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Pandemic Silver Lining: Discovering the Reasonableness of Remote Learning as an Accommodation Under the ADA

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Pandemic Silver Lining: Discovering the Reasonableness of Remote Learning as an Accommodation Under the ADA

Kaitlyn Barciszewski*

Abstract

As society returned to “normal” following the worldwide pandemic caused by the outbreak of COVID-19, higher education students around the world could be heard celebrating and warmly welcoming their return to in-person classes. With this return came the face-to-face social interactions most longed for through the worldwide lockdown with friends, classmates, and professors. Some may even feel that in-person learning is more effective than what had become the norm—Zoom university. At this moment, however, these institutions can and should evaluate the potential benefits and continued utility of this alternate way of doing higher education that was forced upon them for over a year. In doing so, institutions should remember and pay special attention to the way it impacted a growing population within their student body—those with disabilities. Courts in this country must be aware of how this newly discovered way of participating in higher education classes may now be a presumptively reasonable accommodation under the Americans with Disabilities Act (ADA) for those students who, due to their disability, cannot attend in-person. This Note incorporates doctrinal and social science evidence in support of the argument that given the reliance on advanced technologies during the pandemic, virtual learning is a reasonable accommodation for qualified students with disabilities.

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I. Introduction

Although many college students struggled with remote learning through the COVID-19 pandemic, some found it to be highly beneficial.¹ Daniel Goldberg is one such student.² When he “took his final exams last December, he was attired in little more than a baby-blue hospital gown with an intravenous line snaking out of his arm.”³ Mr. Goldberg is a “24-year-old law student at Arizona State University” with “a painful, chronic inflammatory bowel disease.”⁴ Through the height of the pandemic he “toggled between attending virtual classes and consulting with his doctors — sometimes from his hospital bed,” but before the pandemic, Mr. Goldberg had to miss classes often “whenever he needed medical attention.”⁵ During the last academic year, however, “he didn’t miss a single class, and he said he had become a better student as a result. . . [Mr. Goldberg stated,] ‘I should be able to attend via Zoom if I need to.’”⁶ As his classes returned to in-person last fall, Mr. Goldberg asked to continue learning remotely as an accommodation under the Americans with Disabilities Act.⁷ The university granted this request.⁸

Unfortunately, not all universities are as willing to allow students with disabilities to continue learning from home, and

1. See Stephanie Lai, *In Return to Campuses, Students With Disabilities Fear They’re Being ‘Left Behind’*, WASH. POST (Nov. 1, 2021, 6:00 AM) (explaining that some of the benefits of virtual learning for students with disabilities included the ability to read closed captions during lectures in real time, turn cameras off when needed, and watch recorded lectures at home and at their own pace) [perma.cc/FRZ4-RM2R].

2. See Amanda Morris & Emily Anthes, *For Some College Students, Remote Learning Is a Game Changer*, N.Y. TIMES (Aug. 23, 2021) (telling Daniel Goldberg’s story and reporting that virtual learning helped many students with disabilities pursue their education during the pandemic and they want the option to continue) [perma.cc/8EU8-HU4F].

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. See *id.* (explaining further that Mr. Goldberg’s conditions also leave him immunocompromised and more vulnerable to the coronavirus).

8. See *id.* (reporting on the approved accommodation request).

under pre-pandemic jurisprudence, would likely not be required to accommodate such requests. The argument in the past, pre-Covid, was, “of course, an online course is fundamentally different than a course in the classroom,”⁹ and courts deferred to the institution’s judgement in denying telecommuting requests of qualifying students.¹⁰ Moreover, in the employment context, some federal circuits created a presumption against the reasonableness of working from home as an accommodation, reasoning that face-to-face interaction is essential to most jobs.¹¹ This same reasoning was cited, pre-Covid, to deny a student’s request to participate remotely.¹² The fact that college classes were conducted exclusively through remote means without reimbursement to students for the first year of the pandemic, however, provides a reason to scrutinize new institutional decisions that deny remote learning as an accommodation.¹³

This Note argues that students with disabilities should be among the beneficiaries of the new remote classroom and workplace culture that came about due to the COVID-19 pandemic. It will begin by laying out the law that applies to reasonable accommodation requests. Then, Part III will explain past reasonable accommodation jurisprudence applying to telework requests, which includes cases within the higher education setting and in the employment setting, as both require reasonable accommodation under the Americans with Disabilities

9. *Id.*

10. *See, e.g., Gati v. W. Ky. Univ.*, 762 Fed. Appx. 246, 251 (6th Cir. 2019) (unpublished) (denying a qualified student’s request to take courses remotely because the university faculty did not find the proposal reasonable).

11. *See, e.g., Tehankpa v. Ascena Retail Grp.*, 951 F.3d 805, 812 (6th Cir. 2020) (concluding that an accommodation is likely unreasonable if it frustrates attendance or creates an unlimited ability to leave work); *Becerra v. EarthLink, Inc.*, 421 F. Supp. 2d 1335, 1345 (D. Kan. 2006) (noting that “the Tenth Circuit recognized that physical attendance in the workplace is itself an essential function of most jobs”).

12. *See Harnett v. Fielding Graduate Inst.*, 400 F. Supp. 2d 570, 573–74 (S.D.N.Y. 2005), *aff’d*, 198 Fed. Appx. 89 (2d Cir. 2006) (denying a virtual attendance accommodation request because the program required 300 hours of *face-to-face* contact with faculty to complete the program).

13. *See, e.g., Rickenbaker v. Drexel Univ.*, No. 20-3353, 2020 WL 1881319, at *4 (D. S.C. Mar. 30, 2022) (alleging that Drexel University has failed to refund any portion of the Plaintiff and Class members’ spring 2020 tuition payment).

Act (ADA). Part III.B. then proceeds to an evaluation of the reliance on telecommuting during the pandemic and how courts began to assess how new abilities to efficiently work remotely applied to accommodation requests. Next, Part III.C. will analyze the pros and cons of learning remotely. Part IV will propose recommendations on the way forward, considering the newly discovered reasonableness of remote learning in higher education. The Note will conclude in Part V with a reminder about the importance of achieving equal access to higher education for people with disabilities.

II. The Right to Live, Virtual Instruction as an Accommodation in Higher Education

A. Disability Law Applied to Higher Education

The application of disability law to higher education began in 1973 with the enactment of Section 504 of the Rehabilitation Act of 1973, which prohibited discrimination on the basis of disability for programs receiving federal financial assistance.¹⁴ Because higher education institutions receive substantial federal funding, Section 504 applies and has provided a basis for discrimination claims by students with disabilities.¹⁵

The Americans with Disabilities Act (“ADA”) expanded protection against disability discrimination.¹⁶ It was enacted in 1990 to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with

14. See 29 U.S.C. § 794 (2014) (“No otherwise qualified individual with a disability in the United States . . . 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 . . .”).

15. See Laura Rothstein, *The Americans with Disabilities Act and Higher Education 25 Years Later: An Update on the History and Current Disability Discrimination Issues for Higher Education*, 41 J.C. & U.L. 531, 533–34 (2015) (providing a historical overview of § 504 and explaining that higher education institutions were a laboratory for interpreting § 504 in its earliest years as some of the few programs that received substantial federal funding).

16. See *id.* at 533 (providing a historical overview of the ADA).

disabilities.”¹⁷ In 2008, the law was amended to extend the scope of coverage under the law and to provide “clear, strong, consistent, enforceable standards addressing discrimination.”¹⁸

The ADA applies more broadly than the Rehabilitation Act “because of its substantially greater prohibition of discrimination in the private sector.”¹⁹ The ADA expands prohibitions against discrimination and is organized to forbid discrimination against persons with disabilities in three major areas of public life: (1) most employment under Title I of the statute; (2) public services, programs, and activities, which are the subject of Title II; and (3) public accommodations, which are covered by Title III.²⁰ Title II applies to state and local governmental programs, which includes many colleges and universities already covered by the Rehabilitation Act.²¹ Title III applies to specific categories of private providers of public accommodations, including educational programs.²² Such programs include many private colleges and

17. Americans with Disabilities Act Amendment of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at 42 U.S.C. 12101 (1990)).

18. 42 U.S.C. § 12101(a)(7) (2008).

19. Laura Rothstein, *Higher Education and Disability Discrimination: A Fifty Year Retrospective*, 36 J.C. & U.L. 843, 854 (2010).

20. See *Tennessee v. Lane*, 541 U.S. 509, 516–17 (2004) (explaining that “the ADA was passed by large majorities in both Houses of Congress after decades of deliberation and investigation into the need for comprehensive legislation to address discrimination against persons with disabilities”).

21. See 42 U.S.C. § 12132 (providing that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation or denied the benefits of the services, programs or activities of a public entity”); see also Rothstein, *supra* note 15, at 533–34 (explaining that the ADA expanded protection against disability discrimination “to state and local governmental programs (which included many colleges and universities already covered by the Rehabilitation Act”).

22. See 42 U.S.C. § 12182(a) (2009) (providing that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation”); see also Rothstein, *supra* note 15, at 533–34 (explaining that the ADA expanded protection against disability discrimination “to twelve categories of private providers of public accommodations”).

universities that are also covered by the Rehabilitation Act.²³ Thus, the ADA applies to both public and private institutions of higher education under Titles II and III in the same way it applies to both public and private employers under Title I.²⁴

B. The Right to Reasonable Accommodations in Higher Education

Both the Rehabilitation Act and the ADA require more than nondiscrimination—both statutes require “reasonable accommodations” upon request of the student.²⁵ Under these laws, an institution of higher education must reasonably accommodate

23. See Nat'l Ass'n of the Deaf v. Harvard Univ., 377 F. Supp. 3d 49, 56 (D. Mass. 2019) (citing 42 U.S.C. § 12181(7)(J)) (“Private schools, including undergraduate and postgraduate institutions, and other places of education, are public accommodations.”).

24. See Gamino v. Yosemite Cmty. Coll. Dist., No. 118CV00391LJOSAB, 2018 WL 3388524, at *4 n. 3 (E.D. Cal. July 10, 2018), *report and recommendation adopted*, No. 118CV00391LJOSAB, 2018 WL 4005233 (E.D. Cal. Aug. 17, 2018) (explaining that “Title II and Title III of the ADA are ‘parallel provisions’ with Title II covering only public entities and Title III covering only private entities”) (quoting Hernandez v. Cnty. of Monterey, 70 F. Supp. 3d 963, 973 (N.D. Cal. 2014))

25. See 34 C.F.R. §§ 104.3–104.4 (mandating that “[n]o qualified handicapped person shall, on the basis of handicap, be . . . subjected to discrimination” and defining “qualified handicapped person” to mean “a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question”); see also 42 U.S.C. §§ 12131–12132 (2001) (prohibiting discrimination under Title II against someone “who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity”); 42 U.S.C. § 12182(b)(2)(A) (2009) (defining discrimination under Title III to include “a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities.”); Gile v. United Airlines, Inc., 95 F.3d 492, 497 (7th Cir. 1996) (noting that the definition of “reasonable accommodation” in the Rehabilitation Act is the same as that in the ADA); Miller v. Monroe Sch. Dist., 159 F.Supp.3d 1238, 1249 (W.D. Wash. 2016) (explaining that courts analyze claims under the ADA and § 504 of the Rehabilitation Act together, “because there is no significant difference in the analysis of rights and obligations created by the two Acts”).

a qualified individual with a disability by making changes in rules, policies, practices, or services when needed.²⁶ In other words, colleges are generally required to make modifications that would be viewed as reasonable where necessary to ensure nondiscrimination.²⁷ The Department of Education has clarified that such modifications may include “adaptation of the manner in which specific courses are conducted.”²⁸

When requesting accommodation, the student will likely have to demonstrate that his or her condition is one covered by the Rehabilitation Act, the ADA, or state law.²⁹ The ADA Amendments Act of 2008 clarified, broadened, and amended the definition of “disability.”³⁰ The Amendments state that the new definition also applies to the Rehabilitation Act.³¹ Under both the ADA and Rehabilitation Act, an individual is disabled if that individual has (1) “a physical or mental impairment that substantially limits one

26. See 28 C.F.R. § 35.130(b)(7) (stating that in regulations interpreting Title II of the ADA, “[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity”); see also Rothstein, *supra* note 15, at 552 (stating that the ADA Amendments of 2008 codify the basic provisions of the ADA and Rehabilitation Act regulations by providing that reasonable accommodations may include “modification of attendance policies”).

27. See 42 U.S.C. § 12182(b)(1)(B) (2009) (“[A]ccommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.”); see also 34 C.F.R. § 104.44 (effectuating § 504 of the Rehabilitation Act by explaining that an institution “shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student”); *Stern v. Univ. of Osteopathic Med. & Health Sciences*, 220 F.3d 906, 909 (8th Cir. 2000) (finding that the evidence supported having multiple-choice test read on audiotope, private room, and additional time, but not change to essay or response to oral questioning for a medical student with dyslexia).

28. 34 C.F.R. § 104.44.

29. See Laura Rothstein, *Who Is Protected, in* DISABILITIES AND THE LAW § 3:2 (4th ed.) (describing who is protected from discrimination based on disability in the higher education context).

30. 42 U.S.C. § 12102 (2014).

31. See 29 U.S.C. § 705(9)(B) (2014) (incorporating 42 U.S.C. § 12102 (2014)).

or more major life activities”, (2) has “a record of such an impairment”, or (3) is “regarded as having such an impairment.”³²

Moreover, to qualify for protection, the student must not only prove they are disabled under the statutory definition, but also that they are “otherwise qualified.”³³ In the context of higher education, a qualified student with a disability under the ADA and the Rehabilitation Act is one who is able to meet all of a program’s requirements with or without accommodation for his or her disability.³⁴ There are two inquiries necessary to determining whether a student is “otherwise qualified” within the meaning of the ADA and the Rehabilitation Act: (1) the extent to which reasonable accommodations that will satisfy the legitimate interests of both the school and the student are available, and (2) if such accommodations exist, the extent to which the institution explored them.³⁵ Importantly, students who are unable to attend classes and have frequent absences are consistently considered unqualified for the program under the ADA.³⁶

32. 42 U.S.C. § 12102 (2014); *but see* 42 U.S.C. § 12201 (2009) (noting that a covered entity under Title I, a public entity under Title II, and any person who owns, leases, or operates a place of public accommodation under Title III need not provide a reasonable accommodation to an individual who meets the definition of disability *solely* under subparagraph (C) of § 12102).

33. *See* 42 U.S.C. § 12131(2) (2001) (defining an “otherwise qualified” individual under Title II as someone who “with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements” for participation in programs provided by a public entity); *see also* 34 C.F.R. § 104.3(l) (2000) (defining a qualified individual with a disability under section 504 of the Rehabilitation Act similarly).

34. *See id.* (mandating that the student must meet the essential eligibility requirements of the program with or without reasonable accommodations); *see also* Shaikh v. Lincoln Mem’l Univ., 46 F. Supp. 3d 775, 784 (E.D. Tenn. 2014) (finding that a student who was dismissed from an osteopathic medicine program was not otherwise qualified to receive the further accommodation of deceleration of the program because of academic deficiencies displayed after other accommodations had been provided (additional exam time, access to lecture notes, class video recordings)).

35. *See id.*

36. *See* Rothstein, *supra* note 15, at 546 (“Judicial decisions have been consistent that attendance is often an essential requirement and deficiencies need not be excused.”); *see e.g.*, Harville v. Texas A&M Univ., 833 F. Supp. 2d 645, 661 (S.D. Tex. 2011) (holding that it did not violate the ADA to terminate a research

A subfactor that courts often consider in determining whether a student is otherwise qualified is whether they pose a “direct threat” to the institution.³⁷ The Department of Education regulations implementing Title II of the ADA defines “direct threat” to mean “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services.”³⁸ The determination of direct threat is to be based on an individualized assessment of the following:

reasonable judgment that relies on current medical knowledge or on the best available objective evidence to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices or procedures or the provision of auxiliary aids or services will mitigate the risk.³⁹

This assessment is “particularly relevant to issues involving contagious and infectious diseases (such as HIV) and mental health impairments.”⁴⁰

Lastly, a key part of proving disability discrimination in the higher education context is being able to allege that the student made his or her disability or condition known to the school prior to its decision not to accommodate.⁴¹ A student can allege that a

assistant because of excess absences); *Ladwig v. Bd. of Supervisors of La. State Univ. & Agric. & Mech. Coll.*, 842 F. Supp. 2d 1003, 1007 (M.D. La. 2012), *aff'd*, 481 Fed. Appx. 239 (5th Cir. 2012) (unpublished) (finding that that a doctoral student with depression and anxiety did not make out a Title I or Title II case because the student was not qualified to perform essential functions of her graduate assistantship due to medically necessary absences).

37. 42 U.S.C. §§ 12131—12134.

38. 28 C.F.R. § 35.104 (2016).

39. 28 C.F.R. § 35.139(b) (2011).

40. Rothstein, *supra* note 15, at 547 n. 85.

41. See Rothstein, *supra* note 15, at 542 (explaining that many cases have highlighted this requirement); see also *Shamonsky v. St. Luke’s Sch. of Nursing*, No. 07-1606, 2008 WL 724615, at *3 (E.D. Pa. Mar. 17, 2008) (“Where a student has failed to show that the school was aware of her disability at the time she was terminated, the student has failed to state a claim.”) (citing *Leacock v. Temp. U. Sch. of Med.*, No. 97-7850, 1998 WL 1119866, at *4 (E.D. Pa. Nov. 25, 1998)).

school discriminated if the student made his or her qualifying disability known and provided appropriate documentation in a timely manner, and the school failed to make a reasonable accommodation.⁴²

C. Defenses to Accommodation Requests

While the ADA and Rehabilitation Act require reasonable accommodations in both employment and higher education settings, the standards for determining what is reasonable are slightly different, and therefore, the defenses against making certain accommodations are also different.⁴³

1. Undue Hardship Defense

Under Title I of the ADA, an employer does not have to provide a requested accommodation that would cause an “undue hardship” to the employer because such request would be considered unreasonable.⁴⁴ When it comes to deciding what is an unreasonable request, “generalized conclusions will not suffice to support a claim of undue hardship.”⁴⁵ The defense of undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable

42. See *Gati v. W. Ky. Univ.*, 762 F. App’x 246, 250 (6th Cir. 2019) (explaining that a plaintiff makes out a prima facie case of discrimination by showing that: “(1) she has a disability; (2) she is otherwise qualified; and (3) she was being excluded from participation in, denied the benefits of, or subjected to discrimination under the program because of her disability”) (internal quotations omitted).

43. Compare 42 U.S.C. § 12112(b)(5)(A) (2009) (creating an exception for employers under Title I of the ADA to deny requested accommodations that the employer can demonstrate would impose an *undue hardship* on the operation of the business), with 42 U.S.C. § 12182(b)(2)(A)(ii) (2009) (creating an exception for entities under Title III of the ADA to deny requested accommodations that the entity can demonstrate would fundamentally alter the nature of the program or services provided).

44. 42 U.S.C. § 12112(b)(5)(A) (2009).

45. *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Oct. 17, 2002) [perma.cc/484A-YVYV].

accommodation would cause “significant difficulty or expense” to the employer.⁴⁶

A determination of undue hardship should be based on several factors.⁴⁷ Those factors include:

- (1) the nature and cost of the accommodation needed;
- (2) the overall financial resources of the facility making the reasonable accommodation;
- (3) the number of persons employed at the facility;
- (4) the effect on expenses and resources of the facility;
- (5) the overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity);
- (6) the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer; and
- (7) the impact of the accommodation on the operation of the facility).⁴⁸

For example, in *Kazmierski v. Bonafide Safe & Lock, Inc.*, a locksmith company was not required to provide an employee with up to five unplanned absences per month as an accommodation under the ADA.⁴⁹ The employee “suffered from back pain due to herniated discs, sinusitis, anxiety, and depression.”⁵⁰ The Court reasoned that such an accommodation would cause an undue hardship because the essential function of the employee’s job was to make service calls at customer locations to service or install locks, and many service calls involved emergencies and last-minute requests.⁵¹ The company’s policy was to provide same-day

46. 29 C.F.R. § 1630.2(p)(1) (2012).

47. See 42 U.S.C. § 12111(10)(B) (2009) (providing factors courts must consider in determining whether the accommodation creates an undue hardship).

48. *Id.*

49. See *Kazmierski v. Bonafide Safe & Lock, Inc.*, 223 F. Supp. 3d 838, 851 (E.D. Wis. 2016) (determining whether an accommodation created an undue hardship on the employer).

50. *Id.*

51. *Id.*

service for customers, so the company needed its locksmiths to attend work reliably and predictably.⁵²

Of consequence to telework requests, some circuits have added to the statutory factors a presumption against the employee requesting to work from home as an accommodation for a relevant disability. The Sixth Circuit, for example, has concluded that “[a]long with these factors [listed above], an accommodation is likely unreasonable if it frustrates attendance or creates ‘an unlimited ability to leave work.’”⁵³ In *Banks v. Bosch Rexroth Corp.*, the Court held that a doctor’s proposed accommodation for the employee to be “required to leave the worksite” any time her medications failed to resolve her migraines within 15–30 minutes failed as a matter of law because an unlimited ability to leave work is presumptively unreasonable.⁵⁴ Likewise, in *Tchankpa v. Ascena Retail Group, Inc.*, an employee’s request to work-from-home part-time due to his disability was found presumptively unreasonable on the same grounds.⁵⁵

“The issue of undue hardship plays a major role in determining the future of telecommuting as a reasonable accommodation for purposes of the ADA.”⁵⁶ Currently, employers can avoid accommodating an individual’s request to work at home based on undue hardship to the company. Judicial scrutiny of the undue hardship defense as it relates to telecommuting options in the employment context will impact the reasonableness of telecommuting requests for students with disabilities in the higher education context.⁵⁷

52. *Id.*

53. *Tchankpa v. Ascena Retail Grp., Inc.*, 951 F.3d 805, 812 (6th Cir. 2020) (quoting *Banks v. Bosch Rexroth Corp.*, 610 F. App’x 519, 528 (6th Cir. 2015) (unpublished)).

54. *Banks v. Bosch Rexroth Corp.*, 610 Fed. Appx. 519, 527 (6th Cir. 2015) (unpublished).

55. *Tchankpa*, 951 F.3d at 812 (applying the presumption against telecommuting).

56. Brianne M. Sullenger, *Telecommuting: A Reasonable Accommodation Under the Americans with Disabilities Act As Technology Advances*, 19 Regent U.L. Rev. 537, 544 (2007).

57. *See Gati v. W. Ky. Univ.*, 762 F. App’x. 246, 252 (6th Cir. 2019) (unpublished) (relying on precedent in the employment context to analyze a failure to accommodate claim in the higher education context).

2. Fundamental Alteration of the Program Defense

In the higher education context, Title III of the ADA stipulates that a failure to make reasonable modifications when necessary is discrimination *unless* the entity in question can show that such modifications “would fundamentally alter the nature of the service, program, or activity.”⁵⁸ Thus, while higher institutions are required to make “reasonable modifications in policies, practices, or procedures when . . . necessary”,⁵⁹ they are not required to make requested modifications that would fundamentally alter the program, or lower academic standards.⁶⁰ In essence, colleges are not required to modify an academic requirement where they can demonstrate that the requirement is “essential to the instruction being pursued by such student.”⁶¹ However, if an essential course of the program can be reasonably adapted, it must be.⁶² If it cannot

58. 28 C.F.R. § 35.130(b)(7)(i) (2016); *see also* Powell v. Nat’l Bd. of Med. Exam’rs, 364 F.3d 79, 88 (2d Cir. 2004) (finding that a medical school had not discriminated because the school diligently assessed the available options and then made an academic judgment that a reasonable accommodation was not available and, that to accommodate the student would work a fundamental change in the substance of its medical program).

59. 28 C.F.R. § 35.130(b)(7)(i) (2016).

60. *See* Se. Cmty. Coll. v. Davis, 442 U.S. 397, 413 (1979) (“Section 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person.”).

61. 34 C.F.R. § 104.44; *see also* 42 U.S.C. § 12182(b)(2)(A) (2009) (creating an exception for institutions to deny requested accommodations to testing or screening criteria that “can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered”); Lipton v. N.Y. Univ. Coll. of Dentistry, 507 F. App’x. 10, 11 (2d Cir. 2013) (unpublished) (granting great deference to school in refusal to create an exception to the number of times one could take exam; student’s proposed accommodations of more opportunities to pass exam after failing four times was not related to reading disability); Suzanne E. Rowe, *Learning Disabilities and the Americans with Disabilities Act: The Conundrum of Dyslexia and Time*, 15 J. LEGAL WRITING INST. 165, 202–03 (2009) (explaining that schools should not be required to modify written exams in order to accommodate a student with a disability because writing exam essay answers is essential to testing the student’s ability “to articulate conclusion[s] clearly and persuasively, demonstrating sound and persuasive reasoning”).

62. *See* Laura Rothstein & Julia Irzyk, *Programs and Services—Academic Modifications*, in *DISABILITIES AND THE LAW* § 3:9 (4th ed.) (summarizing the fundamental alteration defense to making accommodations).

be adapted, and if it is truly an essential component of the program, the individual may be determined unqualified.⁶³ In addition, the ADA does not require the institution to provide any or all reasonable accommodations which the student requests so long as the institution provides an alternative “effective accommodation.”⁶⁴

Thus, institutions often deny requests for accommodations based on a determination that the accommodation would fundamentally alter the program and lower academic standards.⁶⁵ And while the burden is on the school to prove that such defense applies,⁶⁶ most courts apply a highly deferential standard when evaluating the institution’s determination and reasoning.⁶⁷ The courts will defer to an academic institution’s determination

63. *See id.* (providing an example of a blind medical student who could not take a course in radiology because he could not read x-rays and explaining that if it were determined that the class could not be modified, and that it was essential to the program, the student involved would not be otherwise qualified).

64. 29 C.F.R. § 1630.9 (2011).

65. *See, e.g., Gati v. W. Ky. Univ.*, 762 F. App’x. 246, 251 (6th Cir. 2019) (unpublished) (denying a student’s request to take courses remotely because the university faculty did not find the proposal reasonable); *Kaltenberger v. Ohio Coll. of Podiatric Med.*, 162 F.3d 432, 436 (6th Cir. 1998) (denying a student’s request to take remedial summer courses after failing them with accommodations because “disability discrimination laws do not require an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person”); *McCulley v. Univ. of Kan. Sch. of Med.*, 591 F. App’x. 648, 651 (10th Cir. 2014) (deciding that a prospective medical student with Type III spinal muscular atrophy made an unreasonable accommodation request because providing a staff surrogate to lift patients would fundamentally alter the nature of the program, and thus, the medical school’s rescission of her admission did not violate Title III of the ADA).

66. *See* Richard E. Kaye, *What Constitutes Reasonable Accommodation Under Federal Statutes Protecting Rights of Disabled Individual, as Regards Educational Program or School Rules as Applied to Learning Disabled Student*, 166 A.L.R. Fed. 503, 2 (2022) (explaining that the students bear the initial burden of producing evidence of an accommodation that would enable them to meet the educational institution’s essential requirements, but the burden then shifts to the institution to produce evidence that the requested accommodation would require a fundamental modification of its program or standards).

67. *See Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19, 26 (1st Cir. 1991) (creating the deferential standard); *see also Gati*, 283 F. Supp. 3d at 620 (W.D. Ky. 2017) (requiring judicial deference to a determination by a university that it could not accommodate a student by offering courses remotely without jeopardizing the academic integrity of the mental health counseling program).

against accommodation as long as there is evidence that the school came to a “rationally justifiable conclusion.”⁶⁸

The standard was first articulated in *Wynne v. Tufts University School of Medicine* where the First Circuit ruled in favor of a university denying a requested accommodation as unreasonable.⁶⁹ In reaching its decision, the Court established that in considering whether relevant officials within a university sufficiently considered the feasibility, cost, and effect of possible accommodations on the academic program, the reviewing court should decide if it was “rationally justifiable” for the university to conclude that possible accommodations “would lower academic standards or require substantial program alteration.”⁷⁰ Following this analysis, courts are generally hesitant to disagree with an institution’s academic judgment, acknowledging that the “federal judiciary is ill equipped to evaluate the proper emphasis and content of a school’s curriculum.”⁷¹

This highly deferential standard may make requests for virtual learning as an accommodation more difficult for a court to accept as reasonable compared to the factor-based standard of undue hardship in the employment context. Further judicial scrutiny of the fundamental alteration defense as it relates to

68. *Wynne*, 932 F.2d at 26.

69. *See id.* (placing the burden on the university to prove the requested accommodation was unreasonable but deferring to the university’s academic judgement).

70. *Id.*

71. *Gati v. W. Ky. Univ.*, 762 Fed. Appx. 246, 250–51 (6th Cir. 2019) (unpublished) (internal quotations omitted); *see also Harnett v. Fielding Graduate Inst.*, 400 F. Supp. 2d 570, 580 (S.D. N.Y. 2005), *aff’d*, 198 Fed. Appx. 89 (2d Cir. 2006) (determining that the requested accommodation of video or teleconferencing was not a reasonable accommodation for a graduate psychology student with lupus because the APA requires 300 hours of fact-to-face contact with faculty to complete residency and ultimately this accommodation was not necessary); *but see Hershman v. Muhlenberg Coll.*, 17 F. Supp. 3d 454, 458 (E.D. Pa. 2014) (deciding it was not appropriate to dismiss a case of a student seeking to substitute a class when facts had not been considered regarding whether the request would fundamentally alter the program considering the student’s major and nature of courses involved); *Letter to Appalachian State University*, 34 NAT’L DISABILITY L. REP. ¶ 176 (2006) (requiring the university to make the determination by a group of trained, knowledgeable, and experienced individuals about essential requirements for music therapy program).

telecommuting options in light of technology advances and the reliance on virtual learning during the COVID-19 pandemic will be addressed in subsequent sections.

III. The Problem

A. Pre-Pandemic Jurisprudence Reveals Split Among Federal Circuits

In recent years, courts have been called upon to resolve disputes between employers and employees with disabilities regarding whether working from home is a reasonable accommodation under Title I of the ADA. An examination of the cases from nearly every federal circuit court of appeals over the last decade reveals that most courts rule in favor of employers and against telecommuting as an accommodation.⁷² However, courts have taken conflicting approaches in analyzing whether telecommuting constitutes a reasonable accommodation. Some courts have set forth a presumption that telecommuting is *per se* not a reasonable accommodation,⁷³ while others, including the U.S. Supreme Court, have held that a more fact-specific approach is appropriate when determining if telecommuting, or any requested accommodation, is reasonable.⁷⁴

72. *See, e.g.*, *Tchankpa v. Ascena Retail Grp.*, 951 F.3d 805 (6th Cir. 2020) (granting summary judgement in favor of employer); *E.E.O.C. v. Ford Motor Co.*, No. 11-13742, 2012 WL 3945540 (E.D. Mich. 2012) (reasoning that attendance is an essential requirement of most jobs); *Vande Zande v. State of Wis. Dept. of Admin.*, 44 F.3d 538, 545 (7th Cir. 1995) (reasoning that attendance at the workplace was a necessary part of employment); *Whillock v. Delta Air Lines, Inc.*, 926 F. Supp. 1555, 1565 (N.D. Ga. 1995) (holding that working from home is unreasonable as a matter of law).

73. *See, e.g.*, *Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 538, 545 (7th Cir. 1995) (explaining that an employer is not required to accommodate disability under the ADA by allowing a “disabled worker to work, by himself, without supervision, at home”).

74. *See, e.g.*, *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688 (2001) (“[A]n individualized inquiry must be made to determine whether a specific modification for a particular person’s disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration.”); *Hershman v. Muhlenberg Coll.*, 17 F. Supp. 3d 454, 458 (E.D. Pa. 2014) (denying a college’s motion to dismiss a student’s failure to

Prior to the outbreak of COVID-19, two district courts even had the opportunity to directly address whether telework is a reasonable accommodation in the higher education context under Title III of the ADA. First, in *Harnett v. Fielding Graduate Institute*, a student requested to attend the faculty meetings required for her PhD program through video- or tele-conference.⁷⁵ She alleged that her lupus, which substantially inhibited her ability to walk, breath and work, caused such an accommodation to be reasonable despite the school’s denial and insistence on face-to-face meetings.⁷⁶ The Court determined that the accommodation request was not reasonable in part because the American Psychology Association required 300 hours of *face-to-face* contact with faculty to complete the program.⁷⁷

In *Gati v. Western Kentucky University*, a disabled student sued a public university and two of its administrators, alleging violations of the ADA and the Rehabilitation Act arising out of the university’s failure to offer courses necessary for the completion of the student’s master’s degree through interactive technology that would allow the student to participate remotely.⁷⁸ The student’s permanent disability, from a serious spine injury, rendered him unable to sit for longer than one hour at a time.⁷⁹ The Court denied his request for virtual instruction, reasoning that internet and videoconferencing were not reasonable because these methods did not allow for face-to-face interactions, which were apparently

accommodate claim because whether a requested telework “modification would work a fundamental alteration requires a fact intensive inquiry.”).

75. See *Harnett v. Fielding Graduate Inst.*, 400 F. Supp. 2d 570, 573–74 (S.D. N.Y. 2005), *aff’d*, 198 Fed. Appx. 89 (2d Cir. 2006) (deciding whether remote learning would be a reasonable accommodation).

76. See *id.* at 577 (“There is no dispute that plaintiff was otherwise qualified to meet the . . . program requirements”).

77. See *id.* at 580 (“Even if participation via video or tele-conference would meet the ‘face to face’ requirement, no reasonable trier of fact could have concluded that plaintiff required such an ‘accommodation,’ because at all times plaintiff was willing to attend cluster group meetings in Manhattan—as long as a female was conducting them.”).

78. 283 F. Supp. 3d 616, 620 (W.D. Ky. 2017), *aff’d*, 762 F. App’x 246 (6th Cir. 2019).

79. *Id.*

critical for the counseling program he was in.⁸⁰ Although the student argued that videoconferencing allows interactive communication regardless of location, the Court deferred to the professional academic judgments of the faculty consulted.⁸¹ Thus, in both cases that addressed the reasonableness of remote learning as an accommodation, the courts deferred to the institution's preference of "face-to-face" instruction and decided the request was unreasonable.⁸² Now, after seeing institutions rely on videoconferencing technology for courses to continue through the height of the pandemic and avoid reimbursing tuition, the preference of face-to-face instruction is not enough to determine that the same means of learning would now be unreasonable for a qualified student with a disability.

In sum, federal law aims to protect the right of qualified employees and students to work and receive an education and academically perform, with or without reasonable accommodations.⁸³ However, the law also permits employers to deny requests for accommodations that create an undue hardship on the employer, and it permits institutions to deny requests that fundamentally alter the program and lower standards.⁸⁴ Although some courts have rejected a legal presumption against

80. *See id.* at 627 (holding that the public university was not liable for failing to provide reasonable accommodations since making classes available by videoconferencing was not reasonable under the circumstances).

81. *Id.*

82. *Id.*; *see also Harnett*, 400 F. Supp. 2d at 580 (finding that the institutions requirement of in-person meetings caused the remote learning request to be unreasonable).

83. *See* 42 U.S.C. § 12101 (2009) ("[T]he Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals[.]").

84. *See* 42 U.S.C. § 12112(b)(5)(A) (2009) (creating an exception for employers under Title I of the ADA to deny requested accommodations that the employer can demonstrate would impose an undue hardship on the operation of the business); *see also* 42 U.S.C. § 12182(b)(2)(A)(ii) (2009) (creating an exception for entities under Title III of the ADA to deny requested accommodations that the entity can demonstrate would fundamentally alter the nature of the program or services provided).

telecommuting,⁸⁵ courts generally defer to the judgment of employers or institutions denying requests to work and learn remotely, citing physical presence as an essential part of the job or program.⁸⁶

But a presumption against virtual instruction and deference to an institution's judgment regarding physical presence in the classroom is not appropriate, especially now post-pandemic. During the COVID-19 pandemic, colleges and universities required students and faculty to leave campus to work at home and attend classes virtually.⁸⁷ As such, these intuitions may be hard-pressed to now argue that physical presence in the classroom is essential to all programs. Moreover, the Supreme Court has generally renounced *per se* rules under the ADA.⁸⁸ Such blanket rules that would prohibit an individual with a disability from showing that in their individual case they are entitled to an accommodation goes against the goals of the ADA. "The whole point of the ADA is to provide an opportunity for an employee [or student] to have an individualized, interactive conversation with their employer [or institution] about the appropriateness of an

85. See, e.g., *Hershman v. Muhlenberg Coll.*, 17 F. Supp. 3d 454, 458 (E.D. Pa. 2014) (denying a college's motion to dismiss a student's failure to accommodate claim because whether a requested telework "modification would work a fundamental alteration requires a fact intensive inquiry."); *Mason v. Avaya Communc., Inc.*, 357 F.3d 1114, 1124 (10th Cir. 2004) (expressing the view that the determination of whether a request for an at-home accommodation is reasonable must be made on a case-by-case basis).

86. See *Gati v. W. Ky. Univ.*, 283 F. Supp. 3d 616, 627 (W.D. Ky. 2017) (holding that the public university was not liable for failing to provide reasonable accommodations since making classes available by videoconferencing was not reasonable under the circumstances); see also *Vande Zande v. Wis. Dep't. of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995) (applying the legal presumption in favor of physical presence as an essential function of most jobs).

87. See NAT'L CTR. EDUC. STATS., *84% of All Undergraduates Experienced Some or All Their Classes Moved to Online-Only Instruction Due to the Pandemic*, U.S. DEPT. OF ED. (June 16, 2021) ("In the largest study to date on the impact of the COVID-19 pandemic on postsecondary students, 84% of America's undergrads were found to have had some or all of their classes moved to online-only instruction during spring 2020.") [perma.cc/G5SN-FN7G].

88. See *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 566 (1999) (explaining that the ADA mandates case-by-case analysis by defining disability with respect to the individual).

accommodation[.]”⁸⁹ Thus, any judicial and institutional presumptions against remote learning requests should be abandoned.

B. Times Are Changing: Jurisprudence During the Height of the Pandemic Considered Telework Reasonable

During the pandemic, more than half of the national labor force worked remotely full-time.⁹⁰ Remote working allowed employees to maintain social distancing in the fight against COVID-19.⁹¹ More drastically, most higher education campuses moved to all-virtual learning formats, allowing students and faculty to maintain social distancing and prevent the spread of the virus.⁹² During the height of the pandemic in the employment setting, some immuno-compromised employees were forced to bring claims under Title I of the ADA when their employer failed to allow remote work as a reasonable accommodation to being exposed to the virus at the physical workplace.⁹³

The District Court in *Peeples v. Clinical Support Options, Inc.* specifically answered whether an employee with asthma was likely to succeed on the merits of their ADA failure to accommodate claim against their employer after it refused to allow them to continue teleworking during the COVID-19 pandemic, as necessary to obtain a preliminary injunction against the termination of their

89. Elizabeth Redden, *Cornell Says No Remote Teaching as COVID Fears Persist*, INSIDE HIGHER ED. (Aug. 13, 2021) [perma.cc/6V55-MYA4].

90. Bloom, *How Working from Home Works Out*, STAN. INST. ECON. POL'Y. BRIEF (June 2020) (reporting that as of April 2020, 66 percent of the United States labor force was working remotely, at least part-time, with approximately 42 percent of the work force working remotely full-time as of June 2020).

91. *See id.* (noting that remote working is a critical weapon in combating the pandemic).

92. *See* National Center for Education Statistics, *supra* note 87 (reporting that 84% of undergrads were found to have had some or all of their classes moved to online-only instruction during spring 2020).

93. *See generally* *Peeples v. Clinical Support Options, Inc.*, 487 F. Supp. 3d 56 (D. Mass. 2020); *Silver v. City of Alexandria*, 470 F. Supp. 3d 616 (W.D. La. 2020).

employment.⁹⁴ The Court held that: (1) the employee was likely able to prove by a preponderance of evidence that they were able “to perform the essential functions of their job remotely”⁹⁵; (2) the employee could likely demonstrate that the employer did not reasonably accommodate the employee’s asthma⁹⁶; and (3) the employee was likely to suffer an irreparable harm in the absence of an injunction.⁹⁷ In its reasoning, the Court determined that the employee could likely prove that they were able to perform the essential functions of their job remotely because “telework is certainly contemplated as a viable accommodation in certain circumstances.”⁹⁸

Another 2020 district court case addressed whether virtual participation at a city council meeting counted as “full participation.”⁹⁹ Finding that “virtual attendance by [the plaintiff] is nearly identical to physical presence at the meetings”, the Court reasoned that the rise of significant new technologies, like Zoom, allow for virtual public participation at meetings, with members of the public being able to see and hear everything by live video and

94. See *Peeples*, 487 F. Supp. 3d at 59 (“This matter is before the court on plaintiff Gabriel Peeples’ (“Plaintiff,” “they,” “them,” “their”) motion for a preliminary injunction . . . Plaintiff, who suffers from moderate asthma, alleges that notwithstanding their increased vulnerability to the novel coronavirus, Defendant has refused to permit them to continue to telework in violation of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12112, et seq.”).

95. *Id.* at 63.

96. See *id.* at 64 (reasoning that the employer’s provision of KN95 face masks, hand sanitizer and wipes, an air purifier, and a separate, private workspace for were workplace safety rules rather than an individualized accommodation to address Plaintiff’s disability).

97. See *id.* at 65 (reasoning that the employer was not qualified to opine on the risks to Plaintiff posed by COVID-19 and that the possible serious consequences of an infection if Plaintiff was not permitted to telework could not be discounted).

98. *Id.* at 63 (citing *Merrill v. McCarthy*, 184 F. Supp. 3d 221, 239 (E.D.N.C. 2016); *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, EEOC Notice No. 915.002, 2002 WL 31994335, at *24 (Oct. 17, 2002); see also *Work at Home/Telework as a Reasonable Accommodation*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Feb. 3, 2003), (noting that telework is a reasonable accommodation under the ADA) [perma.cc/9TSB-3Q2T]).

99. *Silver v. City of Alexandria*, 470 F. Supp. 3d 616, 623 (W.D. La. 2020).

being able to ask questions and participate fully.¹⁰⁰ “Indeed,” the Court noted that even “the hearing on this preliminary injunction had actual video participation by members of the public, the media, and others.”¹⁰¹ This Court’s reasoning is significant because it is the first to equate Zoom participation to live, in-person participation, and this reasoning applies to the higher education context as well.

These two cases are the most recent decisions addressing whether remote attendance constitutes a reasonable accommodation under the ADA, and both essentially contemplate that telework is presumptively viable under most circumstances due to advancements in technology.¹⁰² The reasoning of both courts applies equally to virtual participation requests in the higher education context under Titles II and III of the ADA. Just as virtual participation at a city council meeting counted as “full participation,” in *Silver v. City of Alexandria*, it should count as equal participation in the classroom because the same new technologies allow for the remote student, professors, and other students to see and hear everything by live video and to ask questions and participate fully.¹⁰³

C. Access to Remote Learning as an Accommodation Furthers the Goals of the Americans with Disabilities Act

Providing students with disabilities the opportunity to learn remotely provides a way to counter ableism in institutions of higher education. It may also generate new educational and employment opportunities for people with disabilities, thereby

100. *See id.* at 623–24 (“The request was reasonable in that it simply allowed for virtual appearance and allowing the same by means such as video conferencing would not alter the nature of City Council meetings.”).

101. *Id.*

102. *See Peeples*, 487 F. Supp. 3d at 63 (reasoning that “telework is certainly contemplated as a viable accommodation in certain circumstances”); *see also Silver*, 470 F. Supp. 3d at 623 (finding that virtual participation at a city council meeting counted as “full participation”).

103. *Id.*

furthering the goals of the ADA.¹⁰⁴ Overall, the advantages for people with disabilities and society outweigh any disadvantages there may be to finding that remote learning is a reasonable accommodation under the ADA.

1. Countering Ableism in Higher Education

Ableism is defined as “a system of beliefs and actions based on the idea that certain abilities or ways of being are superior to others.”¹⁰⁵ In higher education, such ableism denies people with disabilities from being treated equally and with dignity.¹⁰⁶ Such ableism is evident throughout the process a student must follow to request virtual instruction as an accommodation in the first place.¹⁰⁷

To request remote learning as an accommodation, a student must first “establish that they are worthy of special treatment because of some problem or medically diagnosed condition.”¹⁰⁸ Indeed, by its very terms, the disability rights statute’s definition

104. See *Cities and Counties: First Steps Towards Solving Common ADA Problems*, U.S. DEP’T OF JUST., CIVIL RIGHTS DIV., DISABILITY RIGHTS SECTION (Accessed Feb 13, 2022, 3:36 PM) (“The key goals of the ADA are to ensure that all people with disabilities have equality of opportunity, economic self-sufficiency, full participation in American life, and independent living.”) [perma.cc/GHC4-SY8H]; see also Nicole Belson Golubouff, *The Law of Telecommuting*, 3, AM. L. INST. AM. BAR ASS’N COMM. ON CONTINUING PRO. EDUC. (2001) (claiming that the “[p]assage of the Americans with Disabilities Act (ADA) in 1990 further spurred interest in telecommuting as a way to expand the hiring of disabled workers”).

105. Arlene Kanter, *Remote Work and the Future of Disability Accommodation*, 107 CORNELL L. REV. (forthcoming) (quoting Dan Goodley, *Dis/Ability Studies: Theorizing Disablism and Ableism* (2014)).

106. See Tara Roslin, *Vitriolic Verification: Accommodations, Overbroad Medical Record Requests, and Procedural Ableism in Higher Education*, 47 AM. J.L. & MED. 109, 130 (2021) (“The promise of equal education is stymied by procedural ableism which to date is largely unchecked in the realm of higher education.”).

107. See *Gati v. W. Ky. Univ.*, 762 F. App’x 246, 250 (6th Cir. 2019) (explaining that a plaintiff makes out a prima facie case of discrimination by showing that: “(1) she has a disability; (2) she is otherwise qualified; and (3) she was being excluded from participation in, denied the benefits of, or subjected to discrimination under the program because of her disability”) (internal quotation omitted).

108. Kanter, *supra* note 105.

of an “individual with a disability” locates the “problem” of discrimination within the person, who is described as “substantially limited” in the performance of one or more “major life activities.”¹⁰⁹ This language in the law invokes stereotypical images of people with disabilities as “broken, weak, unable to function, and deserving of pity.”¹¹⁰ Some legal scholars have observed that these negative attitudes about people with disabilities are “hard wired into law.”¹¹¹

For instance, a student asserting a violation of the ADA or Rehabilitation Act bears the burden to establish that he is qualified.¹¹² And, to determine whether a student has satisfied this burden, a court must decide whether he has presented sufficient evidence to show that he possesses the necessary qualifications to perform academically.¹¹³ But even having the necessary academic qualifications is not enough. The student will continue to be viewed as unable to perform like “everyone else” unless or until some “special” accommodations, adjustments, or modifications are made

109. 42 U.S.C. § 12102(1)(A); *see also* Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001 UTAH L. REV. 247, 250 (2001) (noting that while the disability rights statutes were enacted to eliminate stereotypes, “the price for disabled people of using those statutes to enforce their rights may be to force them to adopt the very stereotypes Congress sought to eradicate in passing the laws . . . the statutory language and structure of proof of the disability rights laws themselves have cultural stereotypes about the identities of disabled people”).

110. Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001 UTAH L. REV. 247, 250 (2001).

111. *Id.*

112. *See* 42 U.S.C. § 12131(2) (2001) (requiring a student claiming discrimination be “otherwise qualified” individual under Title II); *see also* 34 C.F.R. § 104.3(l) (2000) (requiring a student be “otherwise qualified” to bring a claim under Section 504 of the Rehabilitation Act).

113. *See* 42 U.S.C. § 12131(2) (2001) (mandating that to qualify under Title II of the ADA the student must meet the essential eligibility requirements of the program with or without reasonable accommodations); *see also* 34 C.F.R. § 104.3(l) (2000) (defining “otherwise qualified” similarly under Section 504 of the Rehabilitation Act); *Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 467 (4th Cir. 2012) (explaining that Title III, unlike Title II, of the ADA does not explicitly include the “qualified individual” language, but it implicitly requires that a student be “otherwise qualified” because the ultimate question is the extent to which a defendant is required to make reasonable modifications in its programs) (citing 42 U.S.C. § 12182(a)).

to the “normal” institutional rules, responsibilities, and conditions of course work.¹¹⁴ Although many students with disabilities do not require any accommodations, for those who do, they are often viewed as “less than,” as outsiders, or even “whiners.”¹¹⁵

At least some of the effects of ableism in the higher education setting may be minimized with more flexible learning arrangements, including the opportunity to learn remotely, at a location away from an unaccommodating or ableist school.¹¹⁶ Further, in response to an institution’s concerns about the costs of accommodations on campus, institutions may be more willing to accept students with disabilities if they believe that the expenses related to physical accommodations could be avoided through allowing the student to learn remotely.¹¹⁷

Moreover, “the strongest support for disability rights, generally, comes from people who have had contact with people with disabilities.”¹¹⁸ Bringing more people with disabilities into institutions of higher education – even remotely – “will be important to challenge existing stereotypes and reduce or eliminate ableism” in higher education and a more diverse campus

114. See Kanter, *supra* note 105 (discussing the ableism built into the process for requesting accommodations in the employment context similarly).

115. LENNARD J. DAVIS, *ENABLING ACTS: THE HIDDEN STORY OF HOW THE AMERICANS WITH DISABILITIES ACT GIVE THE LARGEST US MINORITY ITS RIGHTS* 248 (2015).

116. See Kanter, *supra* note 105 (reaching the same conclusion about the effects of ableism being lessened by remote work allowance in the employment context).

117. See Laura Rothstein, *Forty Years of Disability Policy in Legal Education and the Legal Profession: What has Changed and What are the New Issues?*, 22 AM. U.J. GENDER SOC. POL’Y & L. 519, 552 (2014) (noting that that the primary responsibility to pay for the accommodations remains with the program in which the student or individual is participating); see also *Rebutting the Defendant’s Case; Proving Pretext*, 1 AMS. WITH DISABILITIES: PRAC. & COMPLIANCE MANUAL § 1:269 (Feb. 2022) (explaining that the plaintiff bears the heavy burden of establishing by a preponderance of the evidence that any reason provided by the defendant for rejecting plaintiff’s application for admission is pretext for disability discrimination).

118. Kanter, *supra* note 105; see also Nario-Redmond, *supra* note 105, at 272–73 (finding that what influences perceptions about disability are personal relationships and direct experiences with people with disability).

and future workforce will result.¹¹⁹ Thus, providing students with disabilities the opportunity to learn remotely provides a way to counter ableism in higher education. It may also generate new educational and employment opportunities for individuals with disabilities, thereby furthering the goals of the ADA.¹²⁰

2. Other Advantages of Increasing Access to Remote Learning

The future of virtual learning holds great promise not only for individuals with disabilities, but also for the entire population. As virtual learning becomes more prevalent, it will open doors to allow qualified individuals with disabilities to pursue higher education and fulfilling employment positions that they would otherwise struggle to obtain. Moreover, as institutions adjust to reasonably accommodate those qualified individuals by implementing virtual instruction, this mode of education may become more accessible to society as a whole. In sum, increased access to remote learning as a reasonable accommodation will lead to individual and societal benefits.

(a) Individual Student Benefits

Along with accommodating one's disability, remote learning can benefit the student in other ways too. It has been found that individuals who telecommute in the employment context experience higher productivity "due to efficient structuring of work time, the reduction in commute time, and decreased absenteeism from sickness or bad weather."¹²¹ These reasons for increased

119. See Kanter, *supra* note 105 (arguing the same for the employment context).

120. See 42 U.S.C. § 12101(a)(7) (stating that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals").

121. Sullenger, *supra* note 56, at 546; see also U.S. OFF. OF PERS. MGMT., GEN. SERVS. ADMIN., *2021 Guide to Telework and Remote Work in the Federal Government* (Nov. 2021) ("A robust and well-practiced telework program improves employee performance and engagement and supports mission productivity and efficiency And it can help . . . workers balance work and

productivity apply to students who work from home because they also can efficiently structure work time, reduce commute time, and decrease absenteeism from class. Moreover, recent studies reveal that “the availability of online classes may allow students to move through their degree requirement more quickly.”¹²² Ultimately, the greatest benefit of increased access to remote learning is that “when streamed lectures substitute for no attendance (e.g., if a student is ill), they can help students.”¹²³

Moreover, the student who learns remotely will be better prepared to enter the increasingly remote workforce.¹²⁴ One study predicts that after the pandemic, “high-income workers, especially, will enjoy the perks of working from home.”¹²⁵ Thus, the ability of students with disabilities to learn remotely through college will equip them to pursue higher paying jobs that they may have struggled to obtain before the new remote work culture came about. Because the ability to collaborate with faculty and other students in a digital environment “mirrors the methods of communication in future work environments,”¹²⁶ these students will possess the soft skills necessary to succeed in telecommuting career.

Last but certainly not least, students who learn virtually will save money. No longer must they pay for transportation to and from school or on-campus housing, meal plans, clothes to wear to school, grooming, accessories, and other expenses related to attending class in-person. In one recent study, “employees who

personal responsibilities and make use of beneficial work environments, thereby enhancing employee satisfaction and wellbeing, aiding retention[.]” [perma.cc/7ZY7-Q9PM].

122. Stephanie Riegg Cellini, *How Does Virtual Learning Impact Students in Higher Education?*, BROOKINGS (Aug. 13, 2021) [perma.cc/S2AU-YUU4].

123. *Id.*

124. See Jose Maria Barrero, Nicholas Bloom & Steven J. Davis, *Why Working From Home Will Stick* (Jan. 21, 2021) (finding that about 22 percent of all workers will telework after the pandemic ends, compared with just 5 percent before) [perma.cc/2WX5-K24A].

125. *Id.*

126. *How Online Learning Equips you for your Future Workplace*, ACHIEVE VIRTUAL BLOG (Sep. 27, 2017) [perma.cc/TB48-J667].

worked from home saved \$1,600 to \$6,800 annually.”¹²⁷ Student savings would likely be similar, as the costs associated with showing up in-person are similar.

(b) *Benefits to Society*

In addition to the benefits to students with disabilities, remote learning may offer benefits to society as a whole. As more students with disabilities begin requesting and receiving the reasonable accommodation of participating in class remotely, schools may begin allowing other students without permanent disabilities to attend classes remotely as well. This would result in students having to miss class less frequently due to temporary sickness, family emergencies, or other excused reasons. Allowing students to attend classes through live, remote means does not place a burden on the institution but benefits students who would otherwise have to miss class.¹²⁸

Moreover, allowing remote learning would increase diversity at institutions of higher education and this would benefit the entire campus community. More people with disabilities will be able to pursue higher education and succeed through it with having the ability to learn remotely as an accommodation.¹²⁹ Having more people with disabilities present, even remotely, at universities and colleges will enrich the learning environment for everyone. While “nineteen percent of undergraduates in 2015–16 reported having a disability”¹³⁰, retention rates of students with disabilities were more troubling. Of the students with disabilities who enroll in postsecondary education, only “34 percent finish a

127. Nicole F. Church, *Gauging Perceived Benefits from ‘Working From Home’ as a Job Benefit*, 3 INT’L J. BUS. & ECON. DEV. 81 (Nov. 2015).

128. See Lai, *supra* note 1 (concluding that the pandemic showed that environments can be made fully accessible in a virtual or hybrid environment with little cost to the school).

129. See Discussion, *supra* Part III.C.2(a) (explaining that allowing remote learning as an accommodation will help combat low retention rates of students with disabilities).

130. *Students with Disabilities*, NAT’L CTR. FOR EDUC. STAT. (2021) [perma.cc/2QRT-DHJK].

four-year degree in eight years.”¹³¹ These low retention rates indicate significant difficulties faced by students with disabilities in accessing higher education and succeeding through it. Adding the option to participate through live, virtual means could ease some of the difficulties faced by students with disabilities, and the institution will become more diverse as a result.

As a result of increasing access to higher education and graduation rates for students with disabilities, more people with disabilities would be able to enter workplaces and careers requiring college degrees. Society in turn would benefit from a more diverse workforce.¹³² Further, the ability to learn remotely through college will ultimately prepare students for the ever-increasing remote work culture that has resulted from the pandemic.¹³³ As a result, employers who hire these remote students will benefit from having employees who are prepared to telecommute effectively, and other employers may begin allowing work-from-home as well. Employers and society will also generally benefit from the more diverse workforce that will result from providing a new way for students with disabilities to access higher education.¹³⁴

131. *Briefing Paper: Reauthorization of the Higher Education Act (HEA): The Implications for Increasing the Employment of People with Disabilities*, NAT’L COUNCIL ON DISABILITY (May 19, 2015) [perma.cc/5P59-DU7R].

132. *See* NAT’L COUNCIL ON DISABILITY, *supra* note 131 (explaining that improving postsecondary educational access and opportunities for students with disabilities would also “strengthen the U.S. workforce through better preparation of all people, including people with disabilities, for professional highly skilled employment”); *see also* Lauren Stewart, Elise Shanbacker & Meghan Wills, *A Better Bottom Line: Employing People with Disabilities: Blueprint for Governors*, NAT’L GOVERNORS ASS’N, 6–8 (2013) (noting that supporting education and employment for people with disabilities would likely boost the U.S. economy, and more inclusive companies have already been reaping benefits through increased productivity and earnings) [perma.cc/3PDY-QPGH].

133. *See* Discussion, *supra* Part III.C.2(a) (explaining the increasing prevalence of remote work and how remote learning will prepare students to perform well).

134. *See* Larysa Kautz, *Now Is the Time to End the Subminimum Wage for People with Disabilities*, THE HILL (July 21, 2021) (reporting that studies reveal that “a neurodiverse workforce is better for innovation, productivity, and the bottom line.”) [perma.cc/WK8N-PL4F].

Finally, remote learning (along with remote working) has been found to lead to some environmental and other general societal benefits as well. As the number of commuters decrease, there will be less traffic, congestion, and air pollution, through the reduction of carbon dioxide and other particles emitted by cars and buses.¹³⁵ Also, “[t]he reduction in the amount of commuters on the highways will inevitably improve road conditions and reduce the need for repair and maintenance, which indirectly affects all citizens in reduced taxes.”¹³⁶ Other expected advantages of remote learning include “reduced crime rates as a result of homes being occupied during the workday and fewer commuting automobile accidents.”¹³⁷ It is evident that an increase in individuals learning from home would have positive effects on the environment and general public.

3. Disadvantages of Remote Learning

Despite the many advantages of remote learning, it is not an option for all students, nor is it possible for all programs or fields of study. Only students who have “the space, quiet, high speed internet connection, and self-discipline” will be able to successfully complete their higher education degree remotely.¹³⁸ Others may choose not to learn remotely because they will miss the social interaction that being on campus provides, especially among students with disabilities “who already experience social isolation

135. See Sullenger, *supra* note 56, at 547 (citing Dennis Henderson & Patricia Mokhtarian, *Impacts of Center-Based Telecommuting on Travel and Emissions: Analysis of the Puget Sound Demonstration Project*, 1 TRANSP. RES. PART D: TRANSPORT & ENV'T 29, 29 (1996)) (describing the societal and environmental benefits of increasing telecommuting); see also Jared Mendenhall, *Impacts on Air Quality During COVID-19*, UTAH DEP'T OF ENV'T QUALITY (July 16, 2021) [perma.cc/57VV-7GVH] (finding that air pollution levels were down during the pandemic when stay-at-home orders and teleworking drove traffic volumes down nearly 40% at times across the state of Utah).

136. Sullenger, *supra* note 56, at 547.

137. *Id.*

138. See Kanter, *supra* note 105, at 53–54 (explaining the same requirements for being able to successfully work remotely in the employment context).

and stigma.”¹³⁹ Despite these concerns, for the students who qualify for and request remote learning as an accommodation, it should be granted where it does not work a “fundamental modification” of the specific program. The benefits for students who would struggle to learn in-person due to a disability outweigh the general issues with remote learning that can be mitigated by the institution.

For instance, the concern that virtual learning leads to unsupervised testing can be mitigated through use of new computer software that locks a test-takers screen, proctoring the exam at a location the student can easily access, or restructuring assessments. Because “colleges and universities have harbored concerns about technology’s influence over students’ ability to learn and retain information long before COVID[,]”¹⁴⁰ this is not a new issue and many professors have found ways to ensure students, both in the classroom and virtual, are learning and not cheating. Many agree that the best way to combat these issues is for faculty to create better assessments of student learning and to engage with students more.¹⁴¹ Student engagement can be achieved through use of live video conferencing where the virtual student can ask and answer questions along with the rest of the class.¹⁴² When assessing the students understanding, faculty should create their own exams and may use detection software or

139. Paul M. A. Baker et al., *Virtual Exclusion and Telework: Barriers and Opportunities of Technocentric Workplace Accommodation Policy*, 27 WORK 421, 422–23 (2006).

140. Anita Thomas, *We Cannot Allow Remote Learning to Create Undereducated Students*, THE HILL, (Nov. 5, 2021) [perma.cc/C3F2-529X].

141. See Doug Lederman, *Best Way to Stop Cheating in Online Courses? Teach Better*, INSIDE HIGHER ED (July 22, 2020) (“[W]hen students don’t feel connected and a sense of belonging to the learning community, whether it’s online or face-to-face, they are more likely to detach from any sense of collective community responsibility or ethics and substitute for that a pure ethic of mercenary self-interest.”) [perma.cc/L6GF-RHC8].

142. See, e.g., *5 Ways Zoom Rooms Improve Hybrid Classrooms*, ZOOM BLOG (April 02, 2021) (“Zoom Rooms, our software-based room system, can play a critical role in bridging the gap between remote students and teachers in a hybrid classroom environment, and even provide new opportunities for engagement that go beyond your typical in-person learning experience.”) [perma.cc/6AFY-K4VR].

individual proctoring to supervise the test-taker. These are examples of ways to ensure academic integrity in remote learning.

Another potential unintended consequence of allowing remote learning as a reasonable accommodation is that students who complete school primarily from home might experience social isolation.¹⁴³ Personal contact is drastically reduced when a student telecommutes.¹⁴⁴ This is particularly concerning given a new study that found that young adults were the “hardest hit by loneliness during the pandemic” and reasoned that having to make “critical decisions about their professional and personal lives and relationships” during a time of social distancing likely added to the sense of isolation.¹⁴⁵ Thus, students completing higher education through a distanced learning format will be prone to feelings of isolation.

To combat this concern, institutions and faculty must use care in implementing programs that will prevent social alienation of virtual students. “Maintaining strong communication is an important part of preventing social alienation.”¹⁴⁶ One way for professors to maintain strong communication with virtual students is by being virtually available for office hours through video conferencing technology. Institutions should also ensure that school-sponsored social events are accessible via live teleconferencing for virtual students.

One other concern as the pandemic comes to an end is that institutions and employers will segregate students and workers with disabilities into remote situations to avoid making schools and workplaces physically accessible.¹⁴⁷ This concern is plausible considering that “companies do what they can to skirt the

143. See Sullenger, *supra* note 56, at 559 (explaining the same concern but in the work-from-home context).

144. *Id.*

145. Colleen Walsh, *Young Adults Hardest Hit By Loneliness During Pandemic*, THE HARV. GAZETTE, (Feb. 17, 2021) [perma.cc/53EN-RQTL].

146. Sullenger, *supra* note 56, at 559 (citing *2021 Guide to Telework and Remote Work in the Federal Government*, U.S. OFF. OF PERS. MGMT., GEN. SERVS. ADMIN. (Nov. 2021) [perma.cc/7ZY7-Q9PM]).

147. See Julia Métraux, *The Complex Future of Post Pandemic Work*, BITCHMEDIA (Nov. 1, 2021, 10:50 AM) (exploring the complex future of post-pandemic work) [perma.cc/ZL92-JUKX].

requirements of the ADA[]”¹⁴⁸, so the concern is that institutions and companies will have the attitude of “let’s just have you telework, so we don’t have to make our workplaces accessible.”¹⁴⁹ This attitude could lead institutions and companies to “enforce segregation” between disabled and non-disabled individuals, instead of using financial resources to “comply with a 30-year-old civil rights law.”¹⁵⁰

The answer to this concern, however, is simple. The accommodation of virtual learning should not be forced upon students with disabilities who request physical accommodations to access campus. The Department of Education has advised that college officials “should be aware that in determining what types of auxiliary aids and services are necessary under Title II of the ADA, the institution must give primary consideration to the requests of individuals with disabilities.”¹⁵¹ Moreover, the U.S. Supreme Court ruling in *Olmstead v. L. C.* requires states to eliminate unnecessary segregation of persons with disabilities and to ensure that persons with disabilities receive services in the most integrated setting appropriate to their needs.¹⁵² Thus, institutions would not be permitted to propose remote learning if the student simply requests an accommodation that would permit in-person access.

Lastly, “unless and until all new technologies, computer programs, and software applications are fully accessible and usable, the benefits of remote learning for many people with disabilities will remain illusory.”¹⁵³ People with disabilities should not have to “wait for tech companies to make their products accessible or be charged a fee to access a version that would better accommodate their needs.”¹⁵⁴ For instance, “Zoom waited nearly a

148. *Id.*

149. *Id.*

150. *Id.*

151. *Auxiliary Aids and Services for Postsecondary Students with Disabilities*, U.S. DEP’T OF EDUC. OFF. FOR C.R. (Mar. 27, 2021) [perma.cc/S8F4-26CJ].

152. See *Olmstead v. L. C.* by Zimring, 527 U.S. 581, 597 (1999) (“Unjustified isolation, we hold, is properly regarded as discrimination based on disability.”).

153. Kanter, *supra* note 105, at 55.

154. Métraux, *supra* note 147.

year into the pandemic to announce that it would introduce live captioning—a service that was previously available for a fee—despite the fact that hard-of-hearing and Deaf people relied on Zoom for school and work.”¹⁵⁵

Not only must online learning tools be accessible to students with disabilities, but they must also be “compatible with the various forms of assistive technology that students might use to help them learn.”¹⁵⁶ Also, institutions must ensure that faculty have adequate technology assistance or training to use the technology that enables virtual students to learn and participate. While “[o]nline or distance learning can enhance accessibility for some students, . . . only 8.8% of faculty report receiving training in accommodations for students with disabilities in distance learning environments, and a majority (66.3%) report having no knowledge of how to provide disability related accommodations in online classrooms.”¹⁵⁷

D. Post-Pandemic Outlook on Access to Remote Learning

Although many places of employment realized benefits of remote work and have allowed employees to choose to continue working from home, most colleges and universities resumed mandatory in-person learning for the fall 2021 semester.¹⁵⁸ This was the case for the College of William & Mary in Williamsburg, VA.¹⁵⁹ Cameron Lynch, an immunocompromised student at the

155. *Id.*

156. U.S. Department of Education Releases Webinar, *Fact Sheet for Protecting Students' Civil Rights During COVID-19 Response*, U.S. DEP'T OF EDUC. PRESS OFF. (Mar. 17, 2020) [perma.cc/TL79-7P3L].

157. Rob Gould et al., *Higher Education and the ADA*, ADA NAT'L NETWORK (2019) [perma.cc/6EJ6-TLHT].

158. See Barrero et al., *supra* note 124 (finding that about 22 percent of all workers will telework after the pandemic ends, compared with just 5 percent before); *but see* Anne Dennon, *Will College Campuses Return to Normal in Fall 2021?*, BEST COLLEGES (April 27, 2021) (reporting that most institutions went back to in-person learning for the fall 2021 semester) [perma.cc/5K5V-DQCN].

159. See Amanda Morris & Emily Anthes, *For Some College Students, Remote Learning Is a Game Changer*, N.Y. TIMES (Aug. 23, 2021), (reporting that during the pandemic online classes helped many students with disabilities pursue their

college with celiac disease and diabetes, learned that some of the classes she needed to take would no longer be offered in a virtual format.¹⁶⁰ She brought her concerns to the college's disability services office, but it declined to allow her to attend her required classes remotely as an accommodation.¹⁶¹ This is merely one example of what will likely continue happening around the country. And, without a presumption in favor of remote learning as a reasonable accommodation under the ADA, courts in some circuits (like the Sixth and Seventh) would likely rule unfavorably to the student and uphold the institution's denial based on pre-pandemic jurisprudence.¹⁶²

IV. Recommendations

To harmonize the differing circuit approaches and promote access to higher education, the courts should abandon presumptions against remote learning while scrutinizing academic denials of remote learning accommodation requests. Further, federal agencies charged with enforcing the disability rights statutes in higher education should promulgate regulations to specify that remote learning is typically a reasonable accommodation and to mitigate the concerns described above.¹⁶³ These actions combined will protect a qualified student's right to access to higher education and will encourage people who might otherwise struggle to attend in-person classes due to disability to still pursue higher education at any institution.

A. Abandon Judicial Presumptions Against Remote Learning

As mentioned in Part III.A, many circuits apply a presumption that telecommuting is unreasonable as an accommodation. Now

education, and that they want the option to continue learning remotely) [perma.cc/K3EK-5RQK].

160. *Id.*

161. *Id.*

162. *See supra* Part III.A (describing pre-pandemic jurisprudence).

163. *See supra* Part III.C.3 (describing concerns and solutions to improve remote learning).

considering advancements in technology and reliance on remote learning during the pandemic, courts should never presume that telecommuting is unreasonable when evaluating a student's claim.¹⁶⁴ Aside from those reasons, the ADA requires a fact-specific approach when evaluating accommodations requests.¹⁶⁵ Courts have the duty to evaluate the reasonableness of the request by examining "the facts of each case taking into the consideration the particular individual's disability and employment position [or academic program]."¹⁶⁶ In remote learning cases, courts should look to the nature of the program, the professor's need to supervise the student in-person, and the necessity of the student to use equipment or resources that are only available at the institution and cannot be created elsewhere. In circumstances where the essential academic requirements cannot be met off-campus, the request should be deemed unreasonable. But where the institution cannot show by clear and convincing evidence that live, virtual participation in class fundamentally alters the nature of the program, the accommodation should be found reasonable.¹⁶⁷

In sum, because the process of determining the reasonableness of a proposed accommodation is highly fact-specific and requires balancing the needs of the student with the academic requirements of specific programs, courts should never presume that a request for virtual learning is unreasonable. A student's right to accommodations that allow them to access higher

164. See *Peeples v. Clinical Support Options, Inc.*, 487 F. Supp. 3d 56, 63 (D. Mass. 2020) (reasoning that "telework is certainly contemplated as a viable accommodation in certain circumstances"); see also *Silver*, 470 F. Supp. 3d at 623 (finding that virtual participation at a city council meeting counted as "full participation").

165. See *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 566 (1999) (explaining the ADA mandates case-by-case analysis by defining disability with respect to the individual; see also *Mason v. Avaya Communc., Inc.*, 357 F.3d 1114, 1124 (10th Cir. 2004) (explaining that the determination of whether a request for telecommuting is a reasonable accommodation must be made on a case-by-case basis).

166. *Mason*, 357 F.3d at 1124.

167. See *supra* Part II.C.2 (explaining that the institution bears the burden of proving that the fundamental alteration defense applies to the student's request).

education should not be restricted by outdated presumptions against reasonable and effective means of learning.¹⁶⁸

B. Scrutinize Institutional Decisions Denying Access to Remote Learning

The judicial deference that courts generally give to academic decisions denying virtual learning accommodations should be replaced by a heightened burden of proof.¹⁶⁹ Typically, under the ADA framework, once a student produces evidence of an accommodation that would enable them to meet the educational institution’s essential requirements, “the burden then shifts to the institution to produce evidence that the requested accommodation would require a fundamental modification of its program or standards.”¹⁷⁰ For many programs, it would be “rationally [un]justifiable” for the school to determine that virtual learning is unreasonable based on this defense after relying on such a format throughout the COVID-19 pandemic.¹⁷¹ Likewise, live, virtual participation has now been paralleled to “full participation”¹⁷², so institutions will be hard-pressed to rationally deny such a request as a fundamental alteration.

Nevertheless, courts should heighten the standard of proof to clear and convincing evidence that an accommodation would result in a fundamental modification of the institution’s program. As some circuits have recognized, a “broad judicial deference resembling that associated with the ‘rational basis’ test would substantially undermine Congress’ intent . . . that stereotypes or generalizations not deny handicapped individuals equal access to

168. See *supra* Part III.C (examining the benefits of remote learning).

169. See *supra* Part II.C.2 (explaining the broad judicial deference given to an institutions judgment unless the decision is rationally unjustifiable).

170. Kaye, *supra* note 66.

171. See *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19, 26 (1st Cir. 1991) (“If . . . the relevant officials within the institution . . . came to a *rationally justifiable conclusion* that the available alternatives would result either in lowering academic standards or requiring substantial program alteration, the court could rule as a matter of law that the institution had met its duty of seeking reasonable accommodation.”) (emphasis added).

172. *Silver v. City of Alexandria*, 470 F. Supp. 3d 616, 623 (W.D. La. 2020).

federally-funded programs.”¹⁷³ Thus, to ensure that individuals with disabilities can equally pursue higher education, courts should require proof by clear and convincing evidence that the requested accommodation would fundamentally alter the program before finding the student’s request unreasonable.

C. Promulgate Federal Regulations to Define Remote Learning as a Reasonable Accommodation

When it comes to federal regulation, “little coordination or communication exists around disability and higher education issues.”¹⁷⁴ The administrative agencies most involved with issues relating to higher education and disability discrimination are “the Department of Education (enforcing Section 504) and the Department of Justice (enforcing Titles II and III of the ADA).”¹⁷⁵ A substantial portion of the “regulatory language for Titles II and III refers to architectural barriers and design issues.”¹⁷⁶ However, “[d]efinitive regulations for technology in higher education programming is under development, but has not yet been provided by the federal government.”¹⁷⁷

As discussed in Part III.D, research and experience is beginning to confirm that the benefits of remote learning outweigh its disadvantages, and remote learning may substantially increase enrollment in higher education and job opportunities for people with disabilities.¹⁷⁸ It is therefore time for the federal agencies to respond to the increased viability of remote learning as a

173. *Strathie v. Dep’t of Transportation*, 716 F.2d 227, 231 (3d Cir. 1983) (citations omitted); *see also Novak v. Bd. of Trustees of S. Ill. Univ.*, 777 F.3d 966, 976 (7th Cir. 2015) (“Our own case law has long acknowledged that ‘Congress did not intend that institutions of higher learning enjoy immunity from the Nation’s antidiscrimination statutes.’”) (quoting *Vanasco v. Nat’l–Louis Univ.*, 137 F.3d 962, 968 (7th Cir.1998)).

174. NAT’L COUNCIL ON DISABILITY, *supra* note 131.

175. Rothstein, *supra* note 15, at 543.

176. Rothstein, *supra* note 117, at 561.

177. Laura Rothstein & Julia Irzyk, *Physical Facilities and Access to Technology*, DISABILITIES AND THE LAW § 3:16 (4th ed.) (Oct. 2021).

178. *See supra* Part III.C (listing how access to remote learning can benefit individual students and society).

reasonable accommodation by proposing an amendment to the relevant Title II and III regulations. The regulations should clarify that higher education students with disabilities have a right to learn remotely as a reasonable accommodation in appropriate cases. If a student's disability prevents them from accessing or successfully performing academically at the campus, and if the courses can be conducted remotely without fundamentally altering the program, they have the right to learn and participate remotely. Moreover, the regulations should include recommendations to mitigate the disadvantages of remote learning discussed above.¹⁷⁹

V. Conclusion

The pandemic has provided the chance to rethink how colleges and universities can be made more accessible and inclusive. The pandemic showed that “environments can be made fully accessible in a virtual or hybrid environment with little cost to the school.”¹⁸⁰ It also demanded faculty to be more creative and learn how to use new technology, and that should not go away in pursuit of returning to normal, pre-covid life. Instead, institutions should harness those lessons and skills, and strive to make the learning environment better and more inclusive than it was before. By supporting flexible learning arrangements for students with disabilities, institutions will be showing their commitment to a diverse and healthy college community.

Although remote learning is not for everyone nor appropriate for every course, it is now a good option for many students, like Daniel Goldberg, who found it beneficial during the pandemic.¹⁸¹ It is stories like his that demonstrate the potential for remote learning to improve academic success for students who can now attend classes virtually from anywhere, even a hospital bed.¹⁸² More broadly, remote learning has the potential to create new, and

179. See *supra* Part III.C.3 (describing concerns about remote learning and how to combat them).

180. Lai, *supra* note 1.

181. See *supra* Part I (telling Daniel Goldberg's story).

182. See *id.* (explaining how virtual learning helped many students with disabilities pursue their education and improve grades during the pandemic).

much-needed educational and employment opportunities for students who are qualified for programs but unable to travel or maintain a consistent physical presence on a campus due to a disability. Thus, remote learning furthers the primary goals of the ADA to “assure equality of opportunity, full participation, independent living, and economic self-sufficiency.”¹⁸³ Because of technology advancements and the widespread use of telecommuting during the pandemic, it is time for remote learning to be properly defined as a reasonable accommodation under the ADA. The Department of Education and Department of Justice should clarify in their regulations that remote learning is a reasonable accommodation for most academic courses. If institutions refuse qualified student requests to learn remotely as accommodations, the courts should be highly suspicious, rather than relying on outdated presumptions or deferring to the institution’s academic judgement. Assessing each remote learning case on a case-by-case basis and heightening the burden of proof for institutions to defend against failure to accommodate claims are ways in which courts can protect student rights under the ADA from arbitrary institutional decisions.

183. 42 U.S.C. § 12101(a)(7) (2008).