurant normally does this for other customers.” *DOJ Lesley Q & A.*

6) OCR Dear Colleague Letter (DCL) of January 25, 2013 concerning equal athletic opportunity for students with disabilities

* www2.ed.gov/about/offices/list/**ocr**/**letters**/**colleague**-201301-504.pdf
* Though primarily focused on elementary and secondary education, this DCL makes clear that the duty to provide reasonable modification to rules, when not a fundamental alteration, applies to club, intramural, and interscholastic athletics at all levels of education in order for students with disabilities to have an equal opportunity to enjoy the social, leadership and fitness benefits of such programs.
* This letter provides good examples of what are and are not fundamental alterations in athletics.
* OCR encourages but does not require separate programs for students with disabilities who, even with reasonable accommodation, cannot qualify for other teams. If well-implemented, this OCR policy initiative will ultimately create a population of high school students with disabilities who expect to participate athletic programs in college.
* This letter also provides important guidance on athletic organizations that receive “significant assistance” from federal recipients.

*7) See also* OCR Dear Colleague Letter of June 25, 2013 concerning Title IX responsibilities to students who are pregnant

* Dear Colleague letter posted at: www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.html
* Accompany explanatory pamphlet, ***Supporting the Academic Success of Pregnant and Parenting Students Under Title IX***, posted at: <http://www2.ed.gov/about/offices/list/ocr/docs/pregnancy.pdf>
* “Schools must treat pregnant students in the same way that they treat similarly situated students. Thus, any special services provided to students who have temporary medical conditions must also be provided to pregnant students. Likewise, a student who is pregnant or has given birth may not be required to submit medical certification for school participation unless such certification is also required for all other students with physical or emotional conditions requiring the attention of a physician.” [Prediction: disabled student services programs will become responsible for modifications of rules for students who are pregnant.]

1. **Academic Deference**
2. *Argenyi v. Creighton University*

* 703 F.3d 441 (8th Cir. 2013) or <http://www.ca11.uscourts.gov/opinions/ops/201112013.pdf>
  + With regard to the term “necessary” this case is discussed above. A separate but potentially important issue in *Argenyi* is the statement in the *amicus* brief of DOJ that, the decision to grant or not grant CART to Argenyi is not a matter appropriate for traditional academic deference by the court. “Truly ‘academic’ decisions certainly warrant appropriate judicial deference. The district court erred, however, in deferring to Creighton’s prohibition against using interpreters in clinics is an ‘academic’ decision. …. In this case, whether the requested auxiliary aid or service is necessary to ensure that Argenyi can communicate effectively and is not treated differently than others because of the absence of auxiliary aids and services is not an academic decision.” <http://www.justice.gov/crt/about/app/briefs/argenyibrief.pdf>
* *Compare,* the position of DOJ on academic deference in its brief in *Argenyi (above)* to the language found in a Ninth Circuit *dissenting opinion* in *Emeldi v. University of Oregon* (9th Cir. 2012).
* This case involved a Ph.D. student who alleged that her dissertation advisor resigned as her advisor in retaliation for a discrimination complaint that she made under Title IX. The student was then unable to find any other professor to serve as her dissertation advisor and ended up withdrawing from the program. These facts, taken as true, according to a Ninth Circuit panel, stated a claim of retaliation sufficient to survive a motion for summary judgment by the University. [*See 2012 Summer Reading List*.] In his dissent from a refusal to reconsider this decision *en banc*, Chief Justice Kozinski writes, “[T]he laxest interpretations of the pleading standard is now planted squarely in academia, just where the pleading standard should be highest. If this ill-considered precedent stands, professors will have to think twice before giving honest evaluations of their students for fear that disgruntled students may haul them into court. This is a loss for professors and students and for society, which depends on their creative ferment.” <http://www.ca9.uscourts.gov/datastore/opinions/2012/10/17/10-35551.pdf>
* *Compare, Lipton v. NYU School of Dentistry*
* 2013 WL 28292 (2d Cir. 2013)
* Summary judgment by district court against failing dental student affirmed by the Second Circuit. NYUCD's refusal to create such an exception to its graduation requirements is entitled to great deference.

**V. Jurisdiction**

* + 1. *United States v. University of Nebraska at Kearney* (UNK)
* 2013 WL 2146049 (D. NE 2013)
* Student housing at UNK, including dormitories and one-bedroom apartments for older students, is a “dwelling” and is thus subject to the requirements of the Federal Housing Act. The argument by UNK that student housing is more like a prison than a residence is not persuasive. [Albeit, UNK students might find the analogy legitimate.]
* As a consequence of this determination, UNK is subject to HUD guidance on service animals, pets, assistance and comfort animals. [Prediction: the DOJ service animal regulations, though limited to dogs (and miniature horses) has not killed off the comfort bunny.]  
  + 1. *Archut v. Ross University*
* 2012 WL 5867148 (D.N.J.) or [http://scholar.google.com/scholar\_case?case=5521900363358881022 HYPERLINK](http://scholar.google.com/scholar_case?case=5521900363358881022&hl=en&as_sdt=2&as_vis=1&oi=scholarr)
* The requirements of Section 504 and Title II of the ADA do not apply to the overseas programs of federal recipients of financial assistance. However, all decisions made within the United States, for such programs, are subject to Section 504.
* This decision contains a comprehensive overview of cases concerning the extraterritoriality and Section 504.

1. Other Important Civil Rights Decisions
   * 1. *K.M. v. Tustin Unified School District and D.H. v. Poway Unified School District*
   * \_\_F.3d\_\_ (9th Cir. 2013); WL 3988677 or [http://scholar.google.com/scholar\_case?case= 10597121334101747761&hl=en&as\_sdt=2&as\_vis=1&oi=scholarr](http://scholar.google.com/scholar_case?case=%2010597121334101747761&hl=en&as_sdt=2&as_vis=1&oi=scholarr)

* This is a very important elementary and secondary education decision in which the Ninth Circuit has ruled that, for elementary and secondary students with hearing impairments, the FAPE (free appropriate public education) provisions of the IDEA and Section 504 are not coextensive with the “equal communication” provision of the regulations implementing Title II of the ADA at 28 C.F.R. § 35.160. Thus, students with sensory impairments may be entitled to a higher level of accommodation than provided under the IDEA or the FAPE provisions of the Section 504 regulations. 34 C.F.R. §§ 104.33-.36. [Predictions: 1) This decision may enable students with hearing and visual impairments to arrive at college more familiar with adaptive technology and more aware of which auxiliary aids suit them best. 2) Expect creative advocates to seek expansion of the types of disabilities classified as “sensory impairments.”]
* Hard-of-hearing high school students argued that they were entitled to CART services under the IDEA, Section 504, and Title II of the ADA. These services were denied by their school districts on the grounds that they were not required in order for these students to receive a FAPE under the IDEA or Section 504. Their Title II-based requests were not considered by their districts on the assumption that compliance with FAPE “foreclosed” consideration under any other standard or authority. The district court granted summary judgment to the school districts under the FAPE standard, holding that the FAPE determinations were preclusive.

* On appeal, the students did not contest the FAPE-based determinations. Rather, with strong support from DOJ, they continued to contend that they were owed these services under Title II of the ADA.
* The Ninth Circuit reversed the decision of the district court and remanded the matter in order to take further evidence, holding that “in some situations, but not others, schools may be required under the ADA to provide services to deaf or hard-of-hearing students that are different than the services required by the IDEA.” The Ninth Circuit explained, “As should be apparent, the IDEA and Title II differ in both ends and means. Substantively, the IDEA sets only a floor of access to education for children with communications disabilities, but requires school districts to provide the individualized services necessary to get a child to that floor, regardless of the costs, administrative burdens, or program alterations required. Title II and its implementing regulations, taken together, require public entities to take steps towards making existing services not just accessible, but *equally* accessible to people with communication disabilities, but only insofar as doing so does not pose an undue burden or require a fundamental alteration of their programs.”

1. *Fisher v. University of Texas at Austin*

* \_\_ U.S. \_\_, 133 S.Ct. 2411(2013) or <http://www.supremecourt.gov/opinions/12pdf/11-345_l5gm.pdf>
* A court reviewing a post-secondary affirmative action admissions plan, must verify that it is necessary for the university to use race to achieve the educational benefits of diversity; this will necessarily involve careful inquiry into whether university could achieve sufficient diversity without using racial classifications.

3) [*University of Texas Southwestern Medical Center v. Nassar*](http://www.scotusblog.com/case-files/cases/university-of-texas-southwestern-medical-center-v-nassar/)

* *\_\_U.S.\_\_, 133 S.Ct. 2517 or* [*http://www2.bloomberglaw.com/public/desktop /document/University\_of\_Texas\_Southwestern\_Medical\_Center\_v\_Nassar\_No\_12484/1*](http://www2.bloomberglaw.com/public/desktop%20/document/University_of_Texas_Southwestern_Medical_Center_v_Nassar_No_12484/1) *See also* <http://www.scotusblog.com/2013/06/court-rules-for-employers-in-two-employment-discrimination-cases/>
* To establish employment discrimination under Title VII, it is sufficient for an employee/plaintiff to show that the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives that contributed to the employer's decision. The Court holds retaliation claims to a stricter, “but for” standard of proof. This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action of the employer.

1. *Vance v. Ball State* University

* \_\_\_U.S.\_\_\_, 133 S.Ct. 2434 (2013) or <http://www.supremecourt.gov/opinions/12pdf/11-556_11o2.pdf>

*See also* <http://www.scotusblog.com/2013/06/court-rules-for-employers-in-two-employment-discrimination-cases/>

* Under Title VII, discrimination or retaliation by a “supervisor” may be automatically attributed to an employer. However, not every individual with the title of supervisor counts for this purpose. For purposes of “vicarious liability” under Title VII, an individual is a supervisor only if he or she is empowered by the employer to take “tangible employment actions” against the victim (like hiring, firing, etc.). Under Title VII, the actions of someone who “merely” directs the day-to-day activities of a worker are not automatically attributable to the employer.

1. Prepared by Paul D. Grossman, J.D.: retired, Chief Regional Attorney, U.S. E.D., Office for Civil Rights (OCR), San Francisco; recurring Adjunct Professor of Disability Law, Hastings College of Law, University of California; member, AHEAD Board of Directors; and, member, CHADD, Public Policy Committee.

   Many thanks to Jo Anne Simon, P.C., Adjunct Associate Professor, Fordham Univ. School of Law; Ruth Colker, Distinguished Professor of Law, The Ohio State University; and Alan Konig, J.D., Regional Attorney, OCR, San Francisco who contributed to the identification of important cases for this list. [↑](#footnote-ref-1)
2. These materials are provided for informational purposes only and are not to be construed as legal advice. You should seek counsel to resolve the individualized legal issues that you are responsible for addressing. Further, any policy or procedure additions or revisions should be reviewed by your college’s legal counsel prior to implementation.  
    [↑](#footnote-ref-2)
3. Publication pending: Ruth Colker & Paul Grossman, The Law of Disability Discrimination, 8th Edition(Lexis Publishing 2013), comprehensively and authoritatively taking into account the greatest changes in disability law in twenty years. This textbook, accompanying Teachers’ Manual, and separate handbook containing collected Statute and Regulatory Guidance should be available by October 2013. Also pending, Beyond the ADA, Inclusive Policy and Practice for Students with Disabilities in Higher Education, Chapter 1 (NASPA, March 2014). [↑](#footnote-ref-3)