

# LEGAL PERSPECTIVE: Q&A WITH DANIEL F. GOLDSTEIN

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## ABSTRACT

For students with disabilities to have the same opportunities to succeed as their nondisabled peers, access to educational technology and digital content is critical. It is essential that higher education boards, administrators, faculty, and administrative staff understand why accessibility must be on the forefront of our educational programs, co-curricular initiatives, support services, and infrastructure for on-campus and online programs. This question and answer session with Daniel F. Goldstein, a partner and trial lawyer with Brown, Goldstein & Levy, provides a legal perspective on issues relating to accessibility and online learning.

## KEYWORDS

Accessibility, federal law, regulation, equal access, equal opportunity, liability, disabilities, higher education, online learning, online education, barriers, student success

## I. Q&A

***JALN: What does federal law require of higher education institutions?***

***Daniel F. Goldstein:*** Federal law requires equal access and equal opportunity for students with disabilities. There are four key components that should serve as cornerstones for any discussions regarding accessibility and higher education:

- Universities must provide those with disabilities *equal access to all* of its programs and activities.
- Universities must provide those aids and services that will allow those with disabilities an equal opportunity to participate in and benefit from its programs and activities.
- Universities must also provide those aids, benefits, and services that will allow persons with disabilities equal opportunity to achieve the same results as others.
- Universities may not provide separate programs and activities except when necessary to provide integrated access.

Federal law and regulations supporting students with disabilities date back to the early 1990s: Americans with Disabilities Act of 1990 and Regulations of 1991. As stated by the United States Department of Justice Civil Rights Division, the Americans with Disabilities Act of 1990 (ADA) prohibits discrimination and ensures equal opportunity for persons with disabilities in employment, state and local government services, public accommodations, commercial facilities, and transportation. It also mandates the establishment of TDD/telephone relay services. The current text of the ADA includes changes made by the ADA Amendments Act of 2008 (P.L. 110-325), which became effective on January 1, 2009. The ADA was originally enacted in public law format and later rearranged and published in the United States Code. [1]

There are two critical provisions of the ADA that directly affect higher education. Title II of the Americans with Disabilities Act applies to *public universities* and Title III applies to *private universities*. In addition, Section 504 of the Rehabilitation Act prohibits discrimination in federally assisted programs.

Thus, Section 504 applies to all universities that *receive federal funding*. It is important that institutions follow all updates to the regulations that have been promulgated pursuant to these statutes by the Department of Justice (Titles II and III) and the Department of Education (Section 504). The ADA National Network's website provides [an] ADA Title II and Title III Regulations Fact Sheet Series that includes dates for all revisions and guidance around the changes. Here are several links that can provide additional information:

- The Americans with Disabilities Act: <http://www.ada.gov/>
- The U.S. Department of Education: <http://www2.ed.gov/about/offices/list/ocr/504faq.html>
- ADA Title II Factsheets: [http://adata.org/factsheets\\_en](http://adata.org/factsheets_en)

***JALN: How has technology changed how institutions accommodate students and faculty with disabilities?***

***Daniel F. Goldstein:*** Before the invasion of technology on campus, accommodating students and faculty with disabilities required the specialized services of a Disabled Student Services Office. However, because digital technology and content is susceptible of equal access, accommodation becomes part of the responsibility of everyone responsible for acquiring technology or creating digital content both in and outside of the classroom.

Technology today is pervasive across an institution. The reality is that disability support services cannot offer solutions for inaccessible learning management software, online registration and financial aid, library search software, online calendars of events, statistical software, MOOCs and the like—nor do they need to. Digital technology is uniquely capable of offering mainstream accessibility to students and faculty with disability, as it is not inherently visual, tactile, or audible, but [rather] zeros and ones that must be rendered to be available to at least one of the senses. Thus, offering mainstream access becomes the responsibility of everyone in the university associated with digital technology, whether it is related to courses, student life, or administration.

***JALN: What are the steps for a campus to provide equal opportunity to all students without regard to their disability?***

***Daniel F. Goldstein:*** The first step is to stop the proliferation of inaccessible technology by adopting procurement policies that require that the university license only accessible technology. As more schools do so (ranging from George Mason University to the Cal State system) or are required to do so (as in the recent settlement between the Department of Justice and Louisiana Tech University), vendors will begin to compete on the basis of accessibility, and this [adoption of procurement policies] will become an easier task for universities.

The second step is to find out how big a problem you have—an audit of the accessibility of your existing technology, both system-wide technology and course-related. This [audit] is not unlike the audits many campuses did in the 1990s of the physical accessibility of their buildings.

The third step is to have a plan, public and transparent, that is affordable and realistic to retrofit or replace your inaccessible technology. If the plan is reasonable and you have made interim alternative arrangements for your disabled students, announcing it is an inoculation against being sued—most disability rights lawyers are realistic enough to know that most judges would be hostile to suing a university that is trying to do the right thing and has a reasonable plan for getting there.

The fourth step is to educate your faculty on the simple steps to make sure that the content they distribute is accessible and to make them accountable when they do not.

**JALN:** *How do I know whether a particular technology or online course is accessible?*

**Daniel F. Goldstein:** This is a difficult question. The Advisory Commission on Accessible Instructional Material in Post-Secondary Education, established by the Higher Education Opportunity Act of 2008, recommended in the AIM Commission Report that legislation be required to give the Access Board authority to write standards for accessible educational technology. This [set of standards] would assist honest vendors by telling them the goals to meet and would assist schools because they could ask vendors for representations that those standards have been met. Unfortunately, support within cross-university organizations for such legislation have been lacking, a strange dynamic given that under the present legal regime, universities are the only link in the chain with legal exposure. However, until such standards can be generated, universities should in their procurements require representations and warranties of accessibility and require vendors to indemnify them if they are sued under the ADA and the Rehabilitation Act.

[The AIM Commission Report is available online:  
<http://www2.ed.gov/about/bdscomm/list/aim/publications.html>.]

**JALN:** *Do you have any final comments to share regarding accessibility and online learning?*

**Daniel F. Goldstein:** I have three closing comments for *JALN* readers.

- It is important to remember that federal law imposes no liability on tech developers or content providers. Therefore, colleges and universities must become more informed as consumers. Require accessibility in procurement contracts. Just because a vendor says a product is “accessible” does not mean that it is *usable* by students with disabilities. Institutions must evaluate and verify accessibility.
- Institutions need to stop creating new accessibility barriers by making sure that what is posted to their websites is accessible and by making accessibility a funding requirement when giving faculty funds to create online content.
- When our colleges and universities require vendors to provide accessibility, vendors will deliver accessibility.

## **ABOUT DANIEL F. GOLDSTEIN**

Daniel F. Goldstein is a partner with Brown, Goldstein & Levy, a law firm founded in 1984 and based in Baltimore, Maryland. For more information, visit the firm’s website at <http://www.browngold.com>.

## **REFERENCES**

1. **United State Department of Justice.** Americans with Disabilities Act of 1990.  
[http://www.ada.gov/2010\\_regs.htm](http://www.ada.gov/2010_regs.htm).