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Supporters and Advocates in Disability Accommodations Meetings: Using Title IX as a Framework

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SUPPORTERS AND ADVOCATES IN DISABILITY ACCOMMODATIONS MEETINGS: USING TITLE IX AS A FRAMEWORK

BY MARISSA DITKOWSKY*

Content Warning: This piece contains some discussion of sexual assault and violence.

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INTRODUCTION

Imagine the following. You are new to your university. You have never attended a university on your own before. You have a disability that requires several accommodations, perhaps in your classes, living space, or other aspects of student life. Up until this point, your primary advocate at Individualized Education Program (IEP) meetings was your parent.¹ You were permitted to attend those meetings, but you did not quite understand everything that was happening. Now, you are learning the ins and outs of a

1. An Individualized Education Program is “a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 1414(d) of [the Individuals with Disabilities Education Act].” 20 U.S.C. § 1401(14) (2020). Meetings take place with members of your IEP team to develop and amend your IEP. These meetings may include parents; the student, whenever appropriate; advocates; teachers; and others. 20 U.S.C. § 1414(d)(1)(B)(i), (vi)-(vii) (2020). In accordance with 34 C.F.R. §300.321(b)(1), if the meeting involves a discussion of the student’s transition, the student must be invited to attend.

whole new university. You must meet with an office that wants to discuss some of your accommodations with you. Perhaps this office has some concerns about some of the accommodations that you, and likely a doctor, who has written an extensive note already, have painstakingly documented evidence for and requested. You have never met with this office. You ask the office if a parent, or someone, is allowed to attend with you. The university says no. Alternatively, the university says that only individuals from within the university community are allowed to attend. However, you do not know anyone well enough yet, and the university does not have disability advocates you can talk to separate from the accommodations office. What do you do?

This scenario was, of course, a fictional example, but it happens often. Up until May 2019, I was a disabled law student. While advocating both on behalf of and alongside other students with disabilities at my university and across the country, a common concern arose: students who wished to be accompanied by a third party in accommodations meetings were not permitted to do so. In some circumstances, universities would permit other individuals to attend the meetings, but restrict those individuals to members of the university community. Students could not invite family members, friends, or trained or legal advocates outside of the community, severely limiting the pool of individuals that students were permitted to bring into meetings. Particularly for new or incoming students most in need of help at a school that does not have an established, independent office of advocates to assist students with requesting accommodations, that is a challenge. Even for a student who is not new to a university, a student who develops a disability, or whose disability progresses or changes while attending a university, might be new to requesting accommodations entirely, and might still be in need of assistance from an advocate or third party.

Navigating higher education spaces as a student with disabilities, particularly in one's first dealings with a particular university, can be complicated. Even as a graduate or law student, the process can be daunting and intimidating. The university has far more resources and experience than any one student requesting accommodations, leading to a power imbalance in any one-on-one meeting.

It is unlikely that the law *per se* requires accompaniment or advocacy in most cases, particularly when it is not required as an accommodation in the meetings themselves or if the student does not have a legal guardian that must make educational decisions. However, without such services, it is possible that universities might ultimately deprive students of reasonable accommodations that they are required to provide students in the academic setting under the Americans with Disabilities Act (ADA) or Rehabilitation

Act due to the unbalanced power dynamic. In the alternative, even if schools do meet the aforementioned legal requirements, universities might be less willing to, or may not be presented with information for how to, move beyond the legal minimum for providing accommodations. That might occur even if doing so would be simple, negotiable, or workable—affordable, if not free—and have the potential to benefit more than just the student requesting the accommodation.

Further complicating the matter, universities have begun to allow Title IX accompaniment and advocacy in meetings with the university because of legal requirements, changing priorities, and evolving concerns regarding liability. Although, overall, these changes in permitting advisors in Title IX meetings have been positive, this discrepancy between what universities permit in Title IX meetings and ADA accommodations meetings does not make much logical sense. This disparity in how many universities treat students with disabilities and students pursuing Title IX complaints not only harms students with disabilities, but it also harms survivors who might, following Title IX grievances, require accommodations for disabilities that progress or develop as a result of assault. Students who already have disabilities might also require different or additional accommodations following their assault. Never mind the fact that people with disabilities are more likely to experience sexual assault or violence.² People with multiple disabilities, or those who might require multiple types of accommodations, are at an even higher risk.³ The intersection between sexual violence and disability is inextricable—to disconnect these processes is disingenuous to the realities of survivors.

Part I of this piece will address the differences between legal requirements and liabilities under Title IX, the Americans with Disabilities Act, and the Rehabilitation Act. Part II will discuss why schools should permit students with disabilities to be accompanied by advocates, observers, or supporters in meetings pertaining to accommodations based upon universities' acceptance of the practice for Title IX cases.

I. BACKGROUND

A. *Application of the Rehabilitation Act to Higher Education*

Section 504 of the Rehabilitation Act prohibits *any* programs or activities that receive federal financial assistance from discriminating against an

2. U.S. DEP'T OF JUSTICE, CRIME AGAINST PERSONS WITH DISABILITIES, 2009-2015 - STATISTICAL TABLES 4 (2017), <https://www.bjs.gov/content/pub/pdf/capd0915st.pdf>.

3. *Id.* at 5.

otherwise qualified individual with a disability.⁴ Many private and public higher education institutions receive a significant amount of federal funding in numerous forms, including grants.⁵ Those public and private institutions of higher education that receive federal funding are subject to the requirements of Section 504 of the Rehabilitation Act.⁶ Additionally, the Act itself and the regulations that implement Section 504 in the educational context include colleges, universities, other postsecondary institutions, or public systems of higher education in its definition of a “program or activity.”⁷

In the educational, as opposed to employment or vocational, context, the law defines an individual with a disability as someone with “a physical or mental impairment that substantially limits one or more major life activities of such individual”; “a record of such an impairment”; or “being regarded as having such an impairment,” as defined in the Americans with Disabilities Act.⁸ Of course, that definition has changed over time with the passage of amendments to the Americans with Disabilities Act and amendments to the Rehabilitation Act itself. That said, what constitutes a disability under the Rehabilitation Act under current law is essentially in line with what constitutes a disability under the Americans with Disabilities Act, and it will be addressed in the next section as a concurrent history. The history, drafting, and purposes of these statutes have led to their inextricable intertwinement.

In postsecondary education, discrimination could occur in the admissions process, punishment proceedings, failing to integrate in social and other activities, not providing adequate housing, in the higher education financial aid application process, course selection, and even access to the university website. Discrimination could also occur as a result of not providing reasonable accommodations that would otherwise allow a student to participate or perform in courses. The Department of Education promulgated guidelines for Section 504 that dictate how students with disabilities in

4. 29 U.S.C. § 794 (2019) (stating “[n]o otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service”).

5. Kellie Woodhouse, *Impact of Pell Surge*, INSIDE HIGHER ED (June 12, 2015), <https://www.insidehighered.com/news/2015/06/12/study-us-higher-education-receives-more-federal-state-governments>.

6. See 29 U.S.C. § 794.

7. 29 U.S.C. § 794 (b)(2)(A); 34 C.F.R. § 104.3(k)(2)(i) (2020).

8. 29 U.S.C. § 705(20)(B) (2020); see also 42 U.S.C. § 12102 (2019).

postsecondary institutions must be treated; these guidelines include requirements for admissions; mandates for housing; and parameters for nonacademic services, such as counseling, placement services, and social organizations.⁹

There are also specific regulations providing basic guidelines for the types of modifications universities and postsecondary institutions must make in academic settings to comply with the law.¹⁰ Modifications may include, but are not limited to, “changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.”¹¹ Universities “[m]ay not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient’s education program or activity.”¹² Additionally,

In its course examinations or other procedures for evaluating students’ academic achievement, a recipient to which this subpart applies shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represents the student’s achievement in the course, rather than reflecting the student’s impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure).¹³

Finally, the regulations make reference to the use of auxiliary aids, should a student so require, including “taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions.”¹⁴ Of course, these regulations do not include all of the reasonable accommodations available or potentially required by law, nor do they detail all of the ways in which a university might discriminate against an otherwise qualified person with a disability. The law, and case law, is the authority in that regard, but reasonableness is an extremely case-specific inquiry.

Universities need not adopt accommodations that create “undue financial

9. 34 C.F.R. §§ 104.42-104.43, 104.45, 104.47 (2020).

10. 34 C.F.R. § 104.44 (2020).

11. *Id.* § 104.44(a).

12. *Id.* § 104.44(b).

13. *Id.* § 104.44(c).

14. *Id.* § 104.44(d)(2).

or administrative burdens,”¹⁵ or that require them to make a “fundamental alteration” to the “nature of a program.”¹⁶ Addressing whether universities must pay for these accommodations, the Eleventh Circuit held that universities may require students to seek state vocational rehabilitation funding first.¹⁷ However, if the student is not eligible, or if those funds are otherwise unavailable, the school must provide those services, unless it is an undue burden.¹⁸

B. Application of the Americans with Disabilities Act to Higher Education

The Americans with Disabilities Act (ADA) is a major piece of civil rights legislation that, for the first time, prohibited private entities not receiving federal funds from discriminating against people with disabilities in employment, public services, and public accommodations.¹⁹ Of course, as previously established, many private universities do receive federal funding. However, even those that do not are beholden to the requirements of the Americans with Disabilities Act, unless it is an exempt institution, or not otherwise covered.²⁰

1. Covered Institutions

Title III of the ADA prohibits private entities from engaging in discrimination in public accommodations and services, stating, “No 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.”²¹ Title III applies to twelve categories of private providers of public accommodations, which includes private, non-religious²²

15. *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 412 (1979).

16. *Id.* at 410.

17. *United States v. Bd. of Trs. for Univ. of Ala.*, 908 F.2d 740, 745, 749 (11th Cir. 1990) (holding the Department of Health, Education and Welfare’s regulation was a valid interpretation of Section 504).

18. *Id.* at 745, 748-49.

19. 42 U.S.C. § 12112 (2020) *et seq.*

20. *See* 42 U.S.C. § 12187 (2020).

21. 42 U.S.C. § 12182(a) (2020) (requiring an opportunity to participate, equal benefits, the use of the most integrated setting, and accessible construction; prohibiting the denial of participation, discrimination in administrative procedures, discrimination in association, fixed route systems, or separate benefits for other classes).

22. 42 U.S.C. § 12187 (exempting “religious organizations or entities controlled by

educational programs.²³ Although religious institutions might be exempt under Title III of the ADA, if federally funded, Section 504 compliance is still required.²⁴

Title II of the ADA prohibits discrimination by public services or entities, stating, “[N]o 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.”²⁵ Public, or state-run, institutions of higher education are covered under Title II.²⁶ Any institution covered under Title II is, by definition, not a private entity.²⁷

One potential complication under Title II in the post-secondary educational context is Eleventh Amendment immunity. The Eleventh Amendment, in general, bars claims against states unless “Congress has validly abrogated the immunity pursuant to section five of the Fourteenth Amendment; if the state has clearly waived its immunity; or if the plaintiff is suing state officials for prospective relief for an ongoing federal constitutional or statutory violation.”²⁸ The Fourteenth Amendment asserts

religious organizations, including places of worship”); *see also* *White v. Denver Seminary*, 157 F. Supp. 2d 1171, 1174 (D. Colo. 2001) (holding Denver Seminary was exempt from Title III of the ADA because it “provides a graduate education founded on and steeped in Biblical teachings . . .,” “it teaches “historic, evangelical faith . . .,” “[i]t was founded by the Conservative Baptist Association of Colorado, . . . a majority of its Board of Trustees must be members of the Conservative Baptist Association[, and it] employs only individuals who ‘(a) profess a personal belief in Jesus Christ as a personal Savior; (b) subscribe to a statement of faith . . . and (c) are active members of a local Christian Church.’”). *But see* *Doe v. Abington Friends Sch.*, 480 F.3d 252, 258-59 (3d Cir. 2007) (denying summary judgment where plaintiffs had not yet had the opportunity to receive helpful discovery to aid their argument that a Quaker school was not exempt as a religious organization under Title III, although the school, being “[o]ne of the oldest primary and secondary schools in the country, long known for its Quaker heritage, superficially seems to be a strong candidate”).

23. 42 U.S.C. § 12181(7)(J) (2020).

24. *See* 29 U.S.C. § 794 (2020).

25. 42 U.S.C. § 12132 (2020).

26. *See* 42 U.S.C. § 12131 (2020) (defining “public entity” as “any State or local government” or “any department, agency, special purpose district, or other instrumentality of a State or States or local government”); *see, e.g.*, *Coleman v. Zatechka*, 824 F. Supp. 1360, 1367-68 (D. Neb. 1993) (holding the University of Nebraska was a “public entity” within the meaning of the ADA).

27. *See* 42 U.S.C. § 12181(6) (defining “private entity” as “any entity other than a public entity (as defined in section 12131 (1) of this title)”).

28. *Doe v. Bd. of Trs. of the Univ. of Ill.*, 429 F. Supp. 2d 930, 937 (N.D. Ill. 2006) (citing *Sonnleitner v. York*, 304 F.3d 704, 717 (7th Cir. 2002)); *see* U.S. CONST. amend.

that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”²⁹ Although the Americans with Disabilities Act contains a provision waiving sovereign immunity,³⁰ there has been much debate about the circumstances under which Congress may validly abrogate such immunity, particularly in the context of higher education. In holding that Title II validly abrogated Eleventh Amendment immunity in the context of access to courts, the Supreme Court considered the “constitutional right or rights that Congress sought to enforce when it enacted Title II,” whether a record of discrimination demonstrated that “inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation,” and “whether Title II is an appropriate response to this history and pattern of unequal treatment.”³¹ The Court was careful to note that “Section 5 legislation is valid if it exhibits ‘a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.’”³²

Circuits have reached varying conclusions about whether Congress has validly exercised its authority in abrogating state Eleventh Amendment immunity as applied to post-secondary institutions.³³ Much of the

XI.

29. U.S. CONST. amend. XIV, § 1.

30. 42 U.S.C. § 12202 (2020).

31. *Tennessee v. Lane*, 541 U.S. 509, 522, 529–30 (2004).

32. *Id.* at 518 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).

33. *See, e.g., Bowers v. NCAA*, 475 F.3d 524, 555-56 (3d Cir. 2007) (holding Congress exercised valid authority in abrogating state immunity in the educational context); *Toledo v. Sanchez*, 454 F.3d 24, 40 (1st Cir. 2006) (finding Congress validly abrogated state sovereign immunity); *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 487-90 (4th Cir. 2005) (finding Congress validly waived sovereign immunity in the context of post-secondary education given the history of discrimination and proportionality of remedial measures); *Ass’n for Disabled Ams., Inc. v. Fla. Int’l Univ.*, 405 F.3d 954, 959 (11th Cir. 2005) (finding Congress validly exercised its powers in the context of higher education); *Robinson v. Univ. of Akron Sch. of Law*, 307 F.3d 409, 411–13 (6th Cir. 2002) (finding no due process reasoning behind plaintiff’s claim, thus dismissing the claim, since abrogation for equal protection claims under ADA Title II is not a valid exercise of Congressional power); *Bd. of Trs. of the Univ. of Ill.*, 429 F. Supp. 2d at 939 (holding the burdens Title II places on public universities is disproportionate to the burden imposed, particularly given education is not a fundamental right); *Press v. State Univ. of N.Y.*, 388 F. Supp. 2d 127, 135 (E.D.N.Y. 2005) (holding that it was unwilling to “expand the scope of Title II and encroach on the state’s immunity with respect to a non-fundamental right such as access to post-

disagreement pertains to the fact that education is not considered a fundamental right, as well as the perceived burden Title II places on public universities. For example, in *Doe*, the Northern District of Illinois cites the fact that the Supreme Court held that education is not a fundamental right, as well as the fact that

[t]hese entities must provide reasonable accommodations for recipients of services with disabilities, . . . ensure their existing facilities, when viewed in their entirety, are accessible to people with disabilities, . . . and ensure that any new or renovated facilities are accessible to people with disabilities There are exceptions to Title II's mandates: public entities need not make fundamental alterations to their programs, . . . or incur undue financial burdens in ensuring that their facilities are accessible to people with disabilities There is no question, however, that these requirements, along with the threat of monetary damages if the entities fail to meet them, impose a significant burden on the states.³⁴

On the other hand, in *Association for Disabled Americans*, the Eleventh Circuit wrote, “[t]he Supreme Court long has recognized that even when discrimination in education does not abridge a fundamental right, the gravity of the harm is vast and far reaching.”³⁵ Further, the Eleventh Circuit reasons,

Title II's prophylactic remedy acts to detect and prevent discrimination against disabled students that could otherwise go undiscovered and unremedied. By prohibiting insubstantial reasons for denying accommodation to the disabled, Title II prevents invidious discrimination and unconstitutional treatment in the actions of state officials exercising discretionary powers over disabled students Furthermore, Title II requires only “reasonable modifications that would not fundamentally alter the nature of the service provided.”³⁶

That said, the Title II issue is currently unsettled and not uniform. Certainly, some states might also have explicitly waived the right to be sued depending upon the language within their own civil rights statutes, which might contain similar protections to the ADA.³⁷

Public institutions may also receive federal funds; therefore, they would

secondary education that is subject only to rational review”); *Johnson v. S. Conn. State Univ.*, No. 3:02-CV-2065, 2004 U.S. Dist. LEXIS 21084, at *4 (D. Conn. Sept. 30, 2004) (dismissing a Title II lawsuit, finding the state was immune because education is not a fundamental right).

34. *Doe v. Bd. of Trs. of the Univ. of Ill.*, 429 F. Supp. 2d 930, 939 (N.D. Ill. 2006).

35. *Ass'n for Disabled Ams.*, 405 F.3d at 957–58.

36. *Id.* at 959 (quoting *Lane*, 541 U.S. at 532).

37. *See Bd. of Trs. of the Univ. of Ill.*, 429 F. Supp. 2d at 939–40 (holding Illinois had not waived its right to be sued in the context of public education since its civil rights statutes waiving immunity only referred to employment).

be restricted under Section 504. However, Title II protections are extended regardless of whether public services receive federal funds. Section 504 does not come with the same Eleventh Amendment challenges, notably because Congress passed Section 504 pursuant to its spending powers; any state entity accepting funds connected to Section 504 waives its immunity as a condition of receipt of such funds.³⁸

2. *Who is Protected?*

Once an institution is determined to fall under these laws, it is important to determine which students are protected—and to what extent. As previously discussed, Section 504, in its text, has now adopted the same broad definition of “qualified individual with a disability” as the ADA. However, it is important to understand the evolution of the definition to its current, inclusive state following the ADA Amendments Act (ADAAA) of 2008.

The Rehabilitation Act of 1973 was one of the first major pieces of legislation in the United States to prohibit discrimination against people with disabilities and address other equal access issues. As initially passed, among other things, the Act stipulated, “No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance”³⁹ The Act defined “handicapped individual” as “any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to titles I and III of this Act.”⁴⁰ In 1974, the Act was amended to define a “handicapped” person as one “who (A) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.”⁴¹

However, to be protected against discrimination, one must not only be a person with a disability, but also be “otherwise qualified”—yet another limiting factor. In the landmark case *Southeastern Community College v. Davis*, a prospective nursing student with a hearing disability was denied

38. See, e.g., *Constantine*, 411 F.3d at 495–96.

39. Rehabilitation Act of 1973, Pub. L. 93-112, § 504, 87 Stat. 394 (1973).

40. *Id.* § 7(6), 87 Stat. 361 (1973).

41. Pub. L. 93-651, 89 Stat. 25 (1974).

admission to the program based upon her disability.⁴² She cited Section 504 in challenging the program's discriminatory decision.⁴³ In a major blow to the disability community, the Supreme Court held that a nursing program was not required to "lower or to effect substantial modifications of standards to accommodate a handicapped person,"⁴⁴ particularly given its narrow interpretation of what constituted an otherwise qualified "handicapped"⁴⁵ person. The Court held that, instead of an otherwise qualified person including "those who would be able to meet the requirements of a particular program in every respect except as to limitations imposed by their handicap,"⁴⁶ like the Circuit Court below held, it would only include a person "who is able to meet all of a program's requirements *in spite of* his handicap."⁴⁷ The Court moved on to hold that the requirements were necessary for patient safety, as well as that the plaintiff would not likely have benefitted from auxiliary aids or accommodations absent those that it considered to be of a close, personal nature.⁴⁸

About eleven years after *Davis*, due to the persistence and dedication of so many incredible activists, Congress passed the ADA. The ADA further expanded protections for people with disabilities, but its definition of who constituted a person with a disability was similar. The ADA, as passed in 1990, defined a person with a disability as someone with "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."⁴⁹ In applying *Davis* following the passage of the ADA, the First Circuit, in *Wynne v. Tufts University School of Medicine*, reversed the District Court's grant of summary judgment for the university as to whether a student with dyslexia, who had failed multiple classes even after retaking them, was otherwise qualified based upon the feasibility of alternative testing options.⁵⁰ Although this holding was less

42. 442 U.S. 397, 414 (1979).

43. *Id.* at 402-03.

44. *Id.* at 413.

45. The language, at that time, was handicapped, as opposed to disabled, or a person with a disability. That is no longer the correct terminology. However, it is necessary to use this language here to reflect what the statute stated.

46. *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 406 (1979).

47. *Id.* (emphasis added).

48. *Id.* at 407-09.

49. Americans with Disabilities Act, Pub. L. 101-336, § 3(2), 104 Stat. 330 (1990).

50. *Wynne v. Tufts Univ. Sch. Of Med.*, 932 F.2d 19, 27-28 (1st Cir. 1991) (stating that "[i]f the record were crystal clear that even if reasonable alternatives to written multiple-choice examinations were available, Wynne would have no chance of meeting

harsh than *Davis*, despite Congress' intent in passing such sweeping civil rights legislation, courts interpreted the ADA's definition too narrowly, excluding people with disabilities from protection due to their limited view of what comprised a substantial limitation under the ADA, among other issues.⁵¹

In 2008, however, Congress passed the ADA Amendments Act (ADAAA).⁵² The ADAAA reaffirmed Congress' commitment to broad coverage under the ADA, and it expressly rejected the Supreme Court's holdings in *Sutton* and *Toyota Motor Manufacturing Kentucky, Inc.*⁵³ The Act explicitly states, "The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act,"⁵⁴ and, "The term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008."⁵⁵ The Act states that "major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."⁵⁶ The Act adds that "a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."⁵⁷ An individual is regarded as having such an impairment "if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the

Tufts' standards, we might be able to affirm on a different ground from that relied on by the district court").

51. See, e.g., *Toyota Motor Mfg., Ky. v. Williams*, 534 U.S. 184, 198 (2002) (holding "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"); see also *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491 (1999) (holding plaintiffs with severe myopia were not substantially limited so as to fall under the protection of the ADA).

52. ADA Amendments Act of 2008, Pub. L. 110-325, 122 Stat. 3553 (2008).

53. *Id.* 122 Stat. 3553-54.

54. *Id.* § 3(4)(A), 122 Stat. 3555.

55. *Id.* § 3(4)(B), 122 Stat. 3555.

56. *Id.* § 3(2)(A), 122 Stat. 3555.

57. ADA Amendments Act of 2008, Pub. L. 110-325, § 3(2)(B), 122 Stat. 3555 (2008).

impairment limits or is perceived to limit a major life activity.”⁵⁸

In the spirit of the ADAAA, in the employment context, the Equal Employment Opportunity Commission (EEOC) promulgated regulations stating the following:

An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.⁵⁹

The Department of Justice’s regulations promulgated to enforce Title II of the ADA are similar.⁶⁰

Under the act, a qualified individual with a disability is “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”⁶¹ This definition is consistent with Supreme Court case law, which, when determining whether a person with a disability is otherwise qualified under Section 504, has held, “When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any ‘reasonable accommodation’ by the employer would enable the handicapped person to perform those functions.”⁶² In the educational context, one might be otherwise qualified if one is able to participate in classes, with or without reasonable accommodations. Of course, whether certain requirements are essential for a particular higher education or graduate program is subject to debate and might affect whether a person with a disability could complete the degree with or without reasonable accommodations.

Although misconceptions remain about people with disabilities and the scope and effectiveness of their accommodations, the ADAAA has

58. *See id.* § 3(3)(A), 122 Stat. 3555.

59. 29 C.F.R. § 1630.2(j)(1)(ii) (2012).

60. *See* 28 C.F.R. § 36.105(d)(1)(v) (“An impairment is a disability within the meaning of this part if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment does not need to prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.”)

61. *See* 42 U.S.C. § 12111(8).

62. *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 287 n.17 (1987).

reasserted Congress' intent to pass expansive legislation that covers people with disabilities who face discrimination, in the case of this piece, in higher education and graduate education. Section 504 is similarly broad since it adopts the same terms when defining who is covered.⁶³

3. *Protections Provided*

Finally, it is important to understand the types of protections the ADA provides in the context of higher and graduate education. Title III prohibits

the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered; . . . 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; . . . a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden; . . . a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable; and . . . where an entity can demonstrate that the removal of a barrier . . . is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable.⁶⁴

63. 29 U.S.C. § 705(20) (2020) (defining “individual with a disability” as “any person who has a disability as defined in section 12102 of title 42,” or the Americans with Disabilities Act).

64. See 42 U.S.C. § 12181(9). The following definition is in Title III for “readily achievable”:

(9) Readily achievable. The term “readily achievable” means easily accomplishable and

In *Guckenberg v. Boston University*, the United States District Court for the District of Massachusetts interpreted Title III to prohibit requirements that accommodations testing be conducted by medical doctors, licensed clinical psychologists, and individuals with doctorates, while allowing for a policy that requires current testing to prove disability, given the availability of a waiver when appropriate, as well as IQ tests.⁶⁵ The court also held that the university's administration was in violation of Title III because those in charge of accommodations were discriminatory, had no expertise in learning disabilities, had biases against people with disabilities, and called students with learning disabilities "lazy or fakers."⁶⁶ In *Hoppe v. College of Notre Dame of Maryland*, the United States District Court for the District of Maryland held the university reasonably accommodated a student with a learning disability by allowing her to take four one-and-a-half hour exams one day and two one-and-a-half hour exams the following day, as opposed to six one-hour exams in a single day.⁶⁷ In *Long v. Howard University*, the United States District Court for the District of Columbia denied plaintiffs' motion for summary judgment, holding that, in the specific case of a doctoral student who took a break while undergoing treatment for pulmonary fibrosis, a jury could find it was not reasonable for Howard to readmit the student at the exact place he left off, as well as that it could have been a fundamental alteration to the program.⁶⁸ In *Amir v. Saint Louis University*, the Eighth Circuit held that a medical student's requests that he be permitted to participate in a psychiatry clinic elsewhere, be assigned to a different professor, and that he receive a passing grade in psychiatry were held unreasonable, even though the student alleged the professor threatened him

able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include—

- (A) the nature and cost of the action needed under this Act;
- (B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;
- (C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- (D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

65. See 974 F. Supp. 106, 135-38 (D. Mass. 1997).

66. *Id.* at 140-41.

67. See 835 F. Supp. 2d 26, 32, 33 (D. Md. 2011).

68. See 439 F. Supp. 2d 68, 77-80. (D.D.C. 2006).

with involuntary commitment for his obsessive compulsive disorder.⁶⁹ The court insisted that the placement with another professor was due to the student's fear of retaliation as opposed to a reasonable accommodation for the student's disability under the ADA.⁷⁰ These are just a few of the many examples of Title III cases in the university context.

Title II, more simply, mandates 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."⁷¹ To prove discrimination under Title II, a plaintiff, therefore, must simply demonstrate that (1) she is a qualified individual with a disability; (2) she was either excluded from participation in or denied the benefits of a public entity's service, program or activity, or was otherwise discriminated against; and (3) the exclusion, denial of benefits, or discrimination was because of the plaintiff's disability.⁷² However, similar to Title III, universities are not required to make changes that would result in a fundamental alteration or undue burden.⁷³

In *Toledo v. Sanchez*, the First Circuit denied a motion to dismiss Title II claims against the University of Puerto Rico, finding sufficient facts establishing that the university failed to accommodate a student with schizoaffective disorder when, after disclosing the disability to his professor and the university, the university refused to accommodate him, and the professor ridiculed him in front of the class for turning in an incomplete assignment.⁷⁴ On the other hand, in *Darian v. University of Massachusetts*, the United States District Court for the District of Massachusetts found that, for a pregnant clinical nursing student, no stairs and handling one patient per day were reasonable accommodations, but permitting the student to graduate on time while not seeing patients and doing work primarily from home was not.⁷⁵ The court stated that taking an incomplete, and completing the clinical portion after the student's pregnancy, would have been reasonable, given the clinical nature of the program and the seriousness of the student's

69. See 184 F.3d 1017, 1028-29 (8th Cir. 1999).

70. See *id.* at 1029.

71. 42 U.S.C. § 12132 (2020).

72. See *Darian v. Univ. of Mass.*, 980 F. Supp. 77, 84 (D. Mass. 1997).

73. See *Parker v. Univ. de Puerto Rico*, 225 F.3d 1, 5 (1st Cir. 2000) (citing 28 C.F.R. § 35.150).

74. See 454 F.3d 24, 29-32 (1st Cir. 2006).

75. See 980 F. Supp. at 80-82, 89-90.

pregnancy.⁷⁶ In *Bowers v. NCAA*, the Third Circuit held that an inability to take requisite core classes in high school as a result of a learning disability, leading to a student's ineligibility for an athletic scholarship, established a Title II claim.⁷⁷ In *Goonewardena v. New York, City University of New York*, the court denied the university's motion to dismiss because it failed to prove either that a student with a psychological disability was suspended for a neutral criteria or that the student failed to meet the requirements for readmission despite adequate accommodations.⁷⁸ In *Constantine v. Rectors & Visitors of George Mason University*, the Fourth Circuit denied a motion to dismiss involving ADA and 504 claims because a law student failed an exam when she experienced a migraine during the exam, despite alerting the university of her condition and requesting additional time to complete the exam.⁷⁹ The university refused to re-administer the exam after she failed.⁸⁰

Notwithstanding Eleventh Amendment challenges under Title II, the ADA provides otherwise qualified students with disabilities the ability to attend public and private, non-religious universities. Students must receive reasonable accommodations, have the right to access certain services, and have the right to be free from discrimination. At the very minimum, the ADA provides access.

4. *The Process*

In order to receive any reasonable accommodations under 504 or the ADA, students must typically meet with universities and disclose information about their disabilities.⁸¹ Once this information is disclosed, typically, students must support their requested accommodations with a licensed professional's certification or some form of medical history.⁸² Often, a doctor might be required to explain why certain accommodations are necessary or relevant to the condition. If a university believes the request is unreasonable, it will respond with alternative accommodations or deny the accommodations.⁸³ If the student believes the alternatives offered or rejected

76. *Id.* at 89.

77. *See* 475 F.3d 524, 553 (3d Cir. 2007).

78. *See* 475 F. Supp. 2d 310, 324 (S.D.N.Y. 2007).

79. *See* 411 F.3d 474, 478, 499 (4th Cir. 2005).

80. *Id.* at 478.

81. *Reasonable Accommodations Explained*, AM. PSYCHOL. ASS'N (Apr. 10, 2012), <https://www.apa.org/pi/disability/dart/toolkit-three>.

82. *See The ADA, Section 504, and Postsecondary Education*, NAT'L PARENT CTR. ON TRANSITION AND EMP. (2015), at 2-3 <https://www.pacer.org/transition/resource-library/publications/NPC-42.pdf>.

83. *Id.*

are unreasonable, or violate of the ADA, the student can accept the accommodations or demonstrate that they are unreasonable.⁸⁴

The process typically involves a meeting with the university to discuss the student's needs, specific disability, medical history, and other background information. The student will usually meet alone with someone from an academic or disability support office. This meeting might involve a discussion of specific accommodations, why they are necessary, and how they can be adjusted to be feasible for the university, as well as to maximize utility for the student.

II. THE ROLE OF ADVOCACY AND ACCOMPANIMENT

Third parties who accompany students to accommodations meetings may serve various functions. First, the third party might serve as an advocate to assist the student in making specific inquiries or arguments in the meeting. An advocate typically refers to someone who is trained, although it need not be an attorney. However, an advocate might still be a friend or colleague, and, even still, might not be trained. Second, the third party might serve to encourage or empower the student, whether that role involves communicating during the meeting, mere presence, or both. That role is more of a supporter. Third, the third party might serve as an observer with either a specific purpose or as an objective witness for formality or recordation purposes. A specific purpose might be to observe for certain patterns or statements, or to assist a student solely with recall, for example. Fourth, the third party might well be either a legal guardian, decision-maker, or supporter in the supported decision-making context for the student. Fifth, a third party may serve as an interpreter, which is particularly relevant for students who are deaf or hard of hearing, or to provide some other reasonable accommodation for the student throughout the accommodations request process.

A student may benefit from the presence of a third-party advocate or observer in such a meeting, given the uneven power dynamic between universities and students advocating on their own behalf. These meetings can be overwhelming and might involve the student's first face-to-face interaction with a university representative. As University of California Irvine Juris Doctor Candidate Alessandra Fritz wrote in a survey for undergraduate and graduate students on the issue of advisors in accommodations meetings,

I have anxiety (and depression). Meetings like this are terrifying for me, especially when I do not yet know the person I am meeting, and actually

84. *See Darian v. Univ. of Mass.*, 980 F. Supp. 77, 89 (D. Mass. 1997).

become a barrier to accessing accommodations. The meeting feels like a “test” I am bound to fail because I am not deserving or I won’t say the right things. If the accommodations process is too “scary,” I am far less likely to go through it. If I were able to bring a friend or someone who makes me comfortable, I would feel more comfortable advocating for myself. The person doesn’t even need to talk - just having a familiar presence (who is already on my side) would significantly decrease my anxiety.⁸⁵

Additionally, during primary and secondary education, students identified with an educational disability have a right to assistance by advocates with specific knowledge, teachers, parents, and other members of their Individualized Education Program (IEP) team in developing an (IEP).⁸⁶ However, up until any discussion of a student’s transition, parents and advocates have a more affirmative right to participate as members of the IEP team than the student herself.⁸⁷ Prior to that point, a student may attend an IEP meeting, but there is no guarantee that the student will be invited to attend.⁸⁸ Even if the student is invited to attend an IEP meeting pertaining to her transition, the student is not *required* to attend. If the student does not attend, the school “must take other steps to ensure that the child’s preferences and interests are considered,”⁸⁹ but the student has received no experience advocating for herself or attending a meeting that discusses her educational goals. There are also no guarantees that the IEP team will ensure a student in attendance will understand everything that occurs, meaningfully participate, or gain advocacy skills given paternalistic tendencies toward people with disabilities.

Successful self-advocacy is an important goal, and for universities to assist students with building those skills is extremely important. However, policies that require students to self-advocate immediately without any assistance, support, or transition period are not effective or beneficial to students for

85. Alessandra Fritz, Companion/Advocacy for Accommodations in Higher Education, Univ. of Cal. Irvine (Oct. 16, 2019, 1:43 PM) (on file with author).

86. 20 U.S.C. § 1414(d)(1)(B)(i), (vi)-(vii) (defining an IEP team to include the parents of the child; other individuals, such as advocates, with specific knowledge; and the child, whenever appropriate).

87. *See id.* (including the child with a disability the IEP team only “whenever appropriate”); 34 C.F.R. §300.321(b)(1) (2020) (requiring that a student be invited to any IEP meeting discussing a student’s transition). A state may provide that some or all educational rights transfer to the student who reaches the age of majority and has not been deemed to lack capacity. 20 U.S.C. § 1415(m) (2020). However, that does vary by state, as does the age of majority.

88. 20 U.S.C. § 1414(d)(1)(B)(i), (vi)-(vii); 34 C.F.R. §300.321(b)(1).

89. 34 C.F.R. §300.321(b)(2).

their own personal growth. Given that college might well be students' first opportunity to advocate on their own behalf, particularly following an ineffective transition, these policies create a daunting and unrealistic hurdle for students. Alternatively, if it is not the student's first interaction with the university, and her disability develops or changes significantly during college, it could be the student's first interaction with accommodations request processes. Additionally, the student might be in a more vulnerable state, particularly if the disability occurs in connection with a traumatic incident or assault.

However, not every purpose for an observer is an adversarial purpose. One student, in response to a survey regarding companions in accommodations meetings, stated it would be helpful to have an advocate or companion simply "to remember things better."⁹⁰ That would likely be more akin to the objective observer role, but the presence of any third party, even if objective, can change the power dynamic between the university and a student in an accommodations meeting.

It is not clear whether any set of laws, including the ADA or Rehabilitation Act, on their face, require the presence of third parties at all such meetings. However, certain instances might trigger a legal requirement.

III. INSTANCES IN WHICH ACCOMPANIMENT TO ACCOMMODATION MEETINGS MIGHT BE LEGALLY REQUIRED

A. *Third Party as a Reasonable Accommodation*

A student potentially requiring the presence or assistance of a third party in a meeting to request accommodations may be a reasonable accommodation in and of itself. For example, 504 regulations for postsecondary institutions state that "[n]o qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any . . . counseling . . . or other postsecondary education aid, benefits, or services to which this subpart applies."⁹¹ That includes access to meetings pertaining to the receipt of accommodations.

However, as previously discussed, these accommodations would have to be reasonable, fact specific, and determined on a case-by-case basis. There would be no blanket requirement for any one type of disability or for students experiencing certain types of issues.

90. Anonymous Companion/Advocacy for Accommodations in Higher Education Survey (June 13, 2019, 4:28 PM) (on file with author).

91. 34 C.F.R. § 104.43 (2019).

Students with anxiety, post-traumatic stress disorder, a history of trauma, or other mental health conditions might require a third person for support to adequately or comfortably convey thoughts or concerns. Even if the university does not consider the meeting to be adversarial, certain mental health conditions can lead students to feel attacked or stressed about these meetings. These meetings are also often face-to-face and one-on-one, leading to confrontation quite quickly, regardless of university assertions to the contrary.⁹² Even the presence of a third person could mean the difference between an inability to express one's thoughts and a coherent and thoughtful discussion. In this case, it might actually prevent the discussion from becoming unnecessarily adversarial.

Students with learning disabilities or traumatic brain injuries might also require a third person. This third person might be able to further explain certain concepts in a way that students can understand. A breakdown in communication is the last thing a student would want in such meetings, given how important it is to receive accommodations so the student can succeed. Arguably, the university would not want a breakdown in communication either, as such a breakdown could lead the university to violate the ADA or Section 504 in its provision of academic accommodations if it fails to understand how to adequately and reasonably accommodate the student.⁹³ The third person might also be able to repeat sentences that the students could not process, help to slow down conversations, assist the student in communicating his or her own thoughts or concerns, or assist with any memory or recall difficulties.

Students with auditory processing or hearing loss might require a third person to repeat sentences the student could not hear or process, or to help slow down the conversation. For students with speech impediments, either as a result of hearing loss, deafness, or speech difficulties alone, a third person might also assist in repeating or communicating thoughts the university staff member has trouble understanding.

Finally, students who are deaf might require an interpreter. Although that is not a third person intended to provide support or substantive assistance, it would still require the presence of a third party.

These different types of accommodations are non-exhaustive. Disability is an infinite spectrum, and even the needs of individuals with similar

92. See, e.g., *What is a Reasonable Accommodation?*, IND. UNIV. BLOOMINGTON, <https://studentaffairs.indiana.edu/student-support/disability-services/get-help/accommodations/index.html> (last visited May 7, 2020) (“Access coordinators are available to meet with registered students, one on one, to discuss concerns related to their classes, instructors, or other issues that are affecting students’ academic progress.”).

93. See 29 U.S.C. § 794(a); 42 U.S.C. § 12182; 42 U.S.C. § 12132.

disabilities may vary.

B. Legal Requirements for Including Legal Guardians, Decision-Makers, and Supporters

A guardian is an individual who a court appoints to make some or all decisions on behalf of an adult.⁹⁴ A guardian is appointed to make decisions in the areas in which the adult is found to lack capacity; a guardian may be a plenary guardian, making decisions in all areas, or a limited guardian, making decisions only in the areas the individual has been found to lack capacity.⁹⁵ These areas might include health care, education, and finances, among others. The individual loses the legal right to make decisions in these areas, although in many states, guardians must consider the wishes of the individual under guardianship.⁹⁶

A power of attorney is “a writing or other record that grants authority to an agent to act in the place of the principal[.]”⁹⁷ A power of attorney may be effective upon execution or at a later date based upon a specific occurrence, which is referred to as a “springing” power of attorney.⁹⁸ A durable power of attorney is one that survives incapacity.⁹⁹ A power of attorney does not require a court determination that the individual delegating decision-making power lacks capacity, particularly considering the individual delegating authority must have capacity to sign a power of attorney in the first place.¹⁰⁰ Powers of attorney might provide an agent with decision-making powers in areas such as health care, education, and financial services, among others.¹⁰¹

Supported decision-making is a less restrictive alternative to guardianship that involves the formalization of a network of trusted individuals who may assist an individual in making decisions.¹⁰² Ultimately, however, the

94. See MARGARET C. JASPER, *GUARDIANSHIP, CONSERVATORSHIP, AND THE LAW* 2-3 (2008).

95. See Lawrence A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, 31 *STETSON L. REV.* 735, 740-41 (2002).

96. See, e.g., D.C. CODE § 21-2047(6)-(8) (2015) (codifying that a guardian must include the adult in the decision-making process and allow the adult to act on her own behalf whenever possible).

97. UNIFORM POWER OF ATTORNEY ACT § 102(7) (2006).

98. *Id.* § 109(a); Carolyn L. Dessin, *Acting as Agent Under a Financial Durable Power of Attorney: An Unscripted Role*, 75 *NEB. L. REV.* 574, 577 (1996).

99. UNIFORM POWER OF ATTORNEY ACT § 102(2) (2006).

100. See Dessin, *supra* note 98, at 581.

101. UNIFORM POWER OF ATTORNEY ACT § 213(a)(1)-(5) (2006).

102. See Jessalyn Gustin & Jonathan Martinis, *Supported Decision-Making as an Alternative to Overbroad and Undue Guardianship*, 60 *ADVOCATE* 41-42 (2017).

decision is legally left to the individual.¹⁰³ It is up to the individual to seek assistance and guidance from supporters. The individual creates an agreement to that effect. Supported decision-making has been statutorily recognized in several jurisdictions, including Texas and the District of Columbia.¹⁰⁴ However, supported decision-making may still be adopted in other jurisdictions as it continues to gain traction nationwide.¹⁰⁵

In cases in which a student has a guardian in the area of education, having a guardian present might be required for any decision-making to occur, since the student lacks legal power to make such decisions.¹⁰⁶ In the case of a student who has signed a power of attorney, such a claim might not be so convincing. Even if a student granted authority to another individual to make educational decisions through a power of attorney, the student retains authority to make his or her own educational decisions, assuming he or she has the legal capacity. If the student lacks this capacity, then the existence of a durable power of attorney might be a stronger argument for an agent to be present.

If the student has a supported decision-making agreement, the student retains capacity to make decisions.¹⁰⁷ The student could still receive advice from and communicate with supporters about how to proceed, even if the supporters are not present at the meeting. That said, the argument that any supporter must be permitted in a meeting pertaining to accommodations is also less compelling. However, in honoring that agreement, it would be beneficial for the student to have supporters there to consult, or for the student to be permitted to consult supporters throughout the process before the student is hard pressed to make any immediate decisions.

IV. UNIVERSITY INTERESTS IN NOT PERMITTING ACCOMPANIMENT

There are several reasons why universities might not permit students requesting accommodations to be accompanied by an observer, supporter, or

103. *Id.* at 42.

104. *See* D.C. CODE § 7-2133 (2019); TEX. EST. CODE ANN. §§ 1357.001-.0525 (West 2019); *see also* Supported Decision-Making Agreements Act, ALASKA STAT. ANN. § 13.56 (West 2018); Supported Decision-Making Act, DEL. CODE ANN. tit. 16 §§ 9401A-9410A (2016); IND. CODE ANN. §§ 29-3-14-1 to 13 (West 2019); Supported Decision-Making Act, NEV. REV. STAT. §§ 162C.010-330 (2019); N.D. CENT. CODE §§ 30.1-36.01 to 08 (2019); Supported Decision-Making Act, 42 R.I. GEN. LAWS §§ 66-13-1011 to 10 (2019); WIS. STAT. §§ 52.01-32 (2019).

105. *See, e.g.*, S. 64, 191st Gen. Ct., Reg. Sess. (Mass. 2019); H. 172, 191st Gen. Ct., Reg. Sess. (Mass. 2019).

106. *See, e.g.*, D.C. CODE § 21-2047(a)(6).

107. *See* Gustin & Martinis, *supra* note 102, at 41-42.

advocate of their choice. First, schools may claim that by essentially forcing students to attend meetings unaccompanied, they are preparing students to advocate for themselves. However, as previously discussed, without appropriate transition or training, students might not be prepared to advocate completely independently immediately upon matriculation. These offices are not necessarily providing students with training to advocate for themselves. Additionally, the new university environment is overwhelming, and anyone who is requesting accommodations as a new student might need assistance. Current students who are requesting accommodations for a new, changed, or progressing disability might also need assistance, since it might be their first time dealing with any accommodations process at all. That could be extremely overwhelming. Finally, in cases involving any type of trauma, including cases of sexual assault that require more permanent accommodations for resulting disabilities, advocating for oneself while in a vulnerable state is particularly challenging.

Second, schools turn to the Family Educational Rights and Privacy Act (FERPA)¹⁰⁸ and its accompanying regulations¹⁰⁹ to deter the use of observers, supporters, or advocates. FERPA is a statute that, in part, protects the privacy of student educational records.¹¹⁰ Educational agencies and institutions covered include “any public or private agency or institution which is the recipient of funds under any applicable program.”¹¹¹ The term “applicable program” refers to “any program for which the Secretary or the Department has administrative responsibility as provided by law or by delegation of authority pursuant to law.”¹¹² These include universities that receive funding from the Department of Education.¹¹³ Education records include “those records, files, documents, and other materials which . . . contain information directly related to a student; and . . . are maintained by an educational agency or institution or by a person acting for such agency or

108. 20 U.S.C. §§ 1232g (a)-(j) (2020).

109. 34 C.F.R. §§ 99.1-67 (2019).

110. 20 U.S.C. § 1232g(b) (stating “[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information . . . of students without the written consent of their parents to any individual, agency, or organization . . .”).

111. 20 U.S.C. § 1232g(a)(3).

112. 20 U.S.C. § 1221(c)(1) (2020).

113. See *id.*; *FERPA General Guidance*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/students.html> (last visited May 7, 2020).

institution.”¹¹⁴

There are several issues with the argument that FERPA prevents schools from permitting advocates, observers, or supporters from attending accommodations meetings. First, FERPA rights may be waived.¹¹⁵ A parent or student who has reached the age of majority and otherwise has the capacity to make educational decisions¹¹⁶ must provide a signed and dated consent form before any institution may disclose personal identifying education records.¹¹⁷ Any such written consent must “[s]pecify the records that may be disclosed; . . . [s]tate the purpose of the disclosure; and [i]dentify the party or class of parties to whom the disclosure may be made.”¹¹⁸ That said, so long as these requirements are met, any student FERPA rights may be waived, and institutions may provide such documents to third parties. Institutions may require students to sign a release if students wish to have third parties in attendance at accommodations meetings.

Second, there is no private right of action under FERPA.¹¹⁹ Schools might

114. 20 U.S.C. § 1232g(a)(4)(B). Education records, however, do not include the following:

- (i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;
- (ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;
- (iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person’s capacity as an employee and are not available for use for any other purpose; or
- (iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student’s choice.

115. 34 C.F.R. § 99.30(a)–(b).

116. By the time many students reach postsecondary school, they are eighteen, and FERPA rights have transferred to them. *See* 34 C.F.R. § 99.5. If not, parents must still waive such rights.

117. *Id.*

118. *Id.*

119. *See* *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002) (holding FERPA failed to establish any enforceable private right of action under 42 U.S.C. § 1983 and that FERPA lacks any definitive rights-creating language).

still fear a loss of funding or Department of Education complaint and investigation.¹²⁰ The Supreme Court in *Gonzaga* explicitly referenced these administrative remedies and procedures, calling them, as opposed to private litigation, “[t]he mechanism that Congress chose to provide for enforcing [the] provisions.”¹²¹ However, students themselves cannot sue for damages.¹²²

Third, FERPA only applies to educational records.¹²³ It does not apply to conversations, personal knowledge, or observation.¹²⁴ Universities might argue that it is necessary to incorporate educational records into these meetings to make any progress. Alternatively, schools might fear liability given the potential slippery slope. However, it is entirely possible to conduct an accommodations meeting without the educational agency itself sharing any educational records pertaining to the student with the third party. Of course, discussions about the student will occur, but that is not protected under FERPA.

Fourth, FERPA only prevents *institutions* from sharing educational records with certain third parties.¹²⁵ FERPA does not prohibit *students* from sharing their own educational records with third parties. Institutions may require that students voluntarily and directly share any documents students want advocates to see with advocates to prevent any liability.

Fifth, universities do allow advocates or advisors of the student’s choice in the context of Title IX. If that is permissible and navigable, it is unclear why it would, or could, not be in the case of accommodations for a disability. Although this argument is not directly legal in nature, it demonstrates a logical fault with any arguments against permitting advisors in accommodations meetings that cite FERPA concerns.

Universities’ justifications for excluding advisors or advocates in accommodations meetings are, seemingly, all thin veils for the true concern: potential liability and additional pushback for not providing adequate accommodations. Realistically, schools fear additional scrutiny by a third party that could be used in a case against them. They are also concerned about an uneven power dynamic that could lead them to adopt accommodations that are not reasonable or impose an undue burden, financially or otherwise. From the outset, however, the balance unevenly

120. 20 U.S.C. § 1232g(a), (f)-(g).

121. *Gonzaga Univ.*, 536 U.S. at 289.

122. *Id.* at 287.

123. 20 U.S.C. § 1232g(a)(4)(A).

124. *See id.*; FERPA General Guidance, *supra* note 113.

125. *Id.*

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favors universities and their greater number of resources. Additionally, the law does not require that schools adopt unreasonable accommodations that impose an undue burden or require a fundamental alteration.¹²⁶

V. TITLE IX AND THE USE OF ADVOCATES TO ACCOMPANY SURVIVORS

Although Title IX is the primary source of student rights involving discrimination and lack of access to education that results from sexual assault, Title IX, the Clery Act, the Violence Against Women Act, and regulations enforcing these statutes work together to create a more comprehensive scheme of rights and protections.

A. *Title IX, the Clery Act, and the Violence Against Women Act and Sexual Assault on Campuses*

1. *Title IX*

Title IX appears in the Education Amendments of 1972, which amended the Higher Education Act of 1965.¹²⁷ Title IX bans gender discrimination in educational programs and institutions that receive federal funding, which include many institutions of higher education.¹²⁸

Since the implementation of Title IX, a number of court cases have established that universities must address sexual assaults that are reported to them or that occur on campus. *Alexander v. Yale University*¹²⁹ was the first major case to apply Title IX to cases involving sexual harassment. The case involved alleged harassment by male faculty and administrators.¹³⁰ Although the United States District Court of the District of Connecticut ruled that the plaintiffs could not personally prove that they were deprived of their rights under Title IX,¹³¹ the court set the precedent that sexual harassment is, in fact, considered a form of discrimination.

*Franklin v. Gwinnett County Public Schools*¹³² set a precedent for

126. *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 412 (1979).

127. Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (1972).

128. 20 U.S.C. § 1681(a) (2020) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance . . .”).

129. 459 F. Supp. 1, 1 (D. Conn. 1977), *aff’d*, 631 F.2d 178, 179 (2d Cir. 1980).

130. *See id.*

131. *Id.* at 180 (affirming the dismissal of claims by all plaintiffs, as the remaining plaintiff could not prove that she was, in fact, harassed); 459 F. Supp. at 3-4 (dismissing the claim as to all but one plaintiff).

132. 503 U.S. 60, 75 (1992).

expanding Title IX's reach to sexual assault and molestation. In this case, the Supreme Court held that the duty for a public school not to discriminate against a female student applied to instances in which teachers sexually abuse students.¹³³ The Court applied the reasoning that if a supervisor may not harass an employee on the basis of sex, the same should apply for situations in which teachers harass or abuse students.¹³⁴ However, the case did not involve universities, and it focused on a student-teacher relationship. In *Davis v. Monroe County Board of Education*,¹³⁵ the Supreme Court held that schools were liable for student-on-student sexual harassment. The Court wrote that “[r]ecipients of federal funding may be liable for ‘subjecting’ their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school’s disciplinary authority.”¹³⁶

In April 2011, the Department of Education clarified schools’ responsibilities with a “Dear Colleague Letter.”¹³⁷ The letter expressed in more specific detail the rights of survivors and individuals involved in any grievance process, explaining Department of Education preferences and requirements for grievance and investigation procedures.¹³⁸ One of the major hallmarks of the letter was its guidance that the preponderance of the evidence standard was the appropriate standard for schools to apply in their Title IX investigations.¹³⁹ Although the letter has since been rescinded,¹⁴⁰ schools have already implemented many of the procedures that the guidance

133. *Id.* at 75.

134. *Id.* (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64, (1986)).

135. 526 U.S. 629, 650 (1999).

136. *Id.* at 646-47.

137. U.S. Dep’t of Educ., Office for Civil Rights, Dear Colleague Letter (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

138. *Id.*

139. *Id.* at 11.

140. U.S. Dep’t of Educ., Office for Civil Rights, Q&A on Campus Sexual Misconduct 5 (Sept. 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> (issuing interim guidance permitting schools to use either a clear and convincing or preponderance of the evidence standard); *see also* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, No. 2020-07057 (May 7, 2020) (to be codified at 34 C.F.R. pt. 106), <https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-07057.pdf>. This rule was not yet published in the Federal Register as of publication. It is set to be published in the Federal Register on May 22, 2020.

suggested.¹⁴¹ On May 6, 2020, the United States Department of Education released its final rule, which will change the way it implements Title IX.¹⁴² The proposed rulemaking delivered a devastating blow to years of advocacy in Title IX in several respects,¹⁴³ as does the final rule.¹⁴⁴

Even with these regulations, Title IX will still provide protection against discrimination based upon gender for students who have experienced sexual harassment or assault, or any other form of sex-based discrimination that affects their ability to access their education. That also includes an ability to receive accommodations, which, in the Title IX context, are more commonly referred to as supportive measures, “[d]esigned to effectively restore or preserve access to the recipient’s education program or activity” in the event that they do face some form of discrimination.¹⁴⁵ Title IX will also still provide for investigations of discriminatory conduct by other students, faculty, and other members of the university community.¹⁴⁶ These investigations and discussions about accommodations, naturally, involve meetings with the university or its agents.

2. *The Clery Act*

The Jeanne Clery Disclosure of Campus Security Policy and Crime

141. See Jake New, *Burden of Proof in the Balance*, INSIDE HIGHER ED (Dec. 16, 2016), <https://www.insidehighered.com/news/2016/12/16/will-colleges-still-use-preponderance-evidence-standard-if-2011-guidance-reversed>.

142. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, No. 2020-07057 (May 7, 2020) (to be codified at 34 C.F.R. pt. 106), <https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-07057.pdf>.

143. See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106) (severely limiting a school’s liability for sexual assault that occurs on its campus by requiring actual knowledge of the event, limiting liability to sexual assault that occurs during an “educational program and event,” and limiting the definition of sexual harassment).

144. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, No. 2020-07057 (May 7, 2020) (to be codified at 34 C.F.R. pt. 106), <https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-07057.pdf>.

145. See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

146. See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, No. 2020-07057 (May 7, 2020) (to be codified at 34 C.F.R. pt. 106), <https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-07057.pdf>.

Statistics Act, which was originally named the Crime Awareness and Campus Security Act of 1990, is another amendment to the Higher Education Act of 1965.¹⁴⁷ It requires universities to publish and collect statistics about crimes, including sexual assaults, that occur on campuses.¹⁴⁸ The Act was renamed the Clery Act following the assault and murder of Lehigh University freshman Jeanne Clery.¹⁴⁹ The Act's objective is to provide accurate information to prospective students to inform their choices in attending a university.¹⁵⁰

3. *Violence Against Women Act*

The Violence Against Women Act, as originally passed in 1994, provided grants for the investigation and prosecution of violent crimes against women, provided restitution for the victims of such crimes, and increased sentencing for repeat offenders, among other things.¹⁵¹ The Violence Against Women Act recognized that women experienced sexual assault, domestic violence, stalking, dating violence, intimate partner violence, and other forms of violence as a result of their gender.¹⁵²

In 2013, Congress passed the Campus Sexual Violence Elimination Act, or Campus SaVE Act.¹⁵³ This addition to the Violence Against Women Reauthorization Act of 2013 amended the Clery Act to require universities to include domestic violence, stalking, and dating violence in reports; establish prevention programs and promote awareness; and establish policies and procedures for disciplinary action, among other requirements.¹⁵⁴

a. Recent Developments in Higher Education

At the turn of the last decade, college campuses began to experience a wave of student activism aimed at addressing rape culture and sexual assault

147. CRIME AWARENESS AND CAMPUS SECURITY ACT OF 1990, Pub. L. No. Pub. L. 101-542, 104 Stat. 2384 (1990).

148. 20 U.S.C. § 1092(F)(i).

149. Jeanne Clery, Disclosure of Campus Security Policy and Campus Crime Statistics Act, Pub. L. No. 105-244, 112 Stat. 1742 (1998); CONG. RESEARCH SERV., R43759, HISTORY OF THE CLERY ACT: FACT SHEET 1 (2014).

150. See CONG. RESEARCH SERV., R43759, HISTORY OF THE CLERY ACT: FACT SHEET at 1.

151. VIOLENCE AGAINST WOMEN ACT OF 1994, Pub. L. No. 103-322, § 10002, 108 Stat. 1796 (1994).

152. *Id.*

153. VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT, Pub. L. No. 113-4, § 304, 127 Stat. 54 (2013).

154. *Id.*

on campuses.¹⁵⁵ In 2011, the Department of Education released its now rescinded 2011 Dear Colleague Letter on Title IX compliance, which liberally interpreted Title IX and universities' responsibilities to students engaged in Title IX proceedings.¹⁵⁶ An onslaught of negative press, lawsuits, and Department of Education Office for Civil Rights investigations for Title IX violations pertaining to sexual assault cases on college campuses ensued.¹⁵⁷

Universities began to adjust their policies and procedures for reporting and investigating sexual assault, not only to address student concerns and protests, but also to avoid liability, negative media attention, and Department of Education investigations, as well as to comply with Department of Education settlements following such investigations.¹⁵⁸ Additionally, schools began to permit and foster the creation of rape crisis and resource centers, which provide advocacy and support for students who have experienced sexual assault.¹⁵⁹ Now, in the #MeToo era, many universities are continuing the trend of expanding resources to students and survivors of

155. See Allie Grasgreen, *Holding Colleges Responsible*, INSIDE HIGHER ED (June 11, 2013), <https://www.insidehighered.com/news/2013/06/11/student-activists-spur-sexual-assault-complaints-some-say-education-department>.

156. See U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter, *supra* note 129.

157. See Greta Anderson, *More Title IX Lawsuits by Accusers and Accused*, INSIDE HIGHER ED (Oct. 3, 2019), <https://www.insidehighered.com/news/2019/10/03/students-look-federal-courts-challenge-title-ix-proceedings> (explaining how pressures from the Me Too movement have led to more civil complaints from both alleged victims and accused perpetrators); see also Michelle Goldberg, *Shining a Light on Campus Rape*, N.Y. TIMES (Sept. 7, 2017), <https://www.nytimes.com/2017/09/07/books/review/shining-a-light-on-campus-rape.html> (discussing how "Sulkowicz's case was emblematic of the movement to use civil rights law to combat campus rape"); see also *Title IX: Tracking Sexual Assault Investigations*, CHRONICLE OF HIGHER EDUC., <http://projects.chronicle.com/titleix/> (last visited Oct. 15, 2019) (illustrating the number of investigations the government has conducted of colleges that have possibly mishandled sexual assault reports).

158. See Marissa Ditekowsky, *Investigation Has Historical Context*, THE JUSTICE (Oct. 28, 2014), <https://www.thejustice.org/article/2014/10/investigation-has-historical-context> (detailing how higher learning institutions began to adjust their policies and procedures for dealing with sexual assault on campuses).

159. See, e.g., Health Promotion & Advocacy Ctr., *OASIS: Confidential Victim Advocacy*, AM. UNIV., <https://www.american.edu/ocl/promote-health/oasis.cfm> (last visited Oct. 15, 2019) (detailing the OASIS: Confidential Victim Advocacy program and its purpose); Prevention, Advocacy & Resource Ctr., *Home*, BRANDEIS UNIV., <https://www.brandeis.edu/parc/index.html> (last visited Oct. 15, 2019) (explaining the purpose of the Prevention, Advocacy & Resource Center and the services it provides for students).

sexual assault, implementing bystander intervention programs and adopting stricter policies.¹⁶⁰

b. Legal Requirements and Changes Involving Advocates

Many schools around the country now permit advocates to accompany students—in particular, survivors of sexual assault—involved in Title IX proceedings to any meetings.¹⁶¹ These advocates are permitted to assist survivors with navigating the grievance process at universities and provide support given the sensitive nature of the proceedings. Often times, these survivors have experienced trauma and are at their most vulnerable.

Department of Education regulations enforcing the Violence Against Women Reauthorization Act¹⁶² require universities to “[p]rovide the accuser and the accused [in an institutional disciplinary case involving domestic violence, sexual assault, dating violence, or stalking] with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding with the advisor of their choice[.]”¹⁶³ Additionally, in such cases, universities may “[n]ot limit the choice of advisor or presence for either the accuser or the accused in any meeting or institutional disciplinary proceeding; however, the institution may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.”¹⁶⁴ This provision includes attorneys.¹⁶⁵ Any limitations placed on a survivor’s ability to have an advisor present while making a Title IX complaint must, legally, be made on the accused party as well, if any limitation is to apply. That said, many universities, at this point, simply do not have restrictions.

The final rule adjusts the language to require universities to

[p]rovide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be

160. Beth Howard, *How Colleges Handle Sexual Assault in the #MeToo Era*, U.S. NEWS & WORLD REP. (Oct. 1, 2018), <https://www.usnews.com/education/best-colleges/articles/2018-10-01/how-colleges-handle-sexual-assault-in-the-metoo-era>.

161. See, e.g., Health Promotion & Advocacy Ctr., *supra* note 159; Prevention, Advocacy & Resource Ctr., *supra* note 159.

162. Although the Violence Against Women Act (VAWA) was not reauthorized, these provisions are still intact. The provisions most affected by the failure to reauthorize VAWA are those providing grants and funding, or appropriations provisions.

163. 34 C.F.R. § 668.46(k)(2)(iii).

164. 34 C.F.R. § 668.46(k)(2)(iv).

165. VIOLENCE AGAINST WOMEN ACT, 79 Fed. Reg. 62,751 (Oct. 20, 2014) (codified at 34 C.F.R. pt. 668).

accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties; . . .¹⁶⁶

The final rule does not drastically change the language, other than changing “accused” and “accuser” to “respondent” and “complainant,” and “institutional disciplinary proceeding” to “grievance proceeding,” in an apparent attempt to neutralize the language.¹⁶⁷ The final rule also permits each party’s advisor of choice to conduct cross-examinations on the other party and witnesses during a live hearing, which becomes a whole separate matter for concern.¹⁶⁸ In this case, we focus primarily on the fact that individuals filing Title IX grievances are permitted to be in attendance with advisors of their choice, as opposed to assessing whether it is appropriate for a student accused of sexual assault to have an advisor of choice to cross-examine survivors of sexual assault in a university proceeding.

4. *Comparison Between Accommodations Meetings and Title IX Meetings*

There are several distinctions that, of course, may be drawn between accommodations meetings and Title IX meetings. Overall, the legal requirements, processes, and liabilities these types of meetings involve differ.

First, meetings regarding disability accommodations are less likely to involve either a student’s trauma or a traumatic experience. Many Title IX meetings involve students who have experienced sexual assault, which often results in trauma and other psychological disabilities.¹⁶⁹ Sexual assault can also result in permanent or temporary physical disabilities, particularly if there are injuries. Physical manifestations of trauma and other psychological disabilities are also extremely common.¹⁷⁰ Even if psychological or physical

166. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, No. 2020-07057 (May 7, 2020) (to be codified at 34 C.F.R. pt. 106), <https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-07057.pdf>.

167. *See id.*

168. *Id.*

169. *Effects of Sexual Violence*, RAINN, <https://www.rainn.org/effects-sexual-violence> (last visited Jan. 2, 2020).

170. Substance Abuse and Mental Health Servs. Admin., Trauma-Informed Care in Behavioral Health Services, U.S. DEP’T OF HEALTH AND HUMAN SERVS. at 64 (2014),

disabilities do not result, sexual assault is emotionally sensitive and fraught to detail or relive. The additional support in reporting these instances is therefore so vital.

Disability accommodations meetings may involve trauma if the student's disability is related to, or a result of, a traumatic incident. For example, a student who experiences sexual assault, and therefore institutes a Title IX grievance, might also require reasonable accommodations for a disability that results from the trauma of the assault.¹⁷¹ However, these meetings may also be about a whole number of other types of disabilities that do not involve trauma. Additionally, the purpose of the meetings is not to report a traumatic incident, but rather solely to request accommodations for the disability that resulted from the trauma, even if a trauma-related disability is involved. That is not to say it would still not be beneficial for any student whose disability is a result of trauma to be accompanied, but it is still a distinction, nonetheless.

Second, as previously alluded to, the purpose and nature of the meetings may differ. Again, the purpose is not to report a specific traumatic incident, or to report a specific person, per se. Accommodations meetings do not necessarily involve any formal investigation or disciplinary hearing, whereas a Title IX meeting might. Title IX meetings are inherently more adversarial in that they typically involve some form of accusation or complaint. Accommodations meetings need not involve any form of complaint. Even if a student who experiences discrimination under Title IX does not want to institute a formal Title IX complaint, there is still, already, some issue or discrimination that has occurred. That is not necessarily the case in an accommodations meeting, although it could be if a student with a disability has a particularly difficult professor or other issue on campus that is preventing access.

Third, there are, of course, the specific requirements for Title IX meetings and disciplinary proceedings, which are far more regulated than any sort of disability accommodations meeting.¹⁷²

There are, however, also several similarities between the two types of meetings. First, a Title IX meeting might well involve a student who

https://www.ncbi.nlm.nih.gov/books/NBK207201/pdf/Bookshelf_NBK207201.pdf.

171. Doug Heise, *Post-Traumatic Stress Disorder and the ADA*, NAT'L L. REV. (Mar. 13, 2018), <https://www.natlawreview.com/article/post-traumatic-stress-disorder-and-ada>.

172. See 20 U.S.C. § 1681; Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, No. 2020-07057 (May 7, 2020) (to be codified at 34 C.F.R. pt. 106), <https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-07057.pdf>.

experienced sexual assault asking for reasonable accommodations or supportive measures.¹⁷³ Under Title IX, students are entitled to either accommodation or supportive measures, although differing from disability accommodations in that they are typically more temporary and situational.¹⁷⁴ For example, a student may ask to switch classes, move dormitories, move into or be allowed to move out of on-campus housing, make up exams, be excused during conversations pertaining to sexual violence, have certain absences be excused, or be excused to attend court hearings or Title IX proceedings, among other things.¹⁷⁵ The newly-released final Title IX rule, set to take effect this August, defines supportive measures as

non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.¹⁷⁶

Second, even a disability accommodations meeting may become adversarial at any point, particularly if the university denies a request or fails

173. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, No. 2020-07057 (May 7, 2020) (to be codified at 34 C.F.R. pt. 106), <https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-07057.pdf> (outlining and defining "supportive measures").

174. *See* Sample Language for Interim and Supportive Measures to Protect Students Following an Allegation of Sexual Misconduct, White House Task Force to Protect Students from Sexual Assault (Sept. 2014), <https://www.justice.gov/archives/ovw/page/file/910296/download>.

175. *See id.*

176. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, No. 2020-07057 (May 7, 2020) (to be codified at 34 C.F.R. pt. 106), <https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-07057.pdf>.

to provide a reasonable accommodation. Additionally, students at disability accommodations meeting must advocate for themselves in almost all cases, even if the school eventually provides all requested accommodations. Schools typically require a certain amount of evidence in requesting such accommodations, similar to an adversarial venture.¹⁷⁷

Third, both types of meetings involve legal obligations that schools must meet to accommodate their students and ensure that campuses are a safe and inclusive place for all students. If a school fails to appropriately handle a disabled student's request for a reasonable accommodation or a student's complaint under Title IX, a school may be similarly liable for violations of the law.

5. *Potential Americans with Disabilities Act Arguments*

There are some valid, good faith arguments students might make that not permitting accompaniment by advocates, observers, or supporters when students may do so for Title IX meetings, or for other reasons, violates the ADA on a more generalized level. There does not appear to be any direct case law or support for these arguments, but they would be supported by the text of the ADA itself, as well as indirectly through case law. It is therefore unclear how successful such an argument would be. It is much more likely that not permitting students to have an advisor, in general, does not violate the ADA or Section 504, unless the student requires a specific accommodation as determined on a case-by-case basis.

The ADA provides several general prohibitions, one of which states,

It shall be discriminatory to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.¹⁷⁸

Although this provision and cases about this provision typically focus on physical segregation,¹⁷⁹ the language of the provision extends beyond simply

177. See, e.g., *Disability-Related Accommodations*, AM. UNIV., <https://www.american.edu/provost/academic-access/accommodations.cfm> (last visited Jan. 5, 2020) (detailing the three-step process of documenting a student's disability that is required to request any sort of accommodation).

178. 42 U.S.C. § 12182(b)(1)(A)(iii).

179. See, e.g., *Scherer v. Waterbury*, No. CV 970137073, 200 Conn. Super. LEXIS 4810, at *11-12 (Conn. Super Ct. Feb. 22, 2000).

physical segregation. In fact, there are cases that do interpret the section insofar as it pertains to the provision of separate benefits.¹⁸⁰ Simply because these students are requesting disability accommodations, as opposed to Title IX or other accommodations, schools are denying these students a specific privilege or advantage that is provided to other students. If students making Title IX complaints must be permitted to have advisors, treating students with disabilities differently by virtue of the fact that they have disabilities and are requesting accommodations for their disabilities could bring rise to an ADA claim in this regard.

A school might argue that the Title IX meetings allowing advisors are for a different purpose than the accommodations meetings in question. Further, a school might argue that students with disabilities are not being singled out – any student meeting with the school for any reason other than for purposes of making a Title IX complaint or seeking accommodations under Title IX may not be accompanied by an advisor. However, a school would have to ensure that its policy was actually implemented consistently in that regard to avoid violating the ADA.¹⁸¹ There is no guarantee such arguments would be convincing. The validity of such arguments might also depend upon the school's specific policies.

There is minimal case law that could support a student argument that the ADA could apply to unequal treatment of students with disabilities as opposed to students making Title IX claims, but based simply upon the text of the statute and existing case law, it is possible that the general prohibition could provide some assistance for students. Such claims would also be limited only to universities subject to Title III of the ADA.¹⁸² Otherwise, claims are likely limited to a case-by-case basis.

6. *Why Universities Should Permit Advocates in Accommodations Meetings*

Permitting students to attend meetings with an observer, supporter, or advocate of their choice in an accommodations meeting is the right thing to do. This practice addresses the unequal bargaining power between a university and a student. Additionally, permitting the practice while instituting a transitional program can assist students in developing actual self-advocacy skills, as opposed to forcing them to advocate for themselves, alone, in their first interactions with the university. However, there are also

180. See *Colonial Life & Accident Ins. Co. v. Medley*, 584 F. Supp. 2d 368, 377-78, 377 n.2 (D. Mass. 2008), *rev'd on other grounds*, *Colonial Life & Accident Ins. Co. v. Medley*, 572 F.3d 22, 27 (1st Cir. 2009).

181. See 42 U.S.C. § 12182(b)(1)(A)(iii).

182. See *id.* (outlining this prohibition only as a part of Title III).

a number of other reasons why universities should permit the practice for their own direct benefit.

Universities should permit third parties to attend accommodations meetings to ensure students get everything they need for their own success. At first glance, that might appear as though it is for the benefit of their students. However, student success also directly benefits the university. It can assist with recruitment by student word of mouth, but it also directly affects university rankings.¹⁸³ For example, student outcomes receive thirty-five percent of the weight in factors that the U.S. News & World Report considers in its university rankings.¹⁸⁴ Alumni giving is also calculated in determining these rankings, and students who do poorly and are not provided with adequate resources are not only less likely to have the resources to donate to the university, but are also less likely to want to give to the university.

Permitting third parties to attend accommodations meetings may also diminish the liability the university might be subject to, since it is less likely to violate the law if the student is able to express her concerns and effectively advocate for herself. Students are also less likely to sue the university for not providing reasonable accommodations if the process appears fair and the students feel heard.¹⁸⁵ By making the process harder, or denying simple requests that, in the grand scheme, make little difference to the university, the university risks creating an adversarial process where one would not have otherwise existed. On the other hand, the university might also fear that, providing all requests without any pushback might set a precedent that it will grant all requests no matter how unreasonable or expensive. However, that

183. See Robert Morse et. al., *How U.S. News Calculated the 2020 Best Colleges Rankings*, U.S. NEWS & WORLD REP. (Sept. 8, 2019), <https://www.usnews.com/education/best-colleges/articles/how-us-news-calculated-the-rankings>.

184. *Id.*

185. See David A. Hyman et al., *The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution*, 90 CORNELL L. REV. 893, 944 (2005) (“When providers discuss mistakes openly and forthrightly, patients are less likely to sue than when providers engage in stonewalling.”); see also Merle H. Weiner, *Legal Counsel for Survivors of Campus Sexual Violence*, 29 YALE J.L. & FEMINISM 123, 182 (2017) (“A student might also be less likely to sue the university [if it provides legal counsel in a sexual assault case] because [the student] would be more likely to feel that its process made sense.”); Jeffrey J. Rachlinski, *Contrition in the Courtroom: Do Apologies Affect Adjudication*, 98 CORNELL L. REV. 1189, 1192 (2013) (noting “those who receive an apology are less likely to sue or complain about misconduct”); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 293 (2003) (“[E]mployees fired or laid off from their jobs . . . showed that if the termination process was judged to be fair, employees were less likely to sue.”).

is a slippery slope argument that has little legitimate basis. If anything, allowing an individual to be accompanied by a third person could, as previously mentioned, prevent a situation from becoming adversarial.

A third-party observer may also benefit the university, as well. A third party can confirm what a university claims transpired in a “he said, she said” scenario that would otherwise be void of any other evidence, aside from what both the university representative and the student remember from the meeting. Otherwise, no other evidence would be available. Of course, it could also harm the university if the university, or an agent of the university, makes a misstep in any of those meetings. However, on the other end of that, it could also work to protect the university.

Liability is also limited in the event that having an advocate would have been a reasonable accommodation in any given case. Offices should be assessing the reasonableness of requests and the general flexibility of their policies based upon the requirements of the ADA and Section 504 themselves. Having inflexible policies that are applied to all students regardless of their disability is a minefield for liability in an area of law that is largely determined on a case-by-case basis based upon the needs of the individual student. Policies that are inclusive, rather than exclusive, are therefore recommended.

7. How Universities Can Use Title IX as a Framework in Permitting Advocates in Accommodations Meetings

Universities already have the infrastructure in place to permit, and even encourage, students to use advocates in Title IX grievance and accommodations meetings with the university itself.¹⁸⁶ For example, American University has advocates within the Office of Advocacy Services for Interpersonal and Sexual Violence (OASIS) who are trained to, and tasked with, accompanying students with Title IX grievances to these meetings, should a student request an advocate to do so.¹⁸⁷ American University also has a separate office, the Academic Support and Access Center (ASAC), which is responsible for providing longer-term accommodations for students with disabilities. In interviews with OASIS, advocates Pritma “Mickey” Irizarry and Val Tovar on July 8, 2019 stated that OASIS has worked with ASAC, and that OASIS could speak with ASAC if a student is requesting accommodations related to a Title IX complaint. However, they have not heard of anyone requesting OASIS

186. See, e.g., Health Promotion & Advocacy Ctr., *supra* note 159; Prevention and Advocacy Resource Ctr., *Peer Advocates*, BRANDEIS UNIV., <https://www.brandeis.edu/parc/team/peer-advocates.html> (last visited Jan. 1, 2020).

187. Health Promotion & Advocacy Ctr., *supra* note 159.

advocates for ASAC accommodations meetings, and they have not heard of OASIS attending any meetings for that purpose.¹⁸⁸ Additionally, advocates cannot serve for a non-OASIS client, meaning they cannot assist anyone who does not have some sort of complaint relating to sexual violence.¹⁸⁹

American University is just one example, but other schools have similar restrictions—the sexual violence and prevention offices are limited in the services that they provide.¹⁹⁰ However, these offices provide important services and a solid framework for how student advocacy might work in areas beyond Title IX, including for disability accommodations. Universities can use offices like OASIS as a framework for establishing additional offices that serve similar purposes for accommodations meetings. Alternatively, these offices can serve as a guide for restructuring current advocacy offices and hiring additional advocates to handle disability accommodations meetings for students who request assistance. Ensuring that these offices are definitively able to assist students who experience sexual violence in more permanent disability accommodations meetings, as well as Title IX supportive measure meetings, is also vital for survivors.

Universities can also change, expand upon, clarify, or actually establish their policies on whether individuals are permitted to accompany students in disability accommodations meetings. According to many of responses on a survey conducted on university policies and student experiences, students were not aware of the exact policies at their schools. When students were aware of the policies, they were typically restrictive, or only permitted students to be accompanied by individuals who were a part of the university community. Universities can use their Title IX grievance procedure policies as a starting point for establishing clearer policies for accommodations meetings. After the Dear Colleague Letter and the string of actions against universities by the Department of Education, universities changed their Title IX policies to make them incredibly comprehensive.¹⁹¹ That said, using these policies as a guide would be incredibly helpful.

Accommodations advisor policies should be expansive and allow for student selection in an advisor of their choice, similar to Violence Against Women Act and Title IX regulations.¹⁹² Policies should not restrict advisors

188. Anonymous, *supra* note 90.

189. *Id.*; see also Health Promotion & Advocacy Ctr., *supra* note 159.

190. Prevention and Advocacy Resource Ctr., *supra* note 159.

191. Ditkowsky, *supra* note 158.

192. 34 C.F.R. § 668.46(k)(2)(iv); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, No. 2020-07057 (May 7, 2020) (to be codified at 34 C.F.R. pt. 106), <https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-07057.pdf>.

to members of the university community, nor should they prohibit the presence of any third party whatsoever. These policies should also be clearly established and written.

These policies should not only be expansive, but they should also focus on empowering students. There is a delicate balance. When allowing students to be accompanied by advocates, it can feel as though the university is preventing students from becoming their own advocates. However, that is not necessarily the case. Even OASIS explicitly states that its goal is to empower students, even though it does provide advocates who attend Title IX meetings with students.¹⁹³ Sometimes, providing students with information, guidance, and assistance is all that is necessary to empower students to advocate for themselves. Providing a third-party advisor might, for the first time, allow a student to become an effective advocate for herself.

Simply because schools are not necessarily required to allow students to be accompanied by advisors under the ADA or Section 504 in every instance does not mean schools cannot, or should not, use Title IX's mandates as a framework for disability accommodations meetings. In fact, universities can use Title IX as a framework for meetings in other areas, including racial and other forms of discrimination.

In addition to allowing on-campus advocates to be present at accommodations meetings and establishing clear policies about the use of advocates, campuses can permit and encourage students to organize. With respect to sexual assault, students organized to force universities to change their policies.¹⁹⁴ At Brandeis University, for example, peer advocates are also a large part of the Protection, Advocacy & Resource Center established to assist students who are survivors of sexual assault.¹⁹⁵ Students are aware of the barriers they face, and they know what they need to be successful. Students with disabilities are organizing on campuses across the country, and universities can encourage and permit that organization within their own infrastructure if they decide to truly entertain the feedback of these students.¹⁹⁶ That might include positions in student government, allowing for the creation of a student advocacy group, permitting students to protest on campus, or other acts of free speech.

Students with disabilities, however, have faced roadblocks when creating

193. Health Promotion & Advocacy Ctr., *supra* note 159.

194. See, e.g., Eva Ellenburg, *A Decade of Activism Changed Sexual Assault Policy, But Some Say UNC Still Falls Short*, DAILY TAR HEEL (Dec. 3, 2019, 10:18 PM), <https://www.dailytarheel.com/article/2019/12/decade-sexual-violence>.

195. Prevention and Advocacy Resource Ctr., *supra* note 159.

196. See, e.g., Law School Disability Advocacy Coalition, FACEBOOK (Oct. 2, 2018), <https://www.facebook.com/groups/1925703464401029/>.

on-campus organizations. Some universities have requirements for executive board members who wish to create organizations. For example, American University requires that these board members maintain a 2.5 grade point average (GPA).¹⁹⁷ However, when the purpose of the group is to highlight a university's failure to provide adequate accommodations, which might lead to a less than satisfactory GPA, such gatekeeping requirements prevent students with disabilities from forming formal on-campus organizations and accessing resources to successfully organize. These resources might include funds for hosting events or conducting outreach, the ability to reserve rooms on campus for meetings and events, and more.

Students should also be permitted to protest on campus, and to the most expansive extent possible. Protests should be simple to schedule, have limited requirements, and be encouraged. Students should be empowered to use their voices. Universities should not make it difficult for students to express themselves. At public universities, although the First Amendment protects student speech,¹⁹⁸ it does not protect all forms of speech, nor does it protect unlawful speech or acts.¹⁹⁹ Typically, public universities are considered limited public forums, and the state “[m]ay place restrictions on First Amendment-protected speech so long as those restrictions are ‘reasonable in light of the purpose served by the forum,’ and do not ‘discriminate against speech on the basis of its viewpoint.’”²⁰⁰ Otherwise, free expression is permitted on a public university campus.

The First Amendment does not apply at private universities, since it is not

197. *New Student Club Registration and Recognition Process*, AM. UNIV., <https://www.american.edu/ocl/student-involvement/upload/csi-new-club-registration-process.pdf> (last visited Jan. 1, 2020).

198. See U.S. CONST. amend. I; *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830-35 (1995); *Civil Disobedience at Public Universities*, ACLU OF N. CALIF., <https://www.aclunc.org/our-work/know-your-rights/civil-disobedience-public-universities> (last visited Jan. 1, 2020).

199. See *Rosenberger*, 515 U.S. at 829 (quoting *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384, 390 (1993)); *Young America's Found. v. Kaler*, 370 F. Supp. 3d 967, 982 (D. Minn. 2019) (“[P]ublic universities, just like any governmental entity, ‘may legally preserve the property under its control for the use to which it is dedicated.’”); see also *Victory Through Jesus Sports Ministry Found. v. Lee's Summit R-7 Sch. Dist.*, 640 F.3d 329, 333 (8th Cir. 2011) (“[I]t is well-established that the government need not permit all forms of speech on property that it owns and controls.”); *Disobedience at Public Universities*, *supra* note 198.

200. *Young America's Found.*, 370 F. Supp. 3d at 983 (quoting *Rosenberger*, 515 U.S. at 829).

the government that is prohibiting the speech.²⁰¹ That said, university policies set the standards for what speech is permitted. Many schools do permit protest, while others set certain restrictions or requirements.²⁰² For example, Brandeis University recently changed its policy to require prior approval for time and location of protest.²⁰³ The more restrictions on protest, speech, dissent, and assembly, the less likely students can organize to affect change on campus. That includes students with disabilities who wish to change processes for requesting accommodations.

Although allowing students to organize is important, universities must also work to change their own policies and provide their own resources. They cannot rely solely on self-advocates to do the work. While students should be included in any conversation involving policy decisions affecting them (as we say, “Nothing about us without us”), it is also not their burden to bear—especially when they are not being compensated for the work. Universities should bear the ultimate burden, both in terms of time and resources. Additionally, when students organize, the issues individual students face might not always be resolved. The issues of the collective take precedence, and the students are forced to prioritize. That said, it is still important to keep individual processes in place so that the issues individual students face on a case-by-case basis can be resolved.

CONCLUSION

Students with disabilities face an uphill battle when they confront a university for the first time to request accommodations. Universities wield an unfair amount of power, experience, and resources that shifts the dynamic in their favor. Furthermore, they control their own policies, and determine who can set foot in the accommodations meetings themselves. Third parties in accommodations meetings help to reset the balance. Third parties can observe and prevent questionable activities and statements, attest to whether certain things have occurred, advocate on behalf of students, provide guidance to students who have never navigated the system before, or simply empower students just by virtue of their presence. Not only do third parties reset the balance, but they also might serve as a necessary accommodation for a student with a disability. For example, students with anxiety, trauma,

201. See U.S. CONST. amend. I.

202. FIRE’s *FAQ for Student Protests on Campus*, FIRE, <https://www.thefire.org/get-involved/student-network/defend-protect-your-rights/fires-faq-for-student-protests-on-campus/> (last visited May 7, 2020).

203. Chaiel Schaffel & Ari Albertson, *Univ. Makes Changes to Student Protest Policies*, THE JUSTICE (Nov. 19, 2019, 11:00 AM), <https://www.thejustice.org/article/2019/11/brandeis-univ-makes-changes-to-student-protest-policies>.

hearing or learning disabilities, auditory processing disorders, or other disabilities might require a third party of some sort in these meetings.

Using third parties is likely legally required in case-by-case instances if it is alleged to be a reasonable accommodation, although it is not clear that it is required in many other instances in the disability context. A good faith argument could be made under Title III of the ADA, but there is little case law or support for that specific interpretation. Certainly, it is likely that it is not a blanket requirement in the disability context like it is in the Title IX context. Despite these legal shortcomings, universities can, and should, use the existing Title IX advocacy infrastructure as a framework for permitting advocates and third parties in disability accommodations meetings. Universities already have the resources and policies in place for advocates to accompany students who file grievances or require supportive measures under Title IX in associated meetings. If properly effected, these policies would empower students with disabilities, including survivors who might well require accommodations following Title IX grievance procedures.

Allowing third parties to attend accommodations meetings can be beneficial for universities. It can prevent future litigation by putting students at ease, prevent liability in the event that the third party testifies the university did act appropriately, and help to ensure students are receiving the accommodations that will help them to succeed at their university, which reflects well on the university and its rankings, among other things. Simply put, preventing an adversarial process at the outset with something as simple as allowing a student to have a friend or other individual of her choice present could make the university appear much more reasonable, to the student or a court, throughout the process. Accessible, inclusive, and welcoming spaces are mutually beneficial for everyone. If universities were willing to work with students, as opposed to maintaining restrictive policies that appear to have no rational basis, perhaps they would see that students are willing to work with them, as well.