

MEMORANDUM

To: Association of American Universities
American Council on Education
Association of Public and Land-grant Universities
Association of Research Libraries
EDUCAUSE
National Association of Independent Colleges and Universities

From: Teresa L. Jakubowski

Date: September 16, 2014

Re: **Technology, Equality and Accessibility in College
and Higher Education Act (TEACH Act)**

Executive Summary

The proposed Technology, Equality and Accessibility in College and Higher Education Act (“TEACH Act”), H.R. 3505/S. 2060, 113th Cong. (2014),¹ is intended to ensure that students with disabilities have equal access to instructional technology used by a postsecondary school. The legislation proposes to address a wide array of instructional technology, such as digital content, tablets and online platforms, interactive computer software, etc., and authorizes the Architectural and Transportation Barriers Compliance Board (“Access Board”) to develop accessibility guidelines for electronic instructional materials and related information technologies. Under the bill’s provisions, equal access could be provided by making such instructional technology itself accessible, in compliance with planned guidelines. Alternatively, equal access could be provided through accommodations or modifications, but only if such alternate means are equally effective and equally integrated, and offer substantially equivalent ease of use.² The TEACH Act stems from one of the recommendations of the Advisory

¹ Although introduced as a separate piece of legislation, the TEACH Act may be included in legislation reauthorizing the Higher Education Act (HEA). As of the date this paper was issued, multiple bills addressing HEA reauthorization have been introduced. This paper addresses provisions of a draft reauthorization bill circulated by Senator Tom Harkin, Chairman of the Senate Health, Education, Labor, and Pensions Committee, on June 25, 2014 (hereinafter referred to as “the Harkin draft”), where its corresponding provisions differ from those in the TEACH Act.

² The provision establishing this alternative tri-part standard differs from the corresponding provision set forth in the Harkin draft in certain critical respects. First, whereas the provision in the TEACH Act applies to both nonconforming instructional materials and related technology, the corresponding provision in the Harkin draft applies only to nonconforming instructional materials. Harkin draft, § 901 (proposed § 931(e)). This omission is

Commission on Accessible Instructional Materials in Postsecondary Education for Students with Disabilities (“AIM Commission”), which issued its final report on December 6, 2011. *See* Report of the Advisory Commission on Accessible Instructional Materials in Postsecondary Education for Students with Disabilities, *available at* <http://www2.ed.gov/about/bdscomm/list/aim/meeting/aim-report.pdf> (hereinafter “AIM Report”). Proponents of this legislation argue both that the legislation is consistent with existing federal law applicable to postsecondary institutions and that such institutions’ increasing use of technology allegedly is leaving students with disabilities behind.

The aforementioned associations to which this memorandum is addressed (hereinafter referred to collectively as “the associations”) support the TEACH Act’s general purpose of ensuring that students with disabilities have access to the electronic instructional materials and related technology used by postsecondary institutions. Wherever possible, their members strive to achieve accessibility for individuals with disabilities, including with respect to instructional materials. The associations’ members are consumers in the marketplace for instructional materials, however, with little if any control over whether the publishers and producers of such materials provide them in an accessible format. While the associations support issuance of voluntary accessibility guidelines, such guidelines must be developed with meaningful input from affected stakeholders and education experts, and the development process must be conducted in an appropriate timeframe that allows the guidelines to be properly vetted. The TEACH Act and any guidelines issued pursuant thereto must provide the same level of flexibility inherent in current law, so that institutions are not subjected to requirements that cannot be met when accessible instructional materials are not available (whether through the marketplace or accessible media producers) and/or cannot be made accessible.

The associations nevertheless have several concerns with the TEACH Act as presently proposed. First, the legal standard set forth in the TEACH Act is not consistent with the standard currently provided under the Americans with Disabilities Act (“ADA”) and Section 504 of the Rehabilitation Act. Whereas current law is based on the fundamental concepts of providing “reasonable accommodation,” “reasonable modification” and “comparable” access, the TEACH Act would instead require that postsecondary instructional materials and related technology be “equally effective,” “equally integrated,” and provide “substantially equivalent ease of use.” It also omits provisions for “fundamental alteration” and “undue burden” that have long been recognized under the ADA and Section 504 of the Rehabilitation Act, and would impose requirements on colleges and universities that far surpass the “comparable” and “commercially available” standards imposed on the federal government under Section 508 of the Rehabilitation Act. In essence, the TEACH Act would subject postsecondary institutions to heightened requirements not applied to any other entities covered by these statutes, including the federal government itself. Additionally, such requirements would eliminate the fundamental flexibility incorporated into existing law and regulation that enables affected organizations, including

extremely problematic, as use of related technology is even more likely to require provision of access through alternate methods. Second, the Harkin draft requires that institutions relying on the alternative tri-part standard “provide assurance to the Secretary” that nonconforming materials meet this standard. *Id.* (proposed § 931(f)). As the form and frequency of such “assurance” is undefined, satisfying this requirement may be administratively burdensome. Additionally, given that the alternative, tri-part standard is highly subjective, this “assurance” requirement creates the risk that legitimate and honest disagreements over whether the alternative, tri-part standard has been met potentially would be escalated into allegations of submitting false assurances or certifications.

colleges and universities, to meet the needs of persons with disabilities to the extent reasonable given the real-world constraints such organizations face.

Second, the TEACH Act does not fully recognize the unique types of instructional materials and related technologies that can be utilized in postsecondary institutions, the wide range and varying sources of such materials and technology, and the particular challenges that postsecondary institutions face in making such materials and technology accessible. The AIM Report focuses primarily on digital textbook content and related delivery systems, some of which are already available in certain accessible formats. Postsecondary institutions utilize a wide array of instructional content and technologies. In addition to digital textbooks, instructors may utilize open source materials; books commercially available only in printed form; supplemental readings from journals, periodicals, and newspapers; library research materials; and their own developed materials. Instructors also may utilize a wide array of multi-media content, several forms of which can present unique challenges with respect to accessibility. Dynamic visual representations (such as live weather maps), interactive 3D virtual models (such as for molecular structure), and virtual worlds or simulations (such as virtual microscopes) are but a few examples of the latter. As proposed, the TEACH Act is an all-encompassing statute that does not make any allowance for the widely varying nature of the instructional content and technologies that may be brought within its grasp, nor does it acknowledge the significant challenge that institutions may face in providing access to particular subsets of materials and technologies. Additionally, the TEACH Act, as presently drafted, would inhibit technological innovation and limit the ability of educational institutions to serve as crucibles in which emerging technologies can be explored and further developed.

Third, the TEACH Act only addresses one of the AIM Report's recommendations. The AIM Report set forth a series of recommendations intended to promote increased availability of accessible instructional materials and related technology. The approach was akin to constructing a multi-legged stool, with each leg playing a vital role in promoting a commercial market for more common types of electronic instructional materials, providing support for those where low usage makes it highly unlikely that a commercial market will ever develop, and mitigating the burdens imposed on postsecondary institutions in providing such materials. The establishment of accessibility guidelines for such materials was but one recommendation. The AIM Report recognized that to truly foster the availability of accessible electronic instructional materials and related technology, many additional steps must be pursued in concert. These include, but are not limited to, the following:

- Clarifying and modifying existing copyright law so that a broader array of digital content can be converted to alternate accessible formats for the full range of students with print disabilities covered by the ADA and Section 504, and so that institutions which have converted content to alternate accessible formats can share that content with another institution that has a qualified student with a disability requiring the same format;
- Providing economic incentives, through tax credits and otherwise, for the development of accessible instructional materials and related delivery systems;
- Encouraging the development of cost-effective licensing models for production and delivery of accessible instructional materials;

- Supporting the establishment of federated search capability (i.e., a mechanism for searching more than one source with a single search query) so that institutions and individual students can more easily identify available accessible materials and alternate formats; and
- Providing support for development and sharing of accessible instructional materials and technology in areas where providing access involves high cost and yet involves low incidence of use, such as with respect to embossed and digital Braille and tactile graphics, particularly for science, technology, engineering and mathematics (hereinafter “STEM”), as well as foreign languages and music.

By focusing only on the establishment of accessibility guidelines, the TEACH Act upsets the intended balance of the AIM Report recommendations.³ Where accessible instructional materials and technology are not commercially available (or otherwise available through accessible media producers), postsecondary institutions will face challenges in complying with the TEACH Act’s mandate that they may not be able to overcome, forcing such institutions to make a choice between using technology and risking potential liability if there is no available means or recognized way of making such technology fully accessible.

Fourth, the definitions set forth in the TEACH Act for “electronic instructional materials” and “related technologies” are so broad and vague as to provide little guidance as to what is and is not covered under the Act. This is particularly true for the definition of “related technologies,” which is so broadly defined as to conceivably encompass even technologies that are not intended for student use.⁴

Fifth, the TEACH Act does not provide adequate time for the Access Board to develop appropriate guidelines, particularly given the unique and challenging issues presented by the wide array of instructional materials and related technologies that appear to be encompassed within the scope of the Act. The Act requires the Access Board to issue such guidelines within eighteen (18) months of the statute’s enactment, assuming that the Access Board can leverage its Section 508 standards in the process. The Access Board has been working since July 2006, though, to revise and update its standards for electronic and information technology under Section 508, but had not yet issued its Notice of Proposed Rulemaking (NPRM) as of August 2014 (more than eight years later). Given that issuance of the NPRM and promulgation of the final standards may well take at least another two years, the overall Section 508 rulemaking process ultimately may take ten or more years. Even if the Section 508 standards provide an appropriate starting point for the intended TEACH guidelines, the pace of Section 508

³ The Harkin draft would address certain of the AIM Report’s other recommendations, albeit only in a limited context. The Harkin draft includes limited grant funding to support model demonstration programs to further explore certain of the AIM’s Report’s recommendations, including federated search capacity, copyright issues, improved delivery systems and reduction of duplicated efforts in provision of accessible instructional materials and technology. Even if such model programs are ultimately funded and conducted, any steps necessary to implement the results of such programs very likely will not occur until long after the establishment of guidelines by the Access Board.

⁴ The Harkin draft omits these definitions. While the definitions set forth in the TEACH Act are overbroad and problematic, the lack of any definitions also is problematic, as it leaves the determination as to what is and isn’t covered open to interpretation on an ad hoc basis.

development indicates that it still may take several years to formulate TEACH guidelines. Furthermore, given the pace at which technology is developed, by the time such standards and/or guidelines are adopted, technology will have outpaced them.

The proposed TEACH Act should be amended to address the foregoing concerns. Flexibility as to the manner in which postsecondary institutions can provide access, as reflected in current law and its application to many other areas and types of organizations, is of critical importance. The flexibility provided under current law is what makes the system work for institutions and the students they serve. Under current law, institutions are obligated to provide access where such access is needed by students with disabilities and can be achieved. Where access cannot be fully achieved, access must still be provided to the extent it does not create an undue burden. This approach balances the goal of providing access with the practical realities encountered in doing so, and acknowledges that absolute equivalency is not required. The TEACH Act, however, would require that all instructional materials and related technology be made accessible irrespective of student need. The associations do not oppose providing access where such access can be achieved and is based on student need. Requiring educational institutions to provide accessible instructional materials and related technology irrespective of student need and without consideration of the degree to which access can be achieved imposes burdens on educational institutions beyond those applicable to any other entities. The same flexibility currently provided under the ADA and Section 504, and the same concepts of “comparability” and “commercial availability” applicable to the federal government itself under Section 508, should apply equally under the TEACH Act.

I. Introduction

While the Technology, Equality and Accessibility in College and Higher Education Act (“TEACH Act”), H.R. 3505/S. 2060, 113th Cong. (2014), has the laudable goal of increasing access to instructional materials and related technologies, the manner in which the proposed legislation attempts to do so raises several concerns. Chief among these concerns is that the proposed legislation does not accurately reflect current law and omits several concepts – such as reasonableness, flexibility, and commercial availability – that are necessary for the proper functioning of accessibility law. The legal standard set forth under the TEACH Act far surpasses the degree of accessibility that other entities are required to provide, whether with respect to technology or other forms of access. For this reason, the associations are concerned that the TEACH Act will inhibit the technological innovation and exploration of emerging technologies that have been critical to educational institutions’ ability to incorporate technological advancements in support of learning. The associations nonetheless support the establishment of voluntary accessibility guidelines, provided such guidelines are developed with meaningful input from affected stakeholders and education experts, and are appropriately structured to reflect provisions that realistically can be achieved, while also providing flexibility and allowing for the continued use of unique types of instructional technology where a reasonable accommodation may provide the best option for achieving comparable accessibility.

II. Current Federal Law

Existing federal law already requires that individuals with disabilities be provided access to the goods, services and benefits offered by postsecondary institutions. The vast majority of postsecondary institutions are subject to the requirements of either the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* (“ADA”), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (“Section 504”), or both. The federal agencies enforcing these statutes to date have not enacted specific standards addressing accessibility of electronic instructional materials and/or related technologies. The U.S. Department of Justice (“DOJ”), which enforces Titles II and III of the ADA, has indicated that it intends to pursue rulemakings with respect to the accessibility of websites, as well as electronic and information technology equipment. To date, these rulemakings have not progressed beyond Advance Notices of Proposed Rulemaking. *See* 75 Fed. Reg. 43,460 (July 26, 2010) (ANPRM for website accessibility); 75 Fed. Reg. 43,452 (July 26, 2010) (ANPRM for equipment and furniture).

Although not applicable to postsecondary institutions, Section 508 of the Rehabilitation Act, 29 U.S.C. § 794d, requires that federal agencies make their electronic and information technology accessible to and usable by individuals with disabilities. In the absence of accessibility standards specifically addressing technology under the ADA, DOJ indicates that Section 508 provides the public with guidance for making electronic and information technology accessible. 75 Fed. Reg. at 43,455.

As discussed below, the TEACH Act sets forth a higher legal standard of access than any of the aforementioned statutes, and omits certain legal provisions and exceptions that are critical to the operation of those statutes.

A. The Americans with Disabilities Act of 1990

Most institutions of higher education are covered under the Americans with Disabilities Act. Those that are privately owned are covered under Title III, 42 U.S.C. § 12181 et seq., which applies to places of public accommodation. Those that are publicly owned are covered under Title II, 42 U.S.C. § 12131 et seq., which applies to programs and services offered by state and local governments. Educational institutions controlled by religious organizations are exempt. 42 U.S.C. § 12187.

1. Title III of the ADA

Title III of the ADA requires that “no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation,” which is defined to include postsecondary educational institutions. 42 U.S.C. § 12182(a); 28 C.F.R. § 36.201(a). “Full and equal enjoyment” means “the right to participate and to have an equal opportunity to obtain the same results as others *to the extent possible* with such accommodations as may be required by the [ADA and its implementing] regulations. It does not mean that an individual with a disability must achieve an identical result or level of achievement as persons without a disability.” 28 C.F.R. pt. 36, app. C at 898 (2013) (emphasis added). The U.S. Department of Education’s Office for Civil Rights (OCR), has expressly acknowledged that Section 504 also does not require auxiliary aids, benefits, and services to produce the identical result or level of achievement for those with and without disabilities. *See infra* p. 10.

This general requirement is further clarified to prohibit the following:

- Denying an individual with a disability, on the basis of disability, “the opportunity ... to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity,” whether directly, or through contractual, licensing, or other arrangements. 42 U.S.C. § 12182(b)(1)(A)(i); 28 C.F.R. §36.202(a).
- Providing an individual with a disability, on the basis of disability, an “opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals,” whether directly, or through contractual, licensing, or other arrangements. 42 U.S.C. § 12182(b)(1)(A)(ii); 28 C.F.R. §36.202(b).
- Providing an individual with a disability, on the basis of disability, “a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide ... a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.” 42 U.S.C. § 12182(b)(1)(A)(iii); 28 C.F.R. § 36.202(c).
- Failing to provide goods, services, facilities, privileges, advantages, and accommodations to an individual with a disability in the most integrated setting appropriate to the needs of the individual. 42 U.S.C. § 12182(b)(1)(B); 28 C.F.R. § 36.203(a).

- Utilizing methods of administration that have the effect of discriminating on the basis of disability. 42 U.S.C. § 12182(b)(1)(D); 28 C.F.R. § 36.204.

Title III specifically requires that places of public accommodation, such as educational institutions, take the following actions where necessary to afford access for an individual with a disability:

- Make “reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, *unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.*” 42 U.S.C. § 12182(b)(2)(A)(ii) (emphasis added); 28 C.F.R. § 36.302(a).
- Provide auxiliary aids and services, “*unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.*” 42 U.S.C. § 12182(b)(2)(A)(iii) (emphasis added); 28 C.F.R. § 36.303(a). “Undue burden” is defined as “significant difficulty or expense.”⁵ 28 C.F.R. § 36.104.

“Auxiliary aids and services” are defined to include the following:

- (A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
- (B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;
- (C) acquisition or modification of equipment or devices; and
- (D) other similar services and actions.

42 U.S.C. § 12103; 28 C.F.R. § 36.303(b). Examples include notetakers, computer-aided transcription services, assistive listening devices, alternate formats of materials, videotext displays, taped texts, audio recordings, Braille materials and displays, screen reader software, magnification software, and large print materials. 28 C.F.R. § 36.303(b).

⁵ Factors considered in determining whether an action results in an undue burden are 1) the nature and cost of the action needed; 2) the overall financial resources of the site or sites involved in the action, the number of persons employed at the site, the effect on expenses and resources, legitimate safety requirements, or the impact of the action upon the operation of the site; 3) the geographic separateness, and the administrative or fiscal relationship of the site in question to any parent corporation or entity; 4) the overall resources of any parent corporation or entity; the overall size of the parent entity with respect to the number of its employees; the number, type, and location of its facilities; and 5) the type of operation of any parent entity, including the composition, structure, and functions of the workforce of the parent entity. 28 C.F.R. § 36.104.

Postsecondary institutions are required to furnish appropriate auxiliary aids and services “where necessary to ensure effective communication.”⁶ 28 C.F.R. § 36.303(c)(1). Title III recognizes that the type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the communication needs of the individual with a disability; the nature, length and complexity of the communication involved; and the context of the communication. 28 C.F.R. § 36.303(c)(1)(ii). Use of the most advanced technology is not required so long as effective communication is ensured. 28 C.F.R. pt. 36, app. C at 912 (2013). Moreover, the requirement to provide auxiliary aids and services is a flexible one. A public accommodation can choose among various alternatives as long as the result is effective communication. *Id.* at 913. If provision of a particular auxiliary aid or service would result in a fundamental alteration or an undue burden, then an entity need only provide an alternate auxiliary aid or service, *if one exists*, that would not result in a fundamental alteration or undue burden, but would ensure, to the maximum extent possible, that individuals with disabilities receive the goods, services, facilities, privileges, advantages, or accommodations offered by the public accommodation. 28 C.F.R. § 36.303(g).

Thus, the obligation under Title III of the ADA to provide “reasonable modifications” and auxiliary aids and services is not unlimited, but rather is constrained by allowances for both “fundamental alteration” and “undue burden.” Both of these statutory defenses were derived from regulations and case law under Section 504 of the Rehabilitation Act. *See* 28 C.F.R. pt. 36, app. C at 915 (2013); 28 C.F.R. § 39.160(d) (Section 504 regulations for programs and activities conducted by DOJ); *Southeastern Community College v. Davis*, 442 U.S. 397 (1979).

2. Title II of the ADA

Title II requires that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132; 28 C.F.R. § 35.130(a). In enacting Title II, Congress indicated that this general prohibition should be interpreted as incorporating the more specific prohibitions set forth under Title III. *See* S. Rep. No. 101-116, at 44 (1989); H.R. Rep. No. 101-485(II), at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367. Accordingly, the regulations implementing Title II incorporate the specific prohibitions set forth under Title III with respect to denial of participation, provision of an unequal benefit, and provision of a separate benefit. 28 C.F.R. § 35.130(b). In enacting Title II of the ADA, Congress intended to extend the prohibition against discrimination based on disability set forth in regulations implementing Section 504 to all programs, activities and services offered by state and local governments. *See* S. Rep. No. 101-116, at 44 (1989); H.R. Rep. No. 101-485(II), at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 366. A public entity must operate its programs, services, and activities so that, when viewed in their entirety, they are readily accessible to and usable by individuals with disabilities. 28 C.F.R. § 35.150(a). Public entities are not required to take any action, however, that would result in a

⁶The requirement to provide auxiliary aids and services necessary for effective communication also extends to persons or entities that offer examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes. 42 U.S.C. § 12189; 28 C.F.R. § 36.309. Provision of auxiliary aids and services necessary for effective communication is not required if doing so presents a fundamental alteration or undue burden. 28 C.F.R. §§ 36.309(b)(3), 36.309(c)(3).

fundamental alteration or in undue financial and administration burdens. 28 C.F.R. § 35.150(a)(3).

Title II's regulatory prohibitions include providing an individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others. 28 C.F.R. § 35.130(b)(1)(iii). Similar to Title III, Title II also requires that an entity make "reasonable modifications" to its policies, practices, or procedures where necessary to avoid discrimination on the basis of disability, unless doing so would fundamentally alter the nature of the service, program, or activity being offered, 28 C.F.R. § 35.130(b)(7); and that covered entities provide auxiliary aids and services necessary for effective communication, 28 C.F.R. §§ 35.160(a)(1), 35.160(b)(1). Unlike Title III, Title II requires that an entity give primary consideration to the particular aid or service requested by the person with a disability. Finally, Title II also prohibits entities from using methods of administration that have the effect of subjecting individuals to discrimination on the basis of disability. 28 C.F.R. § 35.130(b)(3)(i). This prohibition also includes methods of administration that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities. 28 C.F.R. § 35.130(b)(3)(ii).

Thus, although requirements under Title II differ in some limited respects from those under Title III, allowances for "fundamental alteration" and "undue burden" are likewise applicable under Title II.

B. Section 504 of the Rehabilitation Act of 1973

1. Regulatory Requirements

Section 504 of the Rehabilitation Act provides that no otherwise qualified individual with a disability shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. 29 U.S.C. § 794; 34 C.F.R. § 104.4(a). The regulations implementing Title II of the ADA were patterned on the regulations implementing Section 504 promulgated by various federal agencies. Like Title II, the Section 504 regulations promulgated by the U.S. Department of Education's Office for Civil Rights (OCR) for educational institutions receiving federal financial assistance provide that denial of participation, provision of an unequal benefit, or provision of a separate benefit (except where necessary to provide an aid, service or benefit that is as effective as that provided to others) is prohibited. 34 C.F.R. § 104.4(b).

OCR's Section 504 regulations similarly prohibit providing an individual with a disability with an aid, benefit, or service that is not as effective as that provided to others. 34 C.F.R. § 104.4(b)(1)(iii). To be equally effective, aids, benefits and services are not required to produce the identical result or level of achievement for those with and without disabilities. Rather, they must afford individuals with disabilities "equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs." 34 C.F.R. § 104.4(b)(2). OCR notes that this regulation is intended to encompass the concept of "equivalent," as opposed to "identical." 34 C.F.R. pt. 104, app. A at 367 (2013).

OCR's Section 504 regulations require that postsecondary educational institutions receiving federal financial assistance provide auxiliary aids for students with impaired sensory, manual or speaking skills. 34 C.F.R. § 104.44(d)(1). Examples of such aids include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. 34 C.F.R. § 104.44(d)(2).

In initially promulgating this regulation, OCR dismissed concerns regarding the cost of providing auxiliary aids and services. OCR emphasized that such institutions can “usually meet this obligation by assisting students in using existing resources for auxiliary aids such as state vocational rehabilitation agencies and private charitable organizations. Indeed, the Department anticipates that the bulk of auxiliary aids will be paid for by state and private agencies, not by colleges or universities.” 34 C.F.R. pt. 104, app. A at 378 (2013). Accordingly, OCR did not construe this requirement as imposing any significant costs upon postsecondary institutions. In those circumstances where the educational institution must provide the auxiliary aid, the institution has flexibility in choosing the methods by which the aids will be supplied, citing as an example use of existing private agencies that provide taped texts free of charge. *Id.*

2. OCR Guidance on Auxiliary Aids and Services

OCR subsequently issued technical guidance to assist postsecondary educational institutions in understanding their obligations to provide auxiliary aids and services under both Section 504 and Title II. See Office for Civil Rights, U.S. Department of Education, “Auxiliary Aids and Services for Postsecondary Students with Disabilities; Higher Education’s Obligations Under Section 504 and Title II of the ADA,” (revised Sept. 1998), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/auxaids.html>. In this guidance, OCR stated that

[p]ostsecondary schools receiving federal financial assistance must provide effective auxiliary aids to students who are disabled. If an aid is necessary for classroom or other appropriate (nonpersonal) use, the institution must make it available, unless provision of the aid would cause undue burden. ...An institution may not limit what it spends for auxiliary aids because it believes that other providers of these services exist, or condition its provision of auxiliary aids on availability of funds. In many cases, an institution may meet its obligation to provide auxiliary aids by assisting the student in obtaining the aid or obtaining reimbursement for the cost of an aid from an outside agency or organization, such as a state rehabilitation agency or a private charitable organization. However, the institution remains responsible for providing the aid.

Thus, OCR made clear that the obligation to provide auxiliary aids and services was still subject to the defense of undue burden, and was not intended to impose an onerous burden on postsecondary institutions.

OCR's 1998 guidance also addressed an institution's obligations with respect to its library holdings:

Libraries and some of their significant and basic materials must be made accessible by the recipient to students with disabilities. Students with disabilities must have the appropriate auxiliary aids needed to locate and obtain library resources. The college library's basic index of holdings (whether formatted on-line or on index cards) must be accessible. For example, a screen and keyboard (or card file) must be placed within reach of a student using a wheelchair. If a Braille index of holdings is not available for blind students, readers must be provided for necessary assistance.

Articles and materials that are library holdings and are required for course work must be accessible to all students enrolled in that course. This means that if material is required for the class, then its text must be read for a blind student or provided in Braille or on tape. A student's actual study time and use of these articles are considered personal study time and the institution has no further obligation to provide additional auxiliary aids.

These passages highlight that an institution's obligation with respect to making its library resources accessible is an extremely flexible one, permitting an institution to provide such access via various means rather than specifying a particular method. Furthermore, they highlight that the institution's obligation is to make library holdings accessible on an as-needed basis.

3. DOJ and OCR Joint 2010 "Dear Colleague Letter"

On June 29, 2010, the DOJ and OCR jointly issued a "Dear Colleague" letter addressing the use of electronic book readers or eReaders that are not accessible to individuals who are blind or have low vision (available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100629.pdf>) (hereinafter "2010 Dear Colleague Letter"). In this letter, DOJ and OCR asserted that requiring the use of eReaders or other emerging technology in a classroom environment when such technology is inaccessible to individuals with disabilities violates the ADA and Section 504 of the Rehabilitation Act, unless those individuals are provided accommodations or modifications that permit them to receive all the educational benefits provided by the technology "in an equally effective and equally integrated manner." Specifically, the letter referenced settlements DOJ had entered into with certain colleges and universities wherein such institutions agreed not to purchase, require, or recommend the use of eReaders, unless or until the device is fully accessible to individuals who are blind or have low vision, or alternatively, unless the institutions "provide *reasonable* accommodation or modification so that a student can acquire the same information, engage in the same interactions, and enjoy the same services as sighted students with substantially equivalent ease of use." 2010 Dear Colleague Letter, at 2. DOJ and OCR indicated that colleges and universities should refrain from requiring the use of eReaders or other emerging technology as long as the device remains inaccessible to individuals who are blind or have low vision. Both the AIM Commission and proponents of the TEACH Act cite the 2010 Dear Colleague Letter as reflecting current law with regard to the provision of accessible instructional materials and technology. As discussed further with respect to the proposed legislation, the associations disagree that the letter accurately represents the current legal standard applicable under Section 504 and the ADA.

On May 26, 2011, OCR issued “Frequently Asked Questions About the June 29, 2010, Dear Colleague Letter” (“FAQ”) to provide further guidance on this issue (available at <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-ebook-faq-201105.pdf>). The FAQ emphasizes that a functional definition of accessibility applies to accommodations or modifications in the context of emerging technology. If the particular technology is not fully accessible to individuals who are blind or have low vision, an institution must provide accommodations or modifications to ensure that these students are provided the benefits of such technology in “an equally effective and equally integrated manner.” FAQ at 2. Students who are blind or have low vision must be afforded the opportunity to acquire the same information, engage in the same interactions and enjoy the same services as sighted students. Although such accommodations or modifications are not required to provide identical ease of use, they still must ensure equal access to the educational benefits and opportunities afforded by the technology and equal treatment in the use of such technology (i.e., “substantially equivalent ease of use”). *Id.* While the FAQ acknowledges that “substantially equivalent ease of use” does not mean “identical ease of use,” there appears to be no difference between these two terms. For all the reasons stated herein, “substantially equivalent ease of use” cannot mean “identical ease of use.” The TEACH Act, which formulates “substantially equivalent ease of use” as one part of a tri-part standard, further eliminates any distinction between “substantially equivalent” and “identical” ease of use.

The proposed legislation and the Dear Colleague Letter utilize familiar concepts from existing law, but articulate and combine them in a manner not reflected in current law to create a whole new regime. For example, whereas the ADA requires that goods, services and accommodations be provided “in the most integrated setting appropriate to the needs of the individual [with a disability],” the TEACH Act and the Dear Colleague Letter require an “equally integrated manner,” without acknowledging those situations where providing a different or separate manner may be necessary to satisfy the requirement that it be “equally effective.” Additionally, “substantially equivalent ease of use” appears derived from the definition of “equivalent facilitation” set forth in Section 103 of the ADA Standards for Accessible Design. 28 C.F.R. § 36.104; 36 C.F.R. pt. 1191, app. B at 319 (2013). “Equivalent facilitation” permits the use of designs, products or technologies other than those prescribed, provided they result in “substantially equivalent or greater accessibility and usability.”⁷ By focusing solely on “ease of use,” however, the TEACH Act and the Dear Colleague Letter do not acknowledge that in some situations, providing substantially equivalent access to the instructional information being imparted may require methods that affect the “ease of use.” As used in the proposed legislation and the Dear Colleague Letter, the formulation and interpretation of these terms differ from how those terms are interpreted under current law.

Finally, the FAQ emphasized that faculty and staff also must comply with the nondiscrimination requirements of Section 504 and the ADA “in their professional interactions with students.” FAQ at 3. It did not extend, however, to technologies used exclusively by faculty and staff, to which students do not have access.

⁷ “Equivalent facilitation” is similarly defined in the 1991 ADA Standards for Accessible Design, 28 C.F.R. pt. 36, app. D, § 2.2, and in the standards issued under Section 508 of the Rehabilitation Act, 36 C.F.R. § 1194.5.

C. Section 508 of the Rehabilitation Act of 1973

Section 508 of the Rehabilitation Act requires that when developing, procuring, maintaining, or using electronic and information technology, each federal department or agency shall ensure that individuals with disabilities “have access to and use of information and data that is *comparable* to the access of and use of the information and data by such members of the public who are not individuals with disabilities,” unless an undue burden would be imposed on the department or agency. 29 U.S.C. §§ 794d(a)(1)(A), 794d(a)(1)(A)(ii) (emphasis added); 36 C.F.R. § 1194.1. Similar to the TEACH Act, Section 508 authorizes the Access Board to publish standards establishing technical and functional performance criteria for the accessibility of the federal government’s electronic and information technology. 29 U.S.C. § 794d(a)(2)(A). Section 508 further provides that in the event providing electronic and information technology that meets the standards issued by the Access Board under Section 508 would impose an undue burden, the federal department or agency need only make the involved information and data available to individuals with disabilities via an alternative means of access that allows the individual to use the information and data. 29 U.S.C. § 794d(a)(1)(B); 36 C.F.R. § 1194.2(a)(1). Congress thus gave the federal government flexibility and an “out” where means of compliance are not commercially available, because such flexibility is necessary to enable the government to continue functioning as it continues to promote its use of accessible technology.

The current regulations promulgated by the Access Board to implement Section 508 provide a further exception to compliance with the Section 508 Standards, 36 C.F.R. pt. 1194, based on the commercial availability of compliant technology. When procuring covered technology, each agency is required to procure compliant products when such products are available in the commercial marketplace or when such products are being developed in response to a Government solicitation. 36 C.F.R. § 1194.2(b). If products are commercially available that meet some but not all of the standards, the agency need only procure the product that best meets the standards. *Id.* The regulations also provide that a fundamental alteration in the nature of a product or its components is not required. 36 C.F.R. § 1194.3(e).

The Access Board presently is in the process of updating the Section 508 Standards – a process which commenced in July 2006 with the establishment of an advisory committee to recommend guidelines. The advisory committee issued its final report on April 3, 2008. *See* Telecommunications and Electronic and Information Technology Advisory Committee, *Report to the Access Board: Refreshed Accessibility Standards and Guidelines in Telecommunications and Electronic and Information Technology* (April 2008), available at <http://www.access-board.gov/guidelines-and-standards/communications-and-it/about-the-ict-refresh/background/teitac-report>. The Access Board has since issued two Advance Notices of Proposed Rulemaking, with accompanying draft standards, for public comment. *See* 76 Fed. Reg. 76,640 (Dec. 8, 2011) (2011 draft standards available at <http://www.access-board.gov/attachments/article/490/draft-rule.pdf>); 75 Fed. Reg. 13,457 (Mar. 22, 2010) (draft standards available at <http://www.access-board.gov/attachments/article/560/draft-rule2010.pdf>). As of August 31, 2014, the Access Board had not yet issued its Notice of Proposed Rulemaking.

The 2011 Draft Standards contain several provisions that limit agencies’ obligation to conform entirely to the proposed standards. The first is for “equivalent facilitation.” The use of an alternative design or technology that results in “substantially equivalent or greater access” to and use of data and information by individuals with disabilities than would be provided by

conformance to a particular requirement in the standards is permitted. 2011 Draft, § E101.2. The 2011 Draft Standards also incorporate provisions for “undue burden” and “fundamental alteration.” *Id.* § E202.5. Where compliance with the standards imposes an undue burden or fundamental alteration, the agency must provide individuals with disabilities access to and use of information and data by “an alternate means that meets identified needs.” *Id.* § E202.5.3. Finally, the 2011 Draft Standards provide that where technology “conforming to one or more provisions of this document is not commercially available, the agency shall procure the product that best meets the provisions of this document consistent with the agency’s business needs.” *Id.* § E202.6.

III. The Proposed Legislation

The TEACH Act requires the Access Board to develop guidelines for the accessibility of electronic instructional materials and related information technologies in institutions of higher education within 18 months. Such guidelines must include performance criteria to ensure that such materials and technologies are accessible to covered blind individuals and covered individuals with a disability, and be consistent with the standards for technical and functional performance criteria issued under Section 508 of the Rehabilitation Act. H.R. 3505, 113th Cong. § 2(a) (2013); S. 2060, 101st Cong. § 2(a) (2014). The guidelines also must be consistent with national and international accessibility standards for electronic materials and related information technologies, to the extent practical. H.R. 3505, § 2(b); S. 2060, § 2(b).

After such guidelines are promulgated, materials and technologies that comply with the guidelines will be deemed to be compliant with the nondiscrimination obligations of Section 504 of the Rehabilitation Act and Titles II and III of the ADA, as they relate to the use of such materials or technologies. H.R. 3505, § 3; S. 2060, § 3. Thus, the TEACH Act creates a safe harbor for compliance with Section 504 and ADA, through compliance with the guidelines the Access Board might issue.

The proposed legislation also provides that the TEACH Act shall not be construed to require an institution of higher education to use electronic instructional materials or related information technologies that conform to the guidelines to be issued by the Access Board. If the institution provides materials or technologies that do not conform to the guidelines, however, it must allow covered blind individuals⁸ and covered individuals with a disability⁹ “to receive the educational benefits of such materials or technologies – (1) in an equally effective and equally integrated manner as non-disabled or non-blind students; and (2) with substantially equivalent ease of use of such materials or technologies.” H.R. 3505, § 4; S. 2060, § 4.

⁸The term “blind individual” is defined as an individual “whose central visual acuity does not exceed 20/200 in the better eye with correcting lenses or whose visual acuity, if better than 20/200, is accompanied by a limit to the field of vision in the better eye to such a degree that its widest diameter subtends an angle of no greater than 20 degrees.” H.R. 3505, § 6(1); S. 2060, § 6(1).

⁹ The terms “covered blind individual” and “covered individual with a disability” are further defined as “a blind individual or an individual with a disability whose blindness or disability limits the ability of such individual to access electronic instructional materials and related information technologies.” H.R. 3505, § 6(2); S. 2060, § 6(2). “Disability” is defined the same as under the ADA, 42 U.S.C. § 12102. H.R. 3505, § 6(3); S. 2060, § 6(3).

“Electronic instructional material” is broadly defined to include “digital curricular content including course-assigned books, journals, articles, and web pages, used by students, faculty, or administrative personnel of an institution of higher education to facilitate the teaching and learning process, including technologies used in distance education as defined in section 103 of the Higher Education Act of 1965 (20 U.S.C. 1003).” H.R. 3505, § 6(5); S. 2060, § 6(4).

“Related information technology” also is broadly defined to include “(A) ... any electronic platform or delivery system used by students, faculty, or administrative personnel of an institution of higher education to access electronic instructional materials; and (B) ... any hardware, firmware, software, and applications required for the manipulation, annotation, and dissemination of such electronic instructional materials.” H.R. 3505, § 6(6); S. 2060, § 6(6).

IV. Analysis of the TEACH Act

As noted above, the associations support the TEACH Act’s overall goal of ensuring that students with disabilities have access to the educational content provided via electronic or other technological means. The associations also generally support the establishment of voluntary accessibility guidelines (developed with meaningful input from affected stakeholders and education experts) in addressing such content so that postsecondary institutions and students have a framework for determining what is and is not considered accessible. Both the TEACH Act and any guidelines issued pursuant thereto must be carefully calibrated, however, to allow for necessary flexibility and to reflect the concepts of reasonableness, undue burden, and market availability, that enable current law to effectively balance our nation’s accessibility goals with what can realistically and practically be achieved. As the AIM Report recognized, while there is much that can be done to improve accessibility of electronic instructional materials, doing so raises complex issues and concerns, some of which conflict. Additionally, both the TEACH Act and the guidelines ultimately issued thereunder must not inhibit innovation and creativity in the advancement of technology. Educational institutions are crucibles in which emerging technology can be explored and developed. The nebulous legal standard currently set forth in the TEACH Act, which renders covered institutions more susceptible to legal liability, limits the ability of educational institutions to serve that critical role – to the detriment of all. Technological advancement benefits not only the respective institutions which employ it and their students, but also the competitive good of the nation.

A. The TEACH Act Incorporates a Legal Standard that Would Negate Essential Sources of Flexibility and Reasonableness Set Forth in Existing Federal Law

The operable legal standard set forth under the TEACH Act essentially may be summarized as “equally effective and equally integrated, with substantially equivalent ease of use.” This tri-part standard is not based on specific language found within the ADA, Section 504 of the Rehabilitation Act, or their implementing regulations. While aspects of this standard derive from requirements in those statutes for effective communication and provision of goods, services, and benefits in an integrated manner, this particular formulation and the requirement for substantially equivalent ease of use do not appear anywhere in such statutes and regulations.

The legal standard articulated in the TEACH Act shifts the focus beyond the current requirement of equal opportunity on the front end, to outcome requirements on the back end.

The tri-part standard “equally effective and equally integrated, with substantially equivalent ease of use” essentially is a results-oriented standard. Current law does not mandate equal results, but rather that proffered auxiliary services result in effective communication, i.e., can individuals with disabilities receive the necessary information in a timely manner and in a way that enables them to receive the benefit of the good or service being provided. *See supra* pp. 7, 10. As presently drafted, the TEACH Act blurs this distinction. It goes beyond the general requirement of equal access to require near identical methods of delivering such information. It supplants the reasonable accommodation and modification standard in current law, and instead requires an alternative that matches the features and functionality of the referenced content and technology in every significant respect. The distinction between “equal access” and “equal results,” along with the concepts of flexibility and reasonableness, is critical to the proper functioning of accessibility law. Eliminating these concepts, or blurring the distinction between them, will result in negative consequences for both educational institutions and their students.

Additionally, the TEACH Act differs from current law in that it overlooks that in certain circumstances, the provision of a separate or different aid or service may in fact be necessary in order to provide equal or equivalent information. For example, science courses may rely on the use of interactive 3D virtual representations of molecular structures as an instructional aid. Making such representations accessible to students with vision impairments is particularly challenging. An approach often used is to provide access to an actual physical model, so that the student can by touch actually feel the molecular structure. This typically is done outside the classroom through scheduled appointments with the instructor, who also provides audible descriptions and explanations of the model at issue. Such an approach has been readily accepted as an effective method of making this educational content accessible to students with vision impairments. Despite being “equally effective” in relaying the intended instructional content, such an approach arguably fails to satisfy the remaining requirements of the tri-part standard set forth in the TEACH Act. The technology is not available to the student in an “equally integrated” manner; rather the student must access the alternate format separately. In this particular circumstance, providing a separate benefit can be deemed necessary to providing the student with an equal opportunity to obtain the instructional content. Such an exception is embodied directly into the statutory language of Title III of the ADA, as well as the regulations implementing Title II and Section 504. The TEACH Act contains no comparable exception. Even if the Act ultimately is construed (whether through regulations or case law) as containing such an exception, this approach still arguably fails to satisfy the third requirement – substantially equivalent ease of use. Often, virtual 3D representations may be available to students online 24/7, and students can access those representations whenever and as frequently as they like. By contrast, the student with a vision impairment does not have 24/7 access to the physical model. The manner in which a postsecondary institution could comply with the TEACH Act with respect to such instructional technology is highly unclear. Must it limit the degree of access students have to the interactive 3D model? Alternatively, must it forgo utilization of the interactive 3D model in favor of static images of the molecular structure, made accessible to individuals with vision impairments through accompanying descriptive text?

The TEACH Act also differs from existing law in that it omits the concepts of “reasonable” accommodation and modification, and “comparable” access set forth under the ADA and the Rehabilitation Act, as well as provisions for fundamental alteration and undue burden. Consequently, the TEACH Act ultimately imposes a requirement that particular

materials and technology may not be able to meet. For example, the Web Content Accessibility Guidelines 2.0 (“WCAG 2.0”) recognize that not all online content presently can be made fully accessible.¹⁰ Development of accessibility solutions typically is a reactive process – first the technology is developed and then the accessibility solution follows.¹¹ Development of accessibility solutions simultaneously with technology itself is an ideal toward which the TEACH Act strives, but in reality development does not happen this way in any other area of technology. A technology is not developed all at once, but in incremental stages, often with improvements and features being added only after the technology has been disseminated for practical use by an array of end-users. Just as one cannot eat an apple all at once, but must eat it in several bites, so too is technology (and accessibility solutions for technology) developed in steps. Until such adaptations for accessibility are made, accommodation will be necessary. For example, at the time WCAG 2.0 was issued in December 2008, it did not adequately address dynamic Web content and advanced user interface controls developed with Ajax, HTML, Javascript and related technologies. Consequently, much of this content remains unavailable to users with disabilities, particularly those who rely on screen readers and cannot use a mouse. In March 2014, the World Wide Web Consortium issued WAI-ARIA 1.0, a technical specification for making such content more accessible. In the interim until such content can be made fully accessible, however, the TEACH Act and the 2010 Dear Colleague Letter would require institutions to refrain from using such content. While an alternate accommodation and/or modification remains a theoretical possibility, the heightened standard set forth in the TEACH Act effectively would result in alternate accommodations and modifications being acceptable in far fewer circumstances. The assumption that institutions cannot take advantage of technology until it is accessible, when accommodation can be provided (albeit not to the heightened standard set forth under the TEACH Act), is unreasonable.

Existing law avoids the Hobson’s choice presented when content and technology cannot be made fully accessible through provision of a flexible standard and specific provisions that encompass situations in which full accessibility may be neither possible nor practical. The contrast between the TEACH Act and Section 508 of the Rehabilitation Act is particularly illustrative. Whereas the TEACH Act would require “equally effective, equally integrated and substantially equivalent ease of use,” Section 508 only requires the federal government to provide “access to and use of information and data that is comparable” to that provided to individuals without disabilities. By incorporating provisions to address situations when compliant technology is not commercially available, Section 508 insulates the federal government from having to forgo using the technology altogether when a fully compliant option is not commercially available. In mandating that its own electronic and information technology be accessible to individuals with disabilities, the federal government recognized that commercial availability of accessible formats for such technology is a critical factor in its ability to achieve this goal. Commercial availability also is implicitly addressed within the provisions in Section

¹⁰ WCAG 2.0 establishes gradations of accessibility for online content, organized into Level A, AA and AAA Success Criteria. The requirements for which conformance may not be possible (or at least pose significant difficulty) are set forth in the Level AAA Success Criteria. Current standards implementing Section 508 are based on WCAG 1.0, issued in May 1999. The Access Board’s present rulemaking to update the Section 508 standards is based on WCAG 2.0.

¹¹ This is the result of several business and economic factors, similar to those identified in the AIM Report to explain limited commercial availability for particular types of accessible instructional materials.

504 and the ADA addressing “undue burden.” Yet the TEACH Act provides no comparable protection for postsecondary institutions, which have far less bargaining power than does the federal government. In circumstances where an accessible technology is not already commercially available and accommodations are not available that would meet the heightened requirement of “equally effective and equally integrated with substantially equivalent ease of use,” institutions will have no practical recourse other than to simply not use the technology or risk potential liability, even when no student has come forward to request an accommodation.

Whereas the ADA, Section 504 and Section 508 all contain a feasibility component, the TEACH Act does not. The associations appreciate that the intended motivation is to encourage publishers and developers to make a greater array of content accessible; however, postsecondary institutions should not be subjected to potential legal liability in the event such content is not commercially available. For example, current Web browsers do not always support STEM technology, and postsecondary institutions are dependent on browser publishers to implement existing standards. The current state of the art of browser support of MathML and related XML markup is not sufficiently developed to provide even rudimentary accessible STEM education, even though the MathML standard was first released in 1998.

The TEACH Act stops short of requiring compliance with the guidelines to be issued by the Access Board,¹² and instead structures them as a “safe harbor” intended to protect an entity from liability under either Section 504 or the ADA. Unless the institution complies with the guidelines, however, the applicable standard to which it will be held is “equally effective,” “equally integrated” and “substantially equivalent ease of use.” Given the uncertainty regarding what this means, particularly when unique forms of technology are involved, the guidelines ultimately serve as de facto requirements. *Essentially, there is no fundamental distinction between the guidelines and the alternative tri-part standard.* If not technically complying fully with the guidelines, the materials and technology will still need to be nearly identical in form and function to meet this tri-part standard. Indeed, *the tri-part standard arguably requires an even higher standard of accessibility than the forthcoming guidelines to be issued by the Access Board*, particularly given that the standards previously issued by the Board with respect to technology have contained provisions addressing commercial availability pursuant to the authorizing statute – whereas the TEACH Act makes no such concession to commercial availability.

The TEACH Act further differs from existing law in that it incorporates an across the board blanket requirement that all instructional material be accessible, rather than utilizing the individual accommodation approach set forth under the ADA and Section 504. While the AIM

¹² Although the TEACH Act purports not to require compliance with the guidelines to be issued by the Access Board, in reality conformance with such guidelines likely will become mandatory. Congress utilized a similar approach in authorizing the Access Board to issue technical standards regarding the accessibility of medical diagnostic equipment pursuant to Section 4203 of the Patient Protection and Affordable Care Act, P.L. 111-148, 124 Stat. 570 (2010). Section 4203 amended the Rehabilitation Act to add a new Section 510, codified as 29 U.S.C. § 794f. Whereas Section 510 does not require any entity using such equipment to comply with these standards, compliance with those standards would become mandatory when an enforcing authority adopts the standards as mandatory requirements for entities subject to its jurisdiction. DOJ has already announced its intent to initiate a rulemaking under Titles II and III of the ADA for this express purpose, even though the Access Board has not yet issued its final standards. It is anticipated that DOJ, OCR, or both would take similar action with respect to guidelines issued by the Access Board pursuant to the TEACH Act.

Report promotes the concept of universal design for instructional materials, it also recognizes that there is certain content for which this would not be possible – whether because of the difficulty in making it accessible, the corresponding low incidence of use and high cost of making certain types accessible, or because the producers of certain materials (such as small publishers) lack sufficient resources to make it accessible. The AIM Report therefore made several recommendations designed to combat these problems – none of which are reflected in the TEACH Act.

Such an across the board approach is particularly problematic for research libraries, each of which licenses and acquires thousands of pieces of literature and databases. Research libraries utilize digital works and journals, many of which presently are not accessible. Whereas libraries can work with individual students to provide access to particular works as needed, in the absence of publishers voluntarily making such literature accessible, it is not possible for libraries to make their comprehensive holdings accessible on an across-the-board basis, irrespective of whether they ever would be needed by a student with a disability. Libraries and institutions are mere consumers of such materials and have little, if any, control over whether or not the publishers of such materials make them available in accessible formats, digital or otherwise. The TEACH Act potentially would shift the cost of making such materials accessible from the publishers to educational institutions, irrespective of whether such materials are actually course materials or other widely disseminated materials. Current law does not require that all library holdings be maintained in an accessible format, but that a particular holding be made accessible when requested by an individual with a disability. As OCR noted with respect to its Section 504 regulations, “[a]s long as no handicapped person is excluded from a program because of the lack of an appropriate aid, the recipient need not have all such aids on hand at all times. . . . recipients are not required to maintain a complete braille library.” See 34 C.F.R. pt. 104, app. A at 378 (2013).¹³ The TEACH Act also does not address the copyright issues that may arise if libraries undertake to convert such materials themselves. If not presently available in an alternate or accessible format, institutions must carefully navigate copyright and/or licensing requirements to ensure that they can lawfully provide students with the necessary accessible formats. For example, the HathiTrust Digital Library and five research institutions were sued in 2011, in part for providing access to over 11 million digitized texts to the print disabled at HathiTrust partner libraries. Many of the digitized texts in HathiTrust are from copyrighted works. HathiTrust and the five institutions prevailed at the federal district court and U.S. Court of Appeals for the Second Circuit. See *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2nd Cir. 2014).¹⁴

¹³ Additionally, DOJ has noted that the purpose of Title III of the ADA is to ensure accessibility to the goods offered by a public accommodation, not to alter the nature or mix of the goods that the public accommodation has typically provided. For example, DOJ notes that a bookstore is not required to stock Braille or large-print books, although it must special order such books if it otherwise normally makes special orders. 28 C.F.R. pt. 36, app. C, at 919-920 (2013).

¹⁴ The HathiTrust Digital Library is a partnership of major research institutions and libraries working to ensure that the cultural record is preserved and accessible long into the future. HathiTrust is comprised of over 11 million digitized volumes that resulted from the Google Library Project, the Internet Archive, Microsoft, and digitization efforts by research libraries. A key function of HathiTrust is to provide access to the collection to individuals with print disabilities. In 2011, the Authors Guild with others filed suit against HathiTrust and five universities claiming that the making, storing, and providing access to digital scans of copyrighted works was illegal. Additional information regarding the case is available at <http://www.arl.org/focus-areas/court-cases/105-authors-guild-v-hathi-trust#.VAm6NEiGlj8>.

B. The TEACH Act Does Not Fully Recognize the Particular Challenges Posed by Certain Instructional Content and Technology

Postsecondary institutions can utilize a wide array of electronic instructional materials and technology. The TEACH Act does not fully recognize that for a certain subset of this content, significant challenges exist in providing accessibility, particularly under the heightened standard set forth in the TEACH Act. The proposed standard of “equally effective and equally integrated with substantially equivalent ease of use” is not attainable for all digital resources and disciplines given current technologies, and may never be depending on the nature of the material and disability involved. While a substantial portion of mainstream digital textbooks and other digital content can be made accessible with publisher and developer cooperation, a limited subset cannot based on current technologies. The AIM Report identified several instances in which this is the case, particularly with respect to STEM content. Examples include live weather maps, 3D virtual models, and virtual simulations, such as virtual microscopes.

The TEACH Act presumptively posits that all instructional content and technology can be made accessible, and thus fails to recognize that this is not factually correct for a certain subset. Accordingly, it is imperative that the TEACH Act appropriately distinguish between these two circumstances, so that accessibility is provided in the wide range of circumstances where it is truly feasible while not imposing onerous requirements in situations where it is not.

Finally, the TEACH Act would adversely affect the ability of postsecondary institutions to innovate. Educational institutions are crucibles in which emerging technology can be explored and developed. Institutions often run small-scale beta programs or pilot programs in order to test a particular technology before investing in its use on a wide-scale basis. The status of such a program is questionable under the TEACH Act, unless and until the program can be made accessible to all students. Requiring that accessibility be provided up front, before the technology is fully developed will stunt such development. *The TEACH Act does not require any institution to use technology, but once it does, the TEACH Act requires that the technology be accessible, without any consideration for reasonableness, undue burden, market availability of accessible options, and so forth.* This creates an incentive for institutions to stay static, to the great detriment of research, learning, and social innovation.

C. The TEACH Act Addresses But One of the AIM Report’s Recommendations

The AIM Report recognized that to promote the availability of accessible electronic instructional materials and related technology, many steps in addition to the formulation of accessibility guidelines by the Access Board are required. These include, but are not limited to, the following:

- Clarifying and modifying existing copyright law so that a broader array of digital content can be converted to alternate accessible formats for the full range of students with print disabilities covered by the ADA and Section 504, and so that institutions which have converted content to alternate accessible formats can share that content with another institution that has a qualified student with a disability requiring the same format;

- Providing economic incentives, through tax credits and otherwise, for the development of accessible instructional materials and related delivery systems;
- Encouraging the development of cost-effective licensing models for production and delivery of accessible instructional materials;
- Supporting the establishment of federated search capability so that institutions and individual students can more easily identify available accessible materials and alternate formats; and
- Providing support for development and sharing of accessible instructional materials and technology in areas where providing access involves high cost and yet involves low incidence of use, such as with respect to embossed and digital Braille and tactile graphics, particularly for STEM, as well as foreign languages and music.

Licensing and copyright issues are of particular concern to postsecondary institutions. As the AIM Report noted, they may legally preclude institutions from providing alternate accessible formats in particular situations. Consequently, any legislation imposing requirements on postsecondary institutions in this regard must also necessarily address these issues.

The TEACH Act also fails to address costs associated with making electronic instructional materials accessible. The AIM Report recognized that broadening the availability of accessible materials requires addressing the cost issue, and made several recommendations to help mitigate the cost of compliance. Failure to address the cost aspect will adversely affect the range of content available to all. For example, certain informal/casual programs and content are provided to students for free. Many institutions also offer online programs, massive open online courses (“MOOCs”), and open source materials. Imposing up-front costs to make these programs and content accessible across-the-board, irrespective of whether any student with a disability requiring such accessibility is even interested in participating, will constrain the ability of institutions to offer such content. Requiring that institutions make such content accessible only when needed brings into closer alignment the provision of accessible materials with the cost and feasibility of doing so, which current law and regulation reflect.

Furthermore, the TEACH Act shifts costs of compliance from the publishers and developers who sell such content to postsecondary institutions, without providing any support to mitigate those costs. When OCR initially imposed the requirement to provide auxiliary aids and services under Section 504, it envisioned that postsecondary institutions would not solely shoulder the costs involved. Rather, OCR envisioned that in the vast majority of cases, such costs would be borne by other entities and organizations, including state and local governments, with the institutions assisting students in identifying sources for such aids and services. As noted in the AIM Report, such mechanisms have not developed with respect to the vast array of electronic content and technology presently available for instructional use. Postsecondary institutions are consequently devoting substantial resources to the provision of such aids and services.

D. The TEACH Act’s Definitions of “Electronic Instructional Material” and “Related Information Technology” are Ambiguous as to Covered Materials.

The proposed definitions of “electronic instructional material” and “related information technology” are so broadly drafted and ambiguous that it is difficult to ascertain what, if any,

content and technology would not be covered under the TEACH Act. “Electronic instructional material” is broadly defined to include course-assigned books, journals, articles and web pages, irrespective of whether they are used by students, faculty or just administrative personnel. The definition also makes no distinction between materials that are commercially available, those that are open source,¹⁵ and those that are internally created. This could be construed as encompassing a wide array of content, irrespective of whether it is assigned content or merely of peripheral importance. For example, course content may include not only assigned and required materials, but also supplementary content such as recommended readings. Additionally, an instructor may refer to open source materials, library holdings, or other “unassigned” materials in the context of lectures. The proposed definition is insufficient to enable postsecondary institutions to readily ascertain which materials are covered under the TEACH Act and which are not. Materials actually assigned and required for a particular course should be accessible to students with disabilities. While other materials should not be included within the definition of instructional materials, postsecondary institutions should still endeavor to provide such materials in accessible formats when needed and requested by a student with a disability, subject to the reasonableness and flexibility provisions of the ADA and Section 504.

The definition of “related information technology” is equally broad and problematic. It is capable of being construed to encompass nearly all technology utilized by an institution, such as course registration and student records, as well as a range of other systems that are outside the scope of “instructional materials.” In particular, the inclusion of faculty and administrative personnel in the definition blurs the distinction between technology that would be covered under the TEACH Act, and technology that would not. Postsecondary institutions utilize a broad range of technology, yet only a subset is available for student use or as a means of interaction between students and faculty or administrative personnel. Section 504 and the ADA (notwithstanding the employment provisions thereof) have always been construed as applying only to the public-facing aspects of technology. Even OCR’s FAQ interpreting the 2010 Dear Colleague Letter acknowledges that Section 504 and the ADA apply only to technologies faculty and administrative personnel utilize *in their interactions with students*. No such limitation is referenced in the TEACH Act, creating the very real possibility that the TEACH Act will be construed more broadly than either Section 504 or the ADA. Accordingly, the definition of “related information technology” should be restricted to that technology actually made available to students or through which students interact with faculty and/or administrative personnel.

V. Conclusion

The TEACH Act’s overall objective of ensuring that students with disabilities have access to the educational content provided via electronic or other technological means, and establishing voluntary guidelines to better define what it means for such content to be accessible, are laudable goals. Notwithstanding the laudable nature of these goals, several aspects of the legislation present concerns for postsecondary institutions. Most notably, the TEACH Act, as drafted, does not reflect the key elements of reasonableness and flexibility in existing law that allow for meeting the needs of persons with disabilities within the practical constraints institutions face. The Act does not take into account that its heightened standard may not be

¹⁵ The cost of providing course materials under open conditions, with institutions receiving no remuneration, could increase significantly, leading to a reduction in open source materials for all students.

achievable for a certain subset of content, and would likely impose undue burdens on technological advancement as compared to other forms of access.

For mainstream digital text book content, compliance with the TEACH Act would not appear to be a significant burden provided that publishers actually make such content accessible and cooperate with educational institutions in providing such materials, something they don't always do now. For a subset of materials and technology, providing accessibility will be challenging and problematic, and in some respects not possible depending on the nature of the materials and the student's disability. The TEACH Act must be appropriately framed so that educational institutions can continue to explore and utilize technologies that improve student research and learning, rather than constantly facing concerns about potential liability for the use of technology that is not fully accessible and/or cannot be made so, but for which reasonable accommodation providing comparable access can be provided under established law and regulation.