LILY BOND: Welcome, everyone. And thank you for joining this webinar entitled "The Legal Year in Review Accessibility Trends in Higher Ed." I'm Lily Bond from 3Play Media, and I'll be moderating today.

And today I am thrilled to be joined by Paul Grossman, who served for 40 years as a civil rights attorney for the US Department of Education Office for Civil Rights, and for 30 years as its chief regional attorney in San Francisco. He's also an adjunct professor of disability law at the University of California Hastings College of Law. And with that, I'm going to hand it off to Paul, who has a great presentation prepared for you.

PAUL GROSSMAN: Thank you, Lily. Good morning to all my friends on the West Coast, and good afternoon to all my friends and colleagues on the East Coast. I very much appreciate your listening in.

I have a lot of things to discuss this morning, many of which I consider very important. But before I start, I also want to thank 3Play Media and Lily Bond for giving me this opportunity, particularly because some of the topics I'm going to talk about today are very much related to the mission of 3Play, but many of them are to the broader civil rights mission of equal educational opportunity for individuals with disabilities in higher ed. And I really appreciate that Lily and 3Play support that mission as well.

So a quick statement about uses and permissions, which is, you're welcome to Xerox these materials, but please do not post them through email or on the internet.

And I am going to start off with one of six issues I want to discuss this morning, and that is directly related to the 3Play mission, and that's digital and communication equality.

And I want to note from the very start that there is one person above all others that I go to for expertise in this area, and that's Lainey Feingold. And you'll see on your slide the link to Lainey's website. And I urge you to go to the website, if for no other reason, to see what a completely compliant website looks like.

And Lainey has one function that I rarely see on any other websites, which is she restates her materials for individuals with intellectual disabilities, making her information accessible across every disability. And there are three articles that Lainey has posted on her website that are particularly useful for getting updated in this area, and I urge you to take a look at each of

them.

So my first message here about this issue is, don't be misled. And what I mean by that is, yes, it proposed Title III regulation pertaining to public accommodations-- that is, institutions open to the public. It doesn't mean institutions that are an arm of the government [INAUDIBLE] Title II regulations. And in addition, you may know that OCR has commenced closing many of the nearly 2,500 complaints that were opened with OCR on website accessibility.

Neither of these events means that there is no longer a legal obligation to make sure that your websites, your technology, your information and communication programs and services, no longer have to be accessible to individuals with sensory impairments-- in particular, that is, individuals with hearing impairments or visual impairments.

OCR closed its complaints because the burden of investigating 2,500 complaints at once was too great. The burden of investigating 2,500 complaints at once meant that their ability to address race and sex and national origin, and even other kinds of disability complaints, was getting impaired. So OCR made a decision to close those complaints and then to instead resolve them through technical assistance.

But I have been assured by OCR that if an individual complainant filed an individual case-- not a mass set of complaints, but an individual complaint against an individual institution-- then the complaint will be opened and will be investigated. And it's evident that the Justice Department, also, on a case-by-case basis, is still moving forward in this area.

Equally important, we've been operating without specific website regulations for a long time. And there is now a large set of judicial precedents about what the responsibilities of the institutions are under Section 504, under Title II, or under Title III, and those precedents aren't going to go away.

The only question that seems still litigatable is whether a virtual-only program or service of a private entity-- like Walmart, let's say-- is a public accommodation and therefore subject to Title III regulation in this area. But for colleges and universities, I think this is an irrelevant question, because if a private college is getting federal financial assistance, it's going to be covered by Section 504, and the guidance under Section 504, originally put forth in the Kindle letter, which I will talk about in just a second, remains in effect.

So just to remind you, in 2010, OCR and DOJ sued or opened complaint investigations against

seven universities, because they were about to use the Kindle DX as a dedicated electronic reader-- in other words, hard copy or alternate media was not going to be available. Everybody was just going to use the Kindle DX. And because the Kindle DX at the time was not accessible to people who were blind or have low vision, the schools were required to discontinue this practice.

And shortly after that, the Kindle guidance was issued. And that guidance requires that universities provide reasonable accommodation or modification so that a student can acquire the same information, engage in the same interactions, enjoy the same services as sighted students with substantially equivalent ease of use. And these four measures of equality, these four basic requirements, stand today unreduced with regard to the whole issue of online learning website access.

And so again, just as an emphasis, it would be incorrect to take the withdrawal of the DOJ regulations or the closing of the OCR complaints as meaning this responsibility no longer exists. And here's the site to both the Kindle letter and the 2012 elaboration on the Kindle letter.

But in addition, I think this responsibility is going to be sustained, because access to a web-based world is important to the 48 million Americans who are deaf or hard of hearing, to the 7 million Americans who are blind or have low vision. These individuals are entitled to vote. These individuals need to participate in our economy. These individuals are entitled as anyone else to an education. And the numbers are just too great for us to turn around.

And I would like to point out that just before the passage of the ADA, there was a famous Louis Harris poll, and that poll is heavily credited as an important factor in the passage of the ADA. And what the Louis Harris poll revealed was that individuals with disabilities were isolated and segregated from the rest of America. They didn't go to the movie theater. They didn't go to the restaurant. They didn't go to the educational institutions.

And when you look at this underlying purpose of the ADA, to ensure that every individual, irrespective of disability, gets to participate in American society, I for one cannot see a legal trend developing that goes backwards with regard to including individuals with these forms of disability.

And I'd like to quickly review for you, even though the OCR has now closed many of the complaints that it had open, it settled many of them before they were closed. And there are

common requirements in these settlement agreements. And I think knowing these common requirements is helpful to any school that now wants to make sure that it's in compliance.

So the first common component to realize is, the breath of the OCR/DOJ settlements is quite substantial. They're particularly looking at the website that faces the world. And they're looking at admissions. They're looking at academic program descriptions. They're looking at course registration. They're looking at athletics ticketing services, library services, signing up for health services, research tools and resources of the card catalog in the library. Courseware. Distance learning programs. So one needs to understand that, when the law applies to the virtual world in the higher education setting, the coverage is quite broad.

So looking at, particularly, the web page accessibility requirements, it's very clear that OCR and DOJ do have a benchmark. And that's the WCAG 2 Level AA. So one should not let a CIO or similar individual complain that there are no standards to look at. Clearly, there are standards.

But in addition, in order to get compliance with accessible websites, these settlement agreements have required training of all appropriate personnel. They've required, at least going forward, that all content must be accessible. And some of these agreements have gone back several years.

So in any event, legacy content must be accessible on an individual case-by-case request, if nothing else, and there has to be a process for students and other individuals to report inaccessible content. And there must be continuous auditing to make sure that everything going forward will be accessible.

And in addition, all of these agreements have quality control provisions. So there has to be ongoing testing and accountability. And someone in the institution must be responsible for ensuring compliance with the agreement. This individual is often called an accessibility coordinator.

And most important, procurement is a provision in almost all these agreements, so that schools going forward cannot procure inaccessible programs, for example. Going forward, what the schools procure must be accessible, or must be able to be made accessible for individuals with sensory impairments.

So I reported to you about a year ago, or maybe two years ago now, on the Dudley complaint

against Miami University. This matter has subsequently settled. It settled at the very, very end of 2016. And I consider this settlement the high-water mark in terms of what is being required of institutions to ensure that their virtual services, that their IT is accessible.

It's a 60-page consent decree. And if your school is under scrutiny or has been sued in this area, or if you want to do a review to be proactive on this issue, I urge that you read this consent decree, because it lays out in detail and addresses in many, many issues of concern.

So just a few highlights. Miami agreed that it would ensure that its web content and learning management systems would come into compliance with WCAG 2 Level AA. There, again, is the widely accepted standard. And they agreed to do so within six months, and then to go back to existing older systems within a period of 18 months, all the way back to 2012, and for materials older than 2012, to make them accessible on an as-needed basis at a student request.

And I note with regard to video captioning, all videos within the home page of each academic division the vise president's office and all videos relating to compilation of critical or important transactions must comply with WCAG 2 Level AA. And similarly, all other videos must be converted on a case-by-case basis at the request of the student.

And here, too, procurement is a very important issue. And Miami agreed to WCAG 2 Level AA, and if that wasn't possible, then to meet the next best standard, whatever came closest. And importantly, it agreed to test before purchasing, and it agreed to migrate to what according to the parties was a more accessible learning management system than the one they were currently using.

Interestingly, there was a First Amendment compromise here, because while Miami agreed only to procure accessible technology, it agreed to consider the availability of materials in electronic format when it was talking about text and book-length course materials.

So, here, it might be that there is only one material, it's absolutely essential to the class, and it's not accessible. Well, then, Miami's going to have to convert it itself. But the agreement does not prevent Miami from having a professor include in his or her syllabus something that is not accessible. And I think, here, they are recognizing academic freedom principles.

Most notable for disabled student services directors-- and I know there are a lot listening this morning-- the agreement requires that disabled students on a recurring basis must meet with

every student with a vision or hearing impairment, and offer to meet with every student who requires assistive technology and set up curricular materials and alternate formats, and work with their instructors to develop an accessibility plan for each class. So with regard to every single class, there is going to be a plan for how to make sure that the materials in that class are accessible.

And in addition, the disabled student services is going to meet with each teacher to review the syllabus, to identify all materials, including multimedia items, to discuss adaptive technology, to determine what format the student prefers, and to confirm with a student that the format will be useful. So it's not just involving the student. It's also involving the teacher. And note that with those students who elect to do these plans, disabled student services will check in with the student once a month and with the instructor twice a semester.

So this is a pretty darn detailed, a very concrete, very involved resolution agreement. I would not say that it is typical of all the agreements that have been negotiated. Indeed, I would say it's the high-water mark. But I think it has a lot of best practices ideas that are worth reviewing and thinking about and implementing wherever feasible.

So there's one more communication case I want to talk about that was decided last year, and that's *Silva versus Baptist Health Services of Southern Florida.* This is not a higher education case, but I think it's very pertinent to the clinical setting questions that we often have come up.

So two profoundly deaf persons, Silva and Jebian, visit Baptist Health Hospitals frequently. Sometimes they go for medical treatment. Sometimes they go for emergencies. Sometimes they go to assist family members who may also have disabilities.

And when they go, they always request ASL interpreters. But they're almost never available, or they come really, really late. So instead, the hospital tries to use video remote interpreting services, but it usually proves to be fatal-- futile. And the reason-- that's an interesting slip. Futile. And the reason is, staff doesn't know how to work the VRI services, and there is inadequate bandwidth to make the VRI services work, even when staff is prepared.

So summary judgment was granted for the hospital at the district court level. And that's because the district court concluded that in order for the plaintiffs to prevail, they had to show that the communication problems that they complained of resulted in actual misdiagnosis, incorrect treatment, or adverse medical consequences-- and further, that the plaintiffs were required to articulate what information they were unable to understand or convey during the

hospital visits. And yes, that's a very illogical requirement.

And although the district court granted summary judgment, the appellate court reversed it. And the important distinction between the district court and the appellate court is that the district court focused on outcomes. Was there malpractice as a result of this communication problem? And the appellate court said, no, you don't look at downstream consequences. You focus on the communication experience itself.

So the appellate court said patients were required to show only that they experienced, quote, "an impairment in their ability to communicate medically relevant information with hospital staff," or "incurred a real hindrance because of disability, which affects their ability to exchange medical information." So note, now, we're focusing on the communication. We're not focusing on the outcome.

Well, I think this case is important to us, because as you know, there is always a question in the clinical setting, in particular, for persons with sensory impairments-- persons who are hard of hearing, persons with low vision-- well, how bad is it? How necessary is some kind of accommodation like, oh, real-time captioning in the clinical setting?

And I think this case tells us, don't focus on the downstream consequences, like what grade is the student getting. Instead, focus on the quality and nature of the communication. And I think once you focus on the quality and nature of communication, the need for auxiliary aides and services becomes much more evident.

I want to shift topics altogether, and I want to tell you, confess to you, that I'm now going to raise an issue to which I have a great personal commitment. I'm on a mission to create an important change in the scope of how colleges and universities respond to sexual assault.

So you all probably know, I've spent a lot of time working with wounded warriors, including people with PTSD. You may not know that I recently foiled an attempted rape, and that I had a friend who was murdered. And in working with wounded warriors and the victim of the rape and the widow to the friend, I've come to learn how PTSD comes about.

And it's basically that we all have a concept of reality. We all have a concept of what's logical. But sometimes, we experience what's called "moral trauma." This is a term, by the way, developed around wounded warriors in the battlefield, where something occurs outside the assumptions we make about how one human treats another, or an event threatens our own

sense of autonomy.

We see something terrible happen, and we feel at risk, and our own sense of safety and reality is severely altered. And when the mind tries to accommodate to these kinds of traumas, sickness often follows. And it might well be post-traumatic stress, depression, insomnia, or great anxiety.

So just a little cross-validation from my observation. Sexual assault is the most frequent cause of PTSD in women, with one study reporting that 94% of women experience PTSD symptoms during the first two weeks after a sexual assault. And another study reports that the lifetime prevalence of PTSD for women who have been sexually assaulted is 50%, versus 7.8% for the adult female population as a whole.

And by the way, I don't mean to imply here that only women are the object of sexual assault. It's just, I had a hard time finding similar studies and data looking at men and women together, or looking at both sexes.

Now, fortunately, there is some evidence of the opportunity to mitigate the impact of rape and sexual assault. And what the studies show is, when it's easy for victims to report the incident, when it's easy for them to talk about it, the likelihood of the PTSD enduring is greatly diminished. Same thing for the opportunity to discuss it with family and friends and authorities. Conversely, if the survivor of sexual assault believes that others have failed to react in a positive and supportive way, there is a greater risk of PTSD.

So here's my proposition. Here's the point I'm campaigning on. Given the close relationship between rape, sexual assault, and violence, PTS, anxiety, depression, and insomnia, are rape, sexual assault, and violence against students in higher education exclusively an issue to be addressed under Title IX?

And I think the clear answer is no. Title IX is important. Title IX may even need to be preeminent. But the fact of the matter is, this is also a disability-related matter, and it needs to be dealt with as one more aspect of responding adequately and appropriately to sexual violence.

So one court has taken a look at this issue-- again, last year-- *Shank versus Carlton College.* And briefly, the facts in this case-- over the course of her education, Ms. Shank was twice the victim of rape. And this occurred while she was underaged and intoxicated and after being

provided alcohol by an upperclassman. And she alleged under Title IX to hold Carlton responsible for, quote, "being deliberately indifferent to widespread underage drinking and in effect, knowing of this widespread, practice and condoning it."

And the school made a motion to dismiss. And the court agreed with the school with regard to its tolerance of the misuse of alcohol. But the court would not allow the motion to dismiss to be successful with regard to the adequacy of Carlton's response-- and importantly, not just under Title IX, but under Section 504 and the ADA as well.

So Ms. Shank alleged that Carlton failed to accommodate her by refusing to suspend and expel either of the alleged rapists and failing to remove notations from her academic record that she had dropped classes, because she said she had to drop classes because of the disabling conditions that resulted from the rapes. Failing to offer her other academic accommodations, like permitting her to attend classes remotely. Allowing her to take only those classes held in sections of campus where the alleged rapist was unlikely to appear. And failing to honor her request not to have to meet with her assailant in a one-to-one meeting if she wanted to know Carlton's disposition of her claims against the students.

Now, this last item here to me is frankly mind-boggling, and I'm very clear that it's a violation of Title IX. But we need to now focus on the 504 and ADA issue. And I think we need to focus on the fact that there's going to be a basket of support services for victims of sexual assault, and that basket of support services must include consideration of accommodations.

Now, I want to raise a very important caution here. Not everything that a victim like Ms. Shank labels as an accommodation is really a request for an accommodation. So requesting kicking a student off of campus, requesting that a student be permanently expelled-- you don't do those kinds of things without robust due process, and that's not a 504 matter.

So we have to be careful to distinguish. Yes, asking for early registration so you don't have to be in the same classes as the alleged rapist-- yes, that's an accommodation. Being allowed to take a reduced course load-- yes, that's an accommodation. But punishing the alleged rapist? That's a Title IX measure.

Now, what should we do? I want us to collaborate. I want every DSS office in America to walk down the hall and talk to the Title IX coordinator and work out a memorandum of understanding, so that both offices are there to support the student. And maybe there are other offices-- counseling, mental health services, and so forth-- that need to be part of this

process. Come on, slide. There we go. So I'm going to try one slide back if I can.

So I just want to be clear about this in a little greater detail. Under Title IX, whether the student who is the alleged victim was drunk or sober was on campus or off campus, what that person did to suggest consent to the other individual-- all those things are relevant under Title IX. But under 504 in the ADA, they are irrelevant. It doesn't matter how it came about. It matters only that now this individual has PTS or insomnia.

And because of these different missions and different orientations, I suggest that the Title IX process and the DSS process are to be separate but well coordinated. The DSS officer does not need to ask the student what happened, or how did it come about? The DSS officer really only needs to know well what conditions is the student now dealing with, and what accommodations make sense?

Now, again, DSS and Title IX and counseling all have to coordinate well. But for example, all I need the Title IX officer to do is make very, very clear to the student that he or she may need and be entitled to accommodations, and how to go to DSS and request them. And that may well be sufficient. But in keeping them separate, not, then, forcing the student to repeatedly tell their story, nor am I looking for consistency between what the student told the Title IX officer and what the student told the DSS officer.

And those of you who are associated with ATIXA or NACUA, OCR, AHEAD, a regional AHEAD, a National Council on Disability-- which, by the way, is also looking at this very same issue and has issued a report-- should we now be drafting, for example, a proposed MOU? Should we, perhaps working together, perhaps all these organizations working together-- can we get out the word that this needs to be taken care of? And it needs to be taken care of now. There is no reason why you cannot leave this call when it's done, go down the hall, and talk to the Title IX officer. And indeed, I really hope that you will do just that.

OK. Let's talk about OCR. And I want to be clear, I am not going to go with you through individual OCR letters. Rather, what I want to do is tell you I think OCR is sending us all a message, and we need to take that message seriously. And I want to boil that message down so it's as clear as it can be.

So here's the OCR message. Never rely on a rule or practice to deny a student an accommodation without first, on a case-by-case basis, consider as an accommodation an exception to that rule. And you do this process through interaction with the student and by a

diligent consideration process. And I am going to explain what I mean by "diligent consideration process."

But just to give you three cases that are [INAUDIBLE], in each case, the student [INAUDIBLE] for extended time. And the school said, OK, you can have the extended time, and the student got extended time on formal in-class exams. But the student was not given extended time in any other setting or on any other form of exams. And the schools, in effect, said, well, this is our rule. This is our practice. We don't give extended time in these other settings that you're asking for.

And in each case, OCR faulted the school, because you might have a rule or you might have a practice, but one of the most important things to understand is, the duty to accommodate may well mean making an exception to a longstanding practice or to a written rule. The fact that something has been done a certain way for a long time, the fact that something's in writing, the fact that you think something's fundamental doesn't necessarily mean that there is not a duty to accommodate.

And by the way, I've had a preview of the cases that OCR will be highlighting in the coming year, and it's more of the same message. But I want to focus for a second on the GateWay case, because unlike the other cases, I think it made very clear what I'm talking about when we talk about a diligent consideration process. Come on. There we go.

So in the GateWay case, a teacher, after receiving notice from DSS, refused to provide a student with extra time on an in-clinic transcription exam. And the teacher gave some pretty persuasive reasons. The exam in question tests a core competency-- that is, can you transcribe, and how fast can you do it?

The exam tests a skill that would be used in the jobs that the student was being trained for. The skill being tested could not be administered in the testing center of DSS. And the purpose of the exam was to measure the student's transcription speed. It was to simulate what would actually happen in the workplace. So the teacher might not have used these words, but in effect, the teacher is arguing it would be a fundamental alteration to give extra time on the transcription exam.

And OCR said, maybe yes, maybe no. But we're finding a violation because you didn't sit down and go through a diligent, deliberative process to figure out, well, maybe we'll give extra time

at the start of the semester, but not by the end of the semester. Or maybe it will give extra time, but not near as much as the student has requested. And those kinds of considerations needed to have been made.

And I'll note that OCR asked the school, when it's faced with what is a legitimate question to be considered under the fundamental alteration doctrine-- you can't just use "fundamental alteration" as a magic word and dismiss the consideration. You need to go through the consideration process. And OCR sets forth in the letter a three-step consideration process.

So you need to set up a committee of relevant officials. You need to consider all the alternatives. So not just the accommodation, but OK, maybe we can't do this accommodation, but maybe we can do another one and look at the effect on the academic program. And then, after reasoned deliberation, the decision-makers must reach a rationally justifiable conclusion.

Now, note, they're not asking for perfection here. They're asking for a rationally justifiable conclusion that the available alternatives would either lower the academic standards or require substantial program alterations. And if that's not true, then the accommodation needs to be granted.

Now the GateWay letter does not mention the fact that this is exactly following the process that was originally set up in *Wynne v. Tufts.* And therefore, I'm citing to you *Wynne v. Tufts,* because I think it's even more helpful to go back. But note, once again, the message here is don't make any arbitrary decisions. Go through a careful deliberative process. And the implication to me of this letter is, if you go through that careful, deliberative process then OCR or the courts are much more likely to defer to your decision as to what is or is not a fundamental alteration.

I am not recommending any particular fundamental alteration procedures, but I am providing you links to two examples. And I know that AHEAD is also developing sample fundamental alteration procedures, and that might be something for you to watch for. I thought-- Kansas [INAUDIBLE], which serves the [INAUDIBLE] community college system, also has some proposed sample procedures.

I'm having a hard time getting my slides to go down. Hmm. Mine's stuck. Of course, my computer locked up. Well, what I'm going to do is, I'm going to-- ah, there we go. Except that I've gone forward a huge number of slides, but let's see if we can-- there we go.

OK. So the last area of OCR information that I want to touch on, but which I think is very important, is this question of self-injurious students.

So just to give you a little background, for many years, OCR considered that there were two ways in which an otherwise qualified student-- that is, a student who was academically successful, a student who was complying with the code of conduct-- nonetheless might not be a qualified individual with a disability, and therefore, not protected by 504 of the ADA. And that was, either the student represented a direct threat to the health and safety of others, or the student represented a direct threat to self.

So DOJ, when it issued Title II regulations, made it clear that while it considers threat to others a so-called safe harbor-- that is, if you go through the proper process for determining that an individual is a direct threat to others, and there is no accommodation that would bring the level of threat down to an acceptable level, then you may suspend or expel or otherwise sanction the student. However, they did not approve threat to self. And so many OCR cases that were about students who were engaging in self-injurious behavior had relied on the threat to self doctrine, but no longer could.

And in theory, this meant if you had a student who was academically was successful, complying with the code of conduct, not a threat to others-- you could not, for example, suspend that student or use some kind of involuntary removal to coerce the student, for example, to take better care of him or herself. And this led to a lot of concern-- well, what can we or can't we do with regard to such students? So OCR has not gone back to the threat to self. But both OCR and DOJ, I think, are getting to the same issue in a different way.

So first of all, I think the reason that they're not returning to the threat of language is because they've seen that doctrine used in the employment setting, and it's been abused. And they don't want to see threat to self as a tool for sanctioning students, or myth or stereotype or diagnostic label. There should be an individualized determination. It's like the cases above. You've got to really think about the actual facts of the case. You've got to look to see what's really going on.

So short of a medical or safety exigency including consideration of impact on others, students who are otherwise qualified to attend college should not be suspended or expelled or put in voluntary medical leave without-- and here's where, now, OCR seems to be opening the door-- due process for the student and opportunity to communicate with the student's treating

physician and psychologist, and diligent consideration of mitigating accommodations that are less substantial than any one of these forms of leave.

So in the case of voluntary or involuntary leave or dismissal, having gone through this individualized process, having concluded that there is no accommodation that would make the student safe, having given the student full due process, having consulted with the student's treating physician or psychologist or psychiatrist, that the student might either go through voluntary or involuntary leave, or in some extreme cases, even dismissal.

But OCR is urging that schools consider creating an opportunity to return. And so, in looking at the opportunity to return, they don't want that to be in terms of a penalty. And it should not be based on an arbitrary period of return. And again, it should be individualized. Right? And preexisting minimums should not be used. It should be on a case-by-case basis.

But I note that behavioral contracts are permissible, provided they are reasonably related to the circumstances that made the leave necessary in the first place. And treatment requirements are permissible-- again, on an individualized basis, if appropriate to the circumstances.

And I want to bring to your attention three DOJ settlements, because in each of these cases, what happened is, a student in two of the three cases, on his or her own initiative, voluntarily went to seek emergency medical help. And while the student was seeking it, the school decided that the student had to go on voluntary leave-- and it wasn't that voluntary-- or mandatory leave.

And what bothered DOJ was, in each of these three cases, sanctioning a student in these circumstances is going to have the effect of discouraging all students from seeking help. And that's not a good policy. You want a student who recognizes they're in trouble to feel like they're not going to lose the opportunity to go to school just because they want to seek some kind of emergency help.

But in addition, in two of these three cases, the parents proposed some very important mitigating accommodations, such as allowing the student to live at home, so they were no longer in the dorm and the parents could be monitoring the student every day, or allowing the student to be in some kind of supervised facility during the day, allowing the student to take a reduced course load, allowing the student to take more courses online and fewer courses on campus, but nonetheless, continuing the student's contact with campus in some manner.

And in all these cases, the school arbitrarily just would not consider the proposed accommodations. And that's the heart of what DOJ was saying. I don't think in any of these cases it was saying, under no circumstances can a student be required to take medical leave, but you cannot do it without first doing a careful consideration of mitigating accommodations.

OK. Service animals. Who knew that service animals was going to be such a big issue? Certainly, when I started OCR, dealing with 504 and ADA issues on campus, I didn't see it as a big issue. But it certainly is now. And I know on the listservs, it's a constant issue.

So I want to give you a very brief overview of this issue. So let's talk about the distinctions between service animals and emotional support animals, because I think understanding this distinction is the key to lawful compliance with how to deal with service animals and ESA requests.

So let's start with service animals. So there are identical ADA regulations under Title II and Title III that define what is a service animal and define what the rights of individuals with service animals are. The 504 regulations are not particularly helpful here, because they only discuss guide dogs. So under these Title II and Title III regulations, it must be a dog, although it can be any breed, and in certain limited circumstances, a service animal might be a miniature horse.

Now, note that DSS approval is required for the miniature horse, but is not required for dogs. Dogs, if housebroken and under control, meaning reasonably well-behaved, are largely a hands-off matter. The person with the service animal is not required to register with DSS or have the animal wear a special tag or vest.

Now, that does not mean that you could not on a voluntary basis encourage people with service animals to register with your office and maybe get a tag, so that they won't be bothered by your security service, for example. But it has to be authentically voluntary.

And with regard to service animals, initially, you are only allowed to ask two questions. Is this dog required because of a disability? Note, you're not asking, what is the disability? And what work or task has the car been trained to perform? It's the second question that's critically important, because if it's a service animal, the dog must be able to recognize a stimuli and be trained and able to respond with an action.

So for example, dogs can smell on someone's breath whether or not that individual is about to have a seizure before the individual knows it. And if the dog is trained to that odor and is trained to respond to that odor-- maybe pulling on the person's leg or at the hem of the dress or whatever-- that's a service animal. It got a stimuli, the odor in the air, and it's been trained to [INAUDIBLE]. So that's the service animal.

Now-- I don't know why my [INAUDIBLE] up. I may try to go by memory from here. I'm going to try one more time. So let me talk about ESAs, and I'm going to contrast it-- oh, what's going to happen now? Maybe we're going to get a new screen? I see the circle. Well, we'll see what's going to happen.

So let's talk about ESAs while we'll see what the heck my computer is doing. There we go. So emotional support animals. So first of all, emotional support animals are not authorized by the ADA. I don't mean they're prohibited by the ADA. I mean, under the ADA, when the Justice Department chose to issue guidance in this issue, it did not mention emotional support animals.

Rather, emotional support animals are authorized under the Fair Housing Act. So that pertains to dorms, and arguably are authorized outside of housing under Section 504 as a form of accommodation. So let's put a pin in that 504. Instead, note that under the Fair Housing Act, HUD has issued some very broad guidance. And I've given you the citation here. And they don't make it all that hard to have an ESA in housing. But it's not just pets. Note that an ESA might be any species of animal, not just a dog, though authority exists to exclude monkeys and reptiles.

If you want an ESA, you're going to have to go through either housing or disabled student services-- in some campuses, it's one, and some campuses, it's the other-- with documentation that the animal's presence mitigates one or more limitations associated with the disability.

Now, who provides the documentation is critically important here. My recommendation-- you are not my clients, I'm just telling you what I advise my clients-- my recommendation is, do not accept documentation from an individual who has not met directly with the student and has not watched the student interact with the emotional support animal.

So if the student just went online and checked three boxes, paid $75, and got a standardized print-out from a psychologist in another state, my advice is, don't accept it. However, if you get

documentation that says the presence of the animal mitigates certain manifestations of a disability and is how I came to this conclusion while that may be legitimate.

So for example the VA might send with a wounded warrior documentation that when the wounded warrior has their VA-issued German shepherd with them, the level of medication that the wounded warrior needs is greatly reduced. To me, that's pretty compelling evidence that the presence of the animal does make a difference. Whereas, if you get a generated out-of-state, looks like a computer-formatted report, Jimmy reports that carrying his hamster with him makes him feel better, I wouldn't accept that. I don't think that's sufficient.

Now, ESAs must be housebroken and under control, just like service animals. But note the big difference here. The ESA does not have to be trained to recognize a stimuli or be trained to respond. Its function may be entirely passive.

Now, one last thing I want to point out is this distinction between active and passive. Students often don't understand the distinction. The public often doesn't understand this distinction. But I think it's incumbent on colleges and universities, maybe to train their security staff, but certainly, when they're communicating with students, to understand, hey, if I have a trained-- a dog in an active role, then it's a service animal, and it's got a lot of rights, and it's pretty much a hands-off matter.

But if all the animal does is passive, it's just its presence that helps, then I think you need to go through an authentic documentation and consideration process.

And one last thing is, the rules are entirely different in the employment setting, so don't apply the guides I've just given you in that setting. You need to take the guidance of EEOC in that area. And is my computer going to let me get to the next page? So while I'm waiting from-- oh, there we go.

OCR has issued one letter that suggests that ESAs must be considered as an accommodation not just in housing. So this should be one more form of accommodation under Section 504 or under the ADA. And note, OCR was explicit that if a student presents proper documentation that he or she is an individual with a disability, that he or she needs and has an ESA, that in the interactive process with the student, you're going to have to consider locations that are beyond just housing. And if my computer will let me get there, I will get you the one-paragraph quote. So while I'm waiting for my computer to react-- there's the quote.

"OCR finds that the College's assertion that a comfort/emotional support animal only applies to residential facilities in campus housing, pursuant to the Fair Housing Act, is erroneous. Specifically, while comfort animals are not considered service animals under the ADA, they may be considered as a necessary accommodation under Section 504, and an institution would have an obligation to engage in the interactive process to assess an individual's need for accommodation. OCR notes that the College failed to undertake this obligation." Once again, OCR is focusing on process, and faulting the college for the process that it undertook as being inadequate.

Now, I want to add a personal perspective here. And again, I want to say, you and I are not in an attorney-client position. I'm only sharing with you advice that I give clients. My advice that I give compliance is, service animals, as long as they're well-behaved and house-trained, hands-off. ESAs, I think you can still make a case-by-case determination, and in some cases, conclude that the evidence is not sufficiently compelling.

And one reason I say this is, when the Justice Department was asked to look at this issue, you'll note that, under the ADA, it issued no guidance recognizing emotional support animals. It has strongly supported HUD with regard to housing, but has not taken any steps with regard to the classroom, the laboratory, the stadium, et cetera, and ESAs.

And OCR-- although its language here, I think, is pretty unambiguous and pretty direct and clear-- to my knowledge, this is the only letter in which it has directly addressed this issue. And this case was not about an ESA. Ultimately, the school decided that this was a service animal and not an ESA. So I think one could argue that this might be dicta. And I frankly would like to see more guidance from OCR before I take this issue entirely seriously. And so at least I think there's discretion here. Now, when you get a compelling ESA case, like the example of the wounded warrior with the German shepherd-- of course, I would admit that person. But when the documentation is shaky, I'd wait for more guidance from OCR.

OK, let's see if my computer will give me the-- very good. So the most frequently asked question. I get is, well, what if someone is allergic to dogs, and how are you going to balance these interests? So to my knowledge, there's only one case that has directly addressed this issue, and it's *Entine versus Lissner.*

So in *Entine,* you had two sorority sisters who were housed together. And one was a student with depression, anxiety, obsessive-compulsive disorder, and PTSD. And that person had an

authentic service animal that actively addressed her anxiety disorder. So it might, for example, pull her aside when she was engaging in an obsessive-compulsive behavior or when she was obviously manifesting her anxiety.

The other individual also had a very real disability, Crohn's disease, and she alleged that the presence of the dog would cause flare-ups in her Crohn's disease. So the sister with the Crohn's disease, making this statement, didn't want the dog to be in the sorority house.

And the ADA coordinator, Scott Lissner, had a genuine conflict on his hands, because both students were registered with DSS. Both students documented that they had medical conditions. Scott tried compromises, like maybe one person could live across the street but come to the house for all the meetings, and nothing worked out.

So, believing that both individuals have legitimate cases, he asked which student had signed the lease second. And that student was the student with the dog. And he asked the student with the dog to move to other nearby housing, but to not bring the dog into the sorority house. So the sister with the dog wanted to stay in the house, and she sued, seeking a temporary restraining order, citing the ADA, Section 504, and the Fair Housing Act.

And the judge faulted Scott Lissner's compromise. He felt that under DOJ guidance, Scott needed to perform a direct threat analysis-- that is, was the dog, its presence, a direct threat to the health and safety of the student with the Crohn's disease? So understand, Scott collected a lot of information from both of these people. But in the judge's opinion, a very rigorous test must be applied before you tell someone with a service animal you can't bring it into a particular environment, and the judge was not satisfied that Scott had done this.

And the reasons articulated by the judge was first that the student with Crohn's disease testified at trial that there's really no way to know what causes her flares. And a blood test was performed on the student with Crohn's disease, and it showed all kinds of aggravating factors in her bloodstream, not just something from the dog.

The judge also noted that Crohn's disease flare-ups occur because of stress, and college is stressful. And the individual with Crohn's disease admitted she had a dog-- although it was a hypoallergenic dog, so I'm not sure what that's probative of-- and finally, the judge felt it was probative or relevant or important that the individual with the dog had gone on the witness stand, sat there with the dog next to her in her lap, and an hour later, the student with Crohn's disease got on the same stand and did not show any adverse medical conditions.

So I think what the judge is saying here is, yes, it may be necessary to reconcile the rights of two individuals, one with a service animal, one allergic to the service animal, but only if the allergic individual's condition is A, so substantial that it constitutes a disability, and B, can reasonably establish that the presence of the animal is what is causing the aggravating condition of which they're complaining.

And we have here on the screen, "Before the university can apply its policy equally to students with disabilities who have requested irreconcilable accommodations, the university must be certain that the student has properly requested an accommodation, and that the accommodations are indeed irreconcilable. Part and parcel of the second test is properly performing the direct threat analysis and establishing that one student's accommodation is indeed the cause of the aggravation of the other student's disability."

Now, I just want to say, one, I want to support my friend Scott Lissner and say, I think he actually was pretty careful and pretty thorough in his analysis. But two, I think the message from the judge here, if we're going to take this case as a precedent, is the individual with a service animal is always going to have the superior right, unless the other individual also has a right under the ADA, and unless the other individual can show that the one person exercising the right is really impinging on the other person exercising their right, for example, to be in the classroom.

One thing I don't think the judge said in this decision is, you can't try to reach a compromise short of direct threat. I don't think that's what's being said here. I think what the judge is saying is, you can't require somebody with a service animal not to bring it into a particular setting, as is strongly presumptively their right, unless you have a darn good reason why not to.

And I think I'm going to stop here to allow for questions. I am going to make my outline available to you all. And included in that is this final issue, which is to let you know that OCR has issued a new Complaint Processing Manual. And important in the Complaint Processing Manual are changes that as a whole are going to be more favorable to schools than they are favorable to complainants.

But I do not agree with the widespread criticism in the press that OCR has made radical changes here to jeopardize the ability of people to file complaints. What OCR has done has made it much, much harder for people to file hundreds of complaints at a time. It's made it much harder for a small group of people to require OCR to invest its resources in 2,500

website complaints. But I don't think, as a whole, these changes are all that onerous to complainants. I think they are looking for a little more flexibility.

And one key thing I do want to highlight for everyone is that, heretofore, if you had a complaint filed against you, you could receive the complaint that OCR was addressing, but you could not receive the underlying original complaint from the complainant. Now, under the manual, you may request that complaint, and you're likely to get it. Now, whether there will be redactions in that document, I do not yet know. But I think it is a matter of strategy. It's always good to request the original complaint to see what the issue that the complainant was concerned with was filed with OCR.

But I want to caution you, if you get that letter, if OCR gives it to you, you better be very, very careful that it does not lead to retaliation, because even when the underlying complaint is legitimate, a retaliation claim may nonetheless exist. So you don't want to hurt yourself when you might otherwise be prevailing. And with that, I guess I should be turning the floor back to Lily for questions.

LILY BOND: Thank you so much, Paul. What a great presentation. And people have been writing in questions throughout, so we have lots of things to get to. So Paul, the first question here is, does a faculty contract trump a student's civil rights?

PAUL GROSSMAN: So that's an extremely hypothetical question. But in general, the, answer, if I'm going to make just a general principle statement, is no. It does not. So there is a provision in the 504 regulations and in the ADA regulations about methods of administration. So that means that how a school does business cannot have a discriminatory result on students.

And I'll give you an example of how this came up in a contractual case that I had many years ago. A school would hire interpreters for deaf students on an as-needed basis. And they had successful relationships with enough interpreters that that worked.

But then the union insisted that the school not hire any interpreter until the school had complied with the provision in the collective bargaining agreement, which stated that no job would be filled with an outside employee before three weeks had transpired, where inside employees were given the opportunity to bid on the job. And of course, the problem was, there were no inside employees who would bid on the position. And secondly, three weeks of a semester can be a lifetime for a student.

And we took the position that, under the method of administration regulation, the rights of the deaf students trumped the collective bargaining agreement provision. And while the school never said, oh, yeah, you're right, it did agree that it would waive this provision with regard to hiring interpreters.

LILY BOND: Thanks, Paul. The next question here is, when is WCAG 2.0 Level AA versus Level A required, and is the cost of adding accessibility accommodations like audio description ever considered in a case?

PAUL GROSSMAN: So I don't feel qualified. Truthfully, Lily, you might be better qualified to answer that than I am, the difference is between Level A and Level AA. I can only tell you that in every single solitary settlement agreement I've seen from DOJ, from private litigants, from OCR, it's been Level AA. So I'm going to assume that that's the standard of compliance.

With regard to cost, there is always such a thing as an undue burden defense. But it's a very, very hard defense to successfully raise. And the truth is, I am unaware of any case against an institution of any size that was successful on undue burden grounds. Fundamental alteration is a very viable defense, but undue burden is not.

Now, one might argue that if there is no one who needs the captioning-- so you have a brick-and-mortar class, and you know everyone who's in that class-- then I could see asserting, because there's no need and there's an expense, that the school need not do it in that situation. But if you have an online circumstance, you have a class with students with sensory impairments, if you have a huge class, I think in all those circumstances that defense isn't going to fly.

LILY BOND: Thanks, Paul. Another question here. Is the Miami consent decree an unusual case, or is it standard practice?

PAUL GROSSMAN: So the Miami consent decree is entirely consistent with many prior settlements. But I do think, in a few instances, it goes farther than the typical settlement agreement.

And the issue that I'm focused on most is with regard to the responsibility of that disabled student service office to sit down with both the teacher and the student and work through an accessibility plan. I don't believe I've seen that in any other agreement. But I think the logic of it is clear, which is, if you have an institution which historically has not been able to assure itself of compliance, this is the way to create the steps necessary to guarantee that compliance will

be achieved.

LILY BOND: Thank you, Paul. And we have a couple of questions here about service animals. The first one is, are we allowed to ask what stimuli the dog is trained to recognize as part of the second allowable question about service animals?

PAUL GROSSMAN: So the person has to articulate what service the dog is trained to provide. And if they give you an answer that is clearly ambiguous, I think you might be asking that question to get clarification. So I definitely wouldn't start with that question. But I think if someone appears to be either uncertain or evasive, then maybe that question is helpful. The bad part of that question, of course, is, it is in some way asking the person, what's your disability? And that's a question you're trying to avoid.

I think that the real circumstance that's going to come up is, the student's going to say, it makes me feel safe. Well, to me, that's not mentioning training, and it's not mentioning a service. It may well be an emotional support animal, but I think the student has just told you it's not a service animal.

LILY BOND: Thanks, Paul. Another question in the same vein-- is any person on a campus allowed to ask the two questions to a service animal owner, and can a school make a policy that limits the number of persons that can question the student?

PAUL GROSSMAN: I think a school should develop a policy that limits the number of persons who ask the question, because at some point, it is harassing the student to ask it again and again and again. And that's the one reason why a voluntary registration system has an advantage, which is, the security staff, if they see the little blue tag or whatever it is that the school uses, won't keep asking the question. So I think that's a very good practice.

LILY BOND: Thanks, Paul. Another question about the Miami consent decree. Would best practices defined in the consent decree also apply to K-12 schools?

PAUL GROSSMAN: No, the rules in K-12 are very, very different. This could take a half an hour, and this isn't the right audience to take the half an hour.

But just to tell you, historically, the kinds of services that students with sensory impairments got were determined through the IEP or 504 plan process. But more recently, the Ninth Circuit-- and I think, consistent with subsequent Supreme Court decisions, although they're not exactly on the same issue-- concluded that students with sensory impairments with rights to services

like real-time captioning are entitled to those services if they need them under Title II of the ADA without going through the IEP process.

So this gets very technical. But the bottom line is, if a student who's deaf or hard of hearing wants a service like real-time captioning, they may have a compelling argument, irrespective of what the IEP team decides.

LILY BOND: Thank you, Paul. So there are a few questions here about responsibility of making something accessible, and I'm going to combine them into one. Who has the responsibility for making something accessible? Is it a faculty member, a university, or a vendor that they are using that provides inaccessible materials?

PAUL GROSSMAN: Ultimately, it's always the university. Now, the university may contract with the vendor to see to it that the vendor will do everything necessary to both guarantee and deliver an accessible product. And indeed, at the very start, I recommended that you go to Lainey Feingold's website, and there is at least one article and maybe two about how to contract with vendors. But even if you contract with a vendor in that manner, if ultimately the product is inaccessible, DOJ and OCR will still hold the university responsible.

Now, there have been cases where there was a contract, for example, to make a facility accessible, and because the university wrote a good contract, they were able to bring that contractor in as a co-defendant. So it didn't entirely let the university off the hook, but it forced the vendor, who had promised to make a facility a constructive facility and accessible manner, also responsible.

LILY BOND: Thank you so much, Paul. Another question here is someone saying, I hope restaurants and small businesses make their websites accessible here in California. I've seen conflicting information on whether or not they're obligated to do so anymore under Title III, based on conflicting cases from last year, and then in 2018.

PAUL GROSSMAN: So in the Ninth Circuit, which is California, under Title III-- and so now we're not talking about colleges and universities or community colleges or entities subject to 504, just talking about Wendy's, let's say, which I don't think gets any sort of financial assistance-- the Ninth Circuit's rule is, anything that you put on the website that pertains to services in the brick-and-mortar world must be accessible. But if it's purely virtual, then it does not have to be accessible.

So the case that this happened about concerns Target. And Target was sued for this issue.

And what the court noted was, on the Web, you can order medications that you go to Target and pick up. On the Web, you can send in photos for processing that you go to Target and pick up. On the Web, you can identify wedding gifts that you want, and go to Target and pick up. All those services, because they have the nexus to the brick-and-mortar world, clearly must be accessible. But if Target also had something that's entirely in the virtual world-- a nice article about the employee of the month-- that would not have to be accessible.

And I have to say that, at the time the Ninth Circuit decided the decision, this was a cutting-edge decision. But now it's been surpassed, and most recent decisions under Title III define virtual services as being public accommodations, and therefore require auxiliary aids and services, and therefore must be accessible.

LILY BOND: Thank you, Paul. I think we have time for one more question. And several people have asked if you have good ideas for resources and information that universities can give to faculty and unions to better understand the legal ramifications of not complying with accessibility requirements.

PAUL GROSSMAN: So I actually think OCR is a good source of that information. And I note that in the new Complaint Processing Manual, there's a much greater emphasis on technical assistance, which is free, which means you can ask OCR to send an employee to your campus and do a faculty in-servicing. I don't mean to advertise my own services, but this is something I do, and I've been successful. There are a number of other experts who go around the country and do this.

I would point out that AHEAD, and every AHEAD regional office-- I'm sure if you contacted them and asked them for the name of people who could come and talk to faculty, they could do so as well. NACUA, which is the National Association of College and University Attorneys, does a lot of in-servicing of its own attorneys, and in turn, those attorneys ought to be able to do training of that nature.

In addition to AHEAD and the regional office of AHEAD, I happen to like NADAC, the National Association of ADA Coordinators, which does training. And I'm not even pushing the higher ed training, but their training in the employment arena and in the facilities access arena is excellent, indeed. With regard to facilities access, I really don't know any better source of training in that area.

LILY BOND: Well, thank you so much, Paul, for a really wonderful presentation. We're extremely grateful

for you having taken the time to be here and present today.

PAUL GROSSMAN: Thank you, Lily, for this opportunity. And because this Title IX, 504 issue is so important to me, I'm particularly grateful for the platform to discuss this issue. And I hope everybody, when this call is over, will give serious thought about how to address that issue.