

S266254

IN THE CALIFORNIA SUPREME COURT

BRENNON B., Petitioner,

vs.

SUPERIOR COURT, CONTRA COSTA, Respondent,

**WEST CONTRA COSTA UNIFIED SCHOOL
DISTRICT, etc, et al., Real Parties in Interest.**

*After a Decision by First Appellate District, Division One, Case No. A157026
Contra Costa Superior Court, Case No. MSC16-01005
The Hon. Charles Treat, Presiding*

REQUEST FOR JUDICIAL NOTICE

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REQUEST FOR JUDICIAL NOTICE

Amici hereby respectfully request that, pursuant to Evidence Code section 452, this Court take judicial notice of the following:

1. Final Pretrial Conference Order, date June 13, 2019, in *Payan v. L.A. Cmty. College Dist.* (C.D. Cal. Aug. 24, 2021), 2021 U.S. App. LEXIS 25324, United States District Court, Central District of California, Case No. 2:17-CV-01697, SVW-SK.
2. Special Verdict form, dated June 20, 2020 in *Payan v. L.A. Cmty. College Dist.* (C.D. Cal. Aug. 24, 2021), 2021 U.S. App. LEXIS 25324, United States District Court, Central District of California, Case No. 2:17-CV-01697, SVW-SK.

These documents are not submitted for the truth of the matters asserted but are, instead, submitted in support of the illustration of the impact of the issues raised in this proceeding as set forth in amici's accompanying brief.

The documents submitted are true and correct copies of the documents contained in the relevant court's files.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct and that this declaration was executed on September 15, 2021 at Brookings, Oregon.

Sharon J. Arkin

SHARON J. ARKIN

EXHIBIT A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 2:17-cv-01697-SVW-SK

Date June 13, 2019

Title Roy Payan, et al v. Los Angeles Community College District, et al.

Present: The Honorable STEPHEN V. WILSON, U.S. DISTRICT JUDGE

Paul M. Cruz

N/A

Deputy Clerk

Court Reporter / Recorder

Attorneys Present for Plaintiffs:

Attorneys Present for Defendant:

N/A

N/A

Proceedings: FINAL PRETRIAL CONFERENCE ORDER

In advance of the Jury Trial scheduled for June 18, 2019 on the issue of deliberate indifference, the Court issues the following Order to clarify the scope of triable issues.

I. Previous Findings

On February 6, 2018, the Court held that the National Federation of the Blind, Inc. (“NFB”) and the National Federation of the Blind of California, Inc. (“NFBCA”) have associational standing to pursue their claims in this case. *See* Dkt. 128. Therefore, as noted during the Pretrial Conference on June 11, 2019, Plaintiffs will not need to provide testimony at trial from a designated representative of these entities in order to reaffirm standing.

The Court has already held that Defendant Los Angeles Community College District (“LACCD”) committed the following violations of Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131 *et seq.* (“Title II” or the “ADA”) and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (“Section 504”):

- (1) LACCD failed to provide Payan with meaningful access to his course materials in the math classes in which Payan enrolled, either through the MyMathLab software program or via equivalent accessible assignments from a math textbook in a timely manner;

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- (2) LACCD discriminate against Mason by using an inaccessible handbook in Professor Daniel’s course and failing to provide Mason with an equally effective, accessible version of the handbook at the same time as sighted students;
- (3) LACCD discriminated against Plaintiffs by denying Plaintiffs meaningful access to the LACC website; and
- (4) LACCD discriminated against Plaintiffs by offering library databases for student use that contained documents which were inaccessible for blind students through JAWS.

The Court hereby adopts the findings of fact and conclusions of law as articulated in the Court’s prior Orders on summary judgment, see Dkts. 155, 167, 183, as well as the findings of fact and conclusions of law made during the Court Trial on the above issues of liability, see Dkt. 267.

Additionally, the Court has granted LACCD’s motion in limine to exclude the expert testimony of Bruce Steven Growick, Plaintiffs’ vocational expert purporting to testify about Plaintiffs’ lost earnings as a result of LACCD’s disability discrimination. See Dkt. 306. Therefore, the only compensatory damages available to Plaintiffs during the Jury Trial on deliberate indifference will be emotional damages.

II. Legal Standards

To be eligible for compensatory damages for a violation of Title II and Section 504, Plaintiffs must show that LACCD’s violations constitute intentional discrimination. *Duvall v. County of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001) (citing *Ferguson v. City of Phoenix*, 157 F.3d 668, 674 (9th Cir. 1998)). To determine whether a public entity intentionally discriminated under the ADA, courts apply the “deliberate indifference” standard, without the need to prove discriminatory animus. *Id.* “Deliberate indifference requires both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that [] likelihood.” *Id.* at 1139 (citing *City of Canton v. Harris*, 489 U.S. 378, 389 (1988)).

The first element—notice—is established where “the plaintiff has alerted the public entity to his need for accommodation.” *Id.* Such a request for accommodation triggers the public entity’s duty to “undertake a fact-specific investigation to determine what constitutes a reasonable accommodation,” including by “gather[ing] sufficient information from the [disabled individual] and qualified experts as needed.” *Id.* (second alteration in original) (internal quotation marks and citation omitted). However,

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just as a public entity cannot offer “just any accommodation” to the disabled individual, *id.*, the public entity does not have the requisite notice for deliberate indifference whenever a disabled individual requests *any* particular accommodation. As one district court observed, the Ninth Circuit’s language in *Duvall* “appears to overlook the fact that not every requested accommodation is reasonable.” *AP ex rel. Peterson v. Anoka-Hennepin Indep. Sch. Dist. No. 11*, 538 F. Supp. 2d 1125, 1147 (D. Minn. 2008). The Court is persuaded by *Peterson*’s position that, for a request for accommodation to trigger the requisite “notice” for purposes of deliberate indifference, it must be “‘plainly obvious’ that the accommodation [requested] was reasonable and necessary.” *Id.* (citing *Bd. of Cty. Comm’rs v. Brown*, 520 U.S. 397, 410, 412 (1997)). This clarification is consistent with *Duvall*’s additional statement acknowledging that “we require[] the plaintiff to identify ‘specific reasonable’ and ‘necessary’ accommodations that the defendant failed to provide” in order to establish liability under the ADA. 260 F.3d at 1139 (quoting *Memmer v. Marin Cty. Courts*, 169 F.3d 630, 633 (9th Cir. 1999)).

Where a request for accommodation is not made by the disabled individual, the element of notice may still be satisfied “where the need for accommodation is obvious, or required by statute or regulation.” *Id.* Thus, the obviousness of the need for accommodation may exist separately from the obviousness that a particular request for accommodation is reasonable and should be granted. As to the latter point, constructive notice may exist from statute or regulation only if the applicable authority requires a *particular* accommodation to be implemented in the specific factual circumstances presented to the public entity; otherwise, any disabled individual could argue that the public entity was on notice for deliberate indifference purposes simply by violating the ADA or its implementing regulations in the first instance.

Turning to the second element of deliberate indifference—failure to act—as already noted above, a request for accommodation triggers the public entity’s duty to investigate. *Duvall*, 260 F.3d at 1139. Thus, deliberate indifference may be found in “[a] denial of a request without investigation.” *Updike v. Multnomah County*, 870 F.3d 939, 954 (9th Cir. 2017). However, “deliberate indifference does not occur where a duty to act may simply have been overlooked, or a complaint may reasonably have been deemed to result from events taking their normal course.” *Duvall*, 260 F.3d at 1139 (citing *Ferguson*, 157 F.3d at 675). Thus, deliberate indifference requires that the public entity’s failure to act was “the result of conduct that is more than negligent, and involves an element of deliberateness,” rather than being attributed to “bureaucratic slippage.” *Id.* (citations omitted); *see also id.* at 1140 (finding a triable issue on deliberate indifference because “a trier of fact could conclude that defendants’ decisions not to accommodate [the plaintiff] were considered and deliberate”). In this sense, a deliberately indifferent failure to act can be either the failure to take any action whatsoever upon notice of the need for

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accommodation, or the offer of an accommodation that is obviously inadequate to accommodate the needs of the particular blind student.

Because the deliberate indifference standard under the ADA originates from deliberate indifference in the civil rights context, it may also be appropriate to assess the deliberateness of the public entity’s conduct under the “conscious disregard” test established by the Supreme Court. *See, e.g., Bd. of Cty. Comm’rs*, 520 U.S. at 411 (deliberate indifference may be satisfied where the deprivation of a federally protected right is the “obvious consequence” of the public entity’s failure to act and therefore the public entity has “consciously disregarded an obvious risk”). Additionally, the “failure to act” is not temporally limited to the factual circumstances immediately surrounding the particular ADA violation at issue; the Ninth Circuit has reaffirmed that subsequent corrective actions taken by the public entity to avoid future violations may be probative as to whether the particular violation was an isolated occurrence attributable to negligence. *See Updike*, 870 F.3d at 952 (upholding summary judgment for the defendants on the issue of deliberate indifference because “[s]ince [the plaintiff’s] first arraignment, the County and State have reviewed their procedures and taken the appropriate corrective action, such that this ‘bureaucratic slippage’ is likely to be avoided in the future”).

III. Triable Issues

The Court will now provide a brief but succinct overview of the outstanding factual issues to be resolved for each of LACCD’s violations of Title II and Section 504 as necessary to determine whether LACCD was deliberately indifference with respect to any of the above violations. The Court’s analysis in this Order does not constitute any affirmative findings of fact or conclusions of law based on the record to date; the Court merely outlines the disputed issues that the parties may address during trial. Specifically, as outlined at the Pretrial Conference, the Court does find some peripheral circumstances surrounding LACCD’s violations relevant to the question of deliberate indifference, but the Court finds it necessary to clarify the extent of those circumstances that will be allowed at trial to ensure that the parties do not venture into irrelevant testimony.

Importantly, the Court holds that any of Plaintiffs’ allegations regarding subsequent ADA violations at LACC after the date the operative First Amended Complaint was filed are not at issue in this case. Thus, the Court will exclude any and all testimony from John Gafford, a current student at LACC who has encountered difficulties with inaccessible technology. Gafford alleges that he encountered difficulties accessing course materials in an accounting class, a business law class, and a music class, each of which involved the use of technology or in-class lecture material that was not

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accessible to Gafford. *See generally* Dkt. 271 (Gafford’s trial declaration). These allegations are outside the scope of the First Amended Complaint and the violations already identified by the Court. It would be impermissible to make future liability determinations about these new alleged violations LACCD committed, which would be questions solely for the Court, at such a late stage in this litigation. Plaintiffs would be free to pursue Gafford’s claims of discrimination in a separate action.

On the other hand, as noted above, it is potentially probative to LACCD’s deliberate indifference whether LACCD has failed to correct any of the deficiencies in its policies, practices, or procedures following the events that resulted in the discrimination at issue in this case. *See Updike*, 870 F.3d at 952 (relying on the defendants’ subsequent actions to review and correct its procedures to avoid future acts of discrimination to uphold a summary judgment finding of no deliberate indifference as a matter of law). Thus, Plaintiffs will be permitted to present evidence from witnesses about the existence of subsequent discrimination at LACC regarding the same violations at issue in this case, namely, (1) the untimely conversion of math textbooks in classes that otherwise utilize MyMathLab, (2) the lack of equally effective and accessible versions of Professor Daniel’s abnormal psychology handbook, (3) the inaccessibility of library databases and inadequate responses from library staff, or (4) the inaccessibility of the LACC website. The Court cautions, however, that the jury will not make any additional *liability* findings beyond the four violations the Court previously identified; any subsequent discrimination regarding the above violations can only be relevant to the second element of deliberate indifference, in terms of whether LACCD has failed to correct any of its procedures that caused discrimination against Plaintiffs in the above ways.

A. Payan’s Math Courses

The focus for deliberate indifference with regard to Payan’s math courses is (1) whether LACCD had knowledge of the inaccessibility of MyMathLab for Payan and the need to provide Payan with an equally effective alternative, and (2) whether the inadequate solution offered to Payan, to convert assignments from a math textbook at OSS which was done in an untimely manner, was simply bureaucratic negligence or features an element of deliberateness. It is important to clarify that LACCD’s knowledge of the inaccessibility of MyMathLab alone would not amount to deliberate indifference, since LACCD is authorized under Title II and Section 504 to offer reasonable accommodations to sight-impaired students that confer the same benefits as MyMathLab. But here, where Payan complained about both MyMathLab and the accommodation offered by LACCD, it is a jury question as to whether OSS’s response that they were “doing the best they could” to convert Payan’s math textbook in a timely

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manner was an adequate response sufficient to constitute bureaucratic negligence rather than deliberate indifference.

Plaintiffs have indicated their intent to call Payan, LACCD faculty and staff members with whom Payan spoke about MyMathLab and math textbook conversions, and Sylvia Mitchell, a former student at LACC who experienced similar difficulties with MyMathLab and receiving timely conversions of assignments from math textbooks. Mitchell’s testimony is relevant to show that LACCD was previously on notice of these accessibility issues and had the opportunity to take proactive measures to prevent future discrimination against blind students such as Payan but failed to do so. The same is true for Virginia Romero, who Plaintiffs represent is a current student at LACC who reported accessibility issues with MyMathLab to LACCD before Payan did. The jury could find that LACCD’s notice over this period renders LACCD’s inadequate accommodation offered to Payan—converting the math textbook chapters in an untimely manner as an ad hoc accommodation—deliberate, rather than merely negligent.

Plaintiffs may also refer to any relevant policies in place at LACC or LACCD, including policies pertaining to testing of software, as part of LACCD’s violation with respect to Payan’s math courses. LACCD’s internal policies may be probative as to LACCD’s awareness of the need to accommodate blind students regarding the use of MyMathLab. Specifically, Plaintiffs may argue that LACCD’s failure to test MyMathLab for accessibility establishes that LACCD had prior notice of potential accessibility problems with MyMathLab but remained willfully ignorant as to the extent of those problems, such that the subsequent discrimination against Payan through an inadequate ad hoc response to Payan’s complaints about MyMathLab was the result of deliberate indifference. Alternatively, LACCD’s policies also may be used to show that LACCD’s failure to provide Payan with meaningful access to math course materials was deliberate in light of known and available solutions, as embodied in LACCD’s policies, that would ensure Payan’s math textbook materials would be converted in a timely manner. Based on this evidence, the jury could find that LACCD’s response to Payan’s complaints about MyMathLab, including the untimely textbook conversions and the alleged failure to test MyMathLab for accessibility, constituted deliberate indifference.

However, the Court emphasizes that LACCD’s policies, practices, or procedures may not be introduced for the purpose of establishing that LACCD was *required* to take particular actions in response to Payan’s lack of access. LACCD’s internal policies are not legally enforceable under the ADA, and neither party has argued as much. Instead, the policies are relevant only to show LACCD’s notice of Payan’s need for accommodation, including whether such need was “obvious,” and whether

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LACCD was deliberately indifferent by failing to take responsive action outlined in LACCD’s policies that LACCD knows would be successful to provide Payan with the access he needed.

In addition, Plaintiffs’ expert witness Peter Bossley will be permitted to testify about the feasibility of any proactive measures to that LACCD could have taken, under its own policies or otherwise, to diagnose any accessibility issues with MyMathLab, such as testing the software for accessibility. This is not to say that the parties should address whether LACCD could have *resolved* the technological deficiencies in the MyMathLab program. Instead, Bossley may testify that testing MyMathLab for accessibility would put LACCD on notice of the full extent of the need to accommodate certain sight-impaired students and would give LACCD the opportunity to establish procedures to accommodate these students in a timely manner rather than depending on ad hoc complaints to initiate any corrective action. And to the extent that Plaintiffs seek to have Bossley testify about the specific inaccessible features of MyMathLab, any testimony about the inaccessibility of MyMathLab is not relevant at this stage of trial; the Court has already held that MyMathLab was inaccessible to Payan through JAWS. *See* Dkt. 183 at 10-12. Thus, no testimony on that subject will be permitted during trial.

On the other hand, LACCD will not be permitted to elicit testimony about general accommodations or services LACCD offers to blind students in unrelated circumstances. During the Pretrial Conference, LACCD argued that, generally, if LACC is aware of an accessibility problem, LACC tries to resolve the problem, meaning that LACCD was not deliberately indifferent. However, as the Court explained during the Pretrial Conference, Plaintiffs’ central position in this case is that LACCD’s practice of responding to complaints on an ad hoc basis, rather than taking proactive or programmatic initiatives to avoid future acts of discrimination, can amount to deliberate indifference. Such a theory is viable under the authority cited above, but the Court cautions that simply responding to complaints on an ad hoc basis is not per se deliberate indifference. During the Pretrial Conference, LACCD indicated an intent to present testimony that ad hoc responses to complaints may be appropriate to satisfy a public entity’s obligations owed to disabled individuals in certain circumstances. The Court agrees with this premise, insofar as the ad hoc responses provide a sufficient accommodation that provides the disabled individual with meaningful access to the program or service at issue. But if the public entity’s ad hoc accommodations do not provide the disabled individual with meaningful access, and the public entity has notice of the substantial likelihood that ad hoc responses to complaints are insufficient but continues to respond in a deficient manner, knowing that the same complaints are likely to recur, then the public entity may fairly be found liable for deliberate indifference. *See Duvall*, 260 F.3d at 1139 (requiring “knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that [] likelihood”).

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Therefore, applying these considerations to Payan’s math courses, Plaintiffs may argue that LACCD’s failure to test MyMathLab for accessibility in response to earlier complaints from students prior to Payan’s complaints show that LACCD was willfully ignorant as to the full extent of accessibility problems and, accordingly, deliberately indifferent to Payan’s need for accommodation by continuing to respond inadequately to complaints about that software, including from Payan, on an ad hoc basis. Testing software for accessibility, consistent with LACCD’s policies, would provide LACCD with confirmatory notice of the extent of any accessibility problems with MyMathLab, triggering affirmative obligations to provide accommodations based on known and “obvious” needs for accommodation. The jury may find that LACCD’s failure to conduct such testing knowing of the consequences speaks to the deliberateness of LACCD’s repeated failure to accommodate blind students, including Payan, in an adequate manner on an ad hoc basis in response to complaints about the inaccessibility of MyMathLab, knowing that the same complaints are likely to recur. Moreover, Plaintiffs may argue that LACCD’s failure to test MyMathLab comprehensively for accessibility necessarily means that LACCD has not satisfied its obligation to conduct a “fact-specific investigation to determine what constitutes a reasonable accommodation” in response to student complaints. *See Duvall*, 260 F.3d at 1139. But ultimately, the focus of the deliberate indifference inquiry regarding Payan’s math courses is limited to LACCD’s deliberate indifference regarding *Payan’s* lack of access to course materials in his math courses, not LACCD’s general attitude toward blind students broadly. Thus, LACCD’s testimony about the accommodations afforded to blind students shall be limited to the actions LACCD has taken in response to complaints from Payan and Mitchell regarding MyMathLab and math textbook conversions.

LACCD also indicated during the Pretrial Conference that it intended to produce testimony from Dr. Kian Kaviani, the chair of LACC’s math department, that MyMathLab was accessible to other sight-impaired students. This testimony is irrelevant for the same reasons as why Bossley’s testimony on the subject of MyMathLab’s accessibility is irrelevant: the Court already made a ruling on this factual question, and whether MyMathLab was usable by other blind students is irrelevant to the question of whether LACCD was deliberately indifferent in responding adequately to Payan’s lack of access. The issue of LACCD’s notice of Payan’s lack of access does not depend on a jury weighing the number of blind students that found MyMathLab accessible against the number that did not. Instead, what is pertinent is analyzing LACCD’s response to complaints of the inaccessibility of MyMathLab to determine whether LACCD’s inadequate response to Payan’s complaint about MyMathLab was deliberately indifferent in light of that notice. And besides, Payan not only provided LACCD with notice of his inability to access MyMathLab but also complained to OSS about his receipt of converted

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textbook chapters in an untimely manner; thus, in light of this latter form of notice, the analysis of deliberate indifference focuses on the sufficiency of the accommodation actually offered to Payan based on LACCD’s prior awareness of accessibility issues with MyMathLab. Whether MyMathLab actually was accessible to other blind students during this time is irrelevant to Plaintiffs’ theory of LACCD’s deliberate indifference regarding Payan’s math course materials.

B. Professor Daniel’s Abnormal Psychology Course Handbook

The focus for deliberate indifference with regard to Mason’s inability to access the course handbook for Professor Blythe Daniel’s Abnormal Psychology course is (1) whether LACCD had knowledge of the inaccessibility of the course handbook and the need to provide Mason with an equally effective alternative that Mason could access, and (2) whether the failure to offer Mason an adequate solution features an element of deliberateness.

On this issue, the Court expects the testimony to be more limited. Plaintiffs will certainly offer Mason to testify about her experiences with the course handbook in Professor Daniel’s course, and LACCD will be allowed to have Professor Daniel testify about the purpose and use of the handbook. Other relevant witnesses may include individuals at OSS, including but not limited to Kelvin Luong, who interacted with Mason as she attempted to receive an accessible converted version of the handbook. As the parties noted in the Pretrial Conference, testimony is expected to cover whether OSS’s converted version of the handbook, provided to Mason via a “Victor Reader Stream” device, was obviously deficient for its intended purpose. *See* Dkt. 270 ¶ 9 (Mason’s trial declaration explaining her inability to use the Victor Reader Stream effectively). Thus, because the Court recalls that Mason did not make particular requests for accommodation regarding Professor Daniel’s handbook, the Court expects that the issue of whether LACCD was deliberately indifferent as to Mason’s lack of access to Professor Daniel’s handbook may come down to whether the need for additional accommodations was “obvious.”

Similarly as for LACCD’s violation regarding Payan’s math courses, Plaintiffs will be permitted to present relevant evidence about LACCD’s policies, practices, or procedures that may be relevant to add color to the inadequacy of LACCD’s response to Mason’s lack of access to Professor Daniel’s handbook. However, Plaintiffs may not rely on LACCD’s policies in the abstract to show that LACCD failed to adhere to those policies in other, unrelated contexts. The focus is on the policies that LACCD could have followed in response to Mason’s lack of access to Professor Daniel’s handbook.

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C. LACC Library Databases

The focus for deliberate indifference with regard to Plaintiffs’ lack of access to certain documents on LACC’s library databases which are inaccessible through JAWS is (1) whether LACCD had knowledge of the inaccessibility of documents on these library databases and the need to provide Plaintiffs with an accommodation to allow them to access these documents, and (2) whether the failure to offer Plaintiffs an adequate solution to access those documents in a timely and equally effective manner features an element of deliberateness.

The Court expects testimony from Payan and Mason regarding their inability to access certain documents, as well as testimony from LACC library staff, including Barbara Vasquez, about LACCD’s knowledge of these accessibility problems and what actions LACCD took in response. The Court noted during the Pretrial Conference that it is unclear whether and to what extent Vasquez attempted to accommodate Plaintiffs with regard to the particular documents they were attempting to access, so any such information may fairly be adduced during trial. The record to date also notes that staff at OSS received complaints from students about the inaccessibility of library databases, and that OSS engaged in some level of testing in response to those complaints, which would be relevant both to LACCD’s prior notice of accessibility problems with the library databases and whether LACCD’s response was adequate. Mitchell is also a relevant witness on this issue, because Mitchell experienced substantially similar problems attempting to access certain documents on library databases in 2012 and 2013 in connection with an English course and an African American Literature course, each of which required research on library databases. *See* Dkt. 273 ¶ 14. This testimony is relevant to whether LACCD was on notice of these accessibility problems prior to the requests for assistance made by Payan and Mason.

Again, LACCD’s policies, practices, and procedures about testing software for accessibility will be relevant to show whether LACCD had prior notice of potential accessibility problems between JAWS and the library databases but remained willfully ignorant as to the extent of those problems, such that the subsequent discrimination against Plaintiffs in this case through inadequate ad hoc responses to complaints was the result of deliberate indifference. Testing library databases for accessibility, consistent with LACCD’s policies, would provide LACCD with confirmatory notice of the extent of any accessibility problems with the library databases, triggering affirmative obligations to provide accommodations based on known and “obvious” needs for accommodation. The jury may find that LACCD’s failure to conduct such testing knowing of the consequences speaks to the deliberateness of LACCD’s repeated failure to accommodate blind students, including Payan, in an adequate manner on an ad hoc basis in response to complaints about the inaccessibility of the library databases, knowing that

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the same complaints are likely to recur. Moreover, Plaintiffs may argue that LACCD’s failure to test the library databases comprehensively for accessibility necessarily means that LACCD has not satisfied its obligation to conduct a “fact-specific investigation to determine what constitutes a reasonable accommodation” in response to student complaints. *See Duvall*, 260 F.3d at 1139. Nevertheless, the focus of the deliberate indifference inquiry regarding the library databases is limited to LACCD’s deliberate indifference regarding *Plaintiffs’* lack of access to the library databases. Thus, LACCD’s testimony about the accommodations afforded to blind students shall be limited to the actions LACCD has taken in response to complaints from Plaintiffs, Mitchell, and possibly other students regarding the inaccessibility of documents on the library databases.

Neither Plaintiffs nor LACCD will be permitted to rely on LACCD’s policies in the abstract to argue that LACCD generally accommodates, or fails to accommodate, blind students in other circumstances.

D. LACC Website

Lastly, the focus for deliberate indifference with regard to Plaintiffs’ lack of access to the LACC website through JAWS is (1) whether LACCD had knowledge of the inaccessibility of the LACC website through JAWS and the need to provide Plaintiffs with accommodations to allow them to access information on the LACC website, and (2) whether the failure to offer Plaintiffs an adequate solution to access those documents in an equally effective manner as sighted students features an element of deliberateness.

Here, the Court expects testimony from Plaintiffs and other sight-impaired students about their efforts to seek assistance with accessing information on the LACC website necessary for their productive enrollment as a student at LACC. The Court also anticipates that OSS staff members will testify about their knowledge of the accessibility issues with the website, as well as testimony from other individuals involved in creating the website. Specifically, the Court recalls testimony from Plaintiffs and staff at OSS about how OSS typically provides assistance to blind students with enrolling in courses for future semesters and accessing transcripts or grades from completed courses. These interactions provide LACCD with notice that accommodations are required to allow Plaintiffs to use at least these features of the LACC website independently and at any time, just as sighted students are able to do. A jury may fairly find that LACCD’s response to this notice, by requiring blind students to receive assistance from sighted students to perform these functions, was sufficiently inadequate as to be deliberate.

Initials of Preparer

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PMC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:17-cv-01697-SVW-SK	Date	June 13, 2019
Title	<i>Roy Payan, et al v. Los Angeles Community College District, et al.</i>		

The Court also considers testing to be relevant for this violation. Plaintiffs will be permitted to point to LACCD’s policies, practices, or procedures regarding the creation of school websites and testing for accessibility, to show that LACCD had prior notice of potential accessibility problems with the LACC website but remained willfully ignorant as to the extent of those problems, such that the subsequent discrimination against Plaintiffs in this case through inadequate ad hoc responses to complaints about the LACC website was the result of deliberate indifference. Testing the LACC website for accessibility, consistent with LACCD’s policies, would provide LACCD with confirmatory notice of the extent of any accessibility problems with the website, triggering affirmative obligations to provide accommodations based on known and “obvious” needs for accommodation. The jury may find that LACCD’s failure to conduct such testing knowing of the consequences speaks to the deliberateness of LACCD’s repeated failure to accommodate blind students, including Payan, in an adequate manner on an ad hoc basis in response to complaints about the inaccessibility of the website, knowing that the same complaints are likely to recur. Moreover, Plaintiffs may argue that LACCD’s failure to test the LACC website comprehensively for accessibility necessarily means that LACCD has not satisfied its obligation to conduct a “fact-specific investigation to determine what constitutes a reasonable accommodation” in response to student complaints. *See Duvall*, 260 F.3d at 1139. Nevertheless, the focus of the deliberate indifference inquiry regarding the LACC website is limited to LACCD’s deliberate indifference regarding *Plaintiffs’* lack of access to the website.

Bossley’s testimony about testing and LACCD’s policies, limited in the ways mentioned above, will likely be relevant for this violation as well. But Plaintiffs may not rely on the policies in the abstract to show that LACCD failed to adhere to its own policies in different contexts, and neither may LACCD argue that its policies were carried out in other ways irrelevant to the question of the accessibility of the LACC website. And, consistent with the above, neither party will be permitted to present evidence about whether the LACC website actually is accessible through JAWS, because the Court already determined that Plaintiffs could not access the website through JAWS when relying on Bossley’s expert report. *See* Dkt. 183 at 18-20.

IV. Conclusion

The Court issues this Final Pretrial Conference Order to guide the parties as to the relevant testimony to be elicited during the Jury Trial. The Court expects and requires that the parties abide by

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 2:17-cv-01697-SVW-SK Date June 13, 2019

Title *Roy Payan, et al v. Los Angeles Community College District, et al.*

the above determinations, and the parties may object during trial if testimony appears to exceed the bounds set forth above.

The Court sets a final Pretrial Conference for June 17, 2019 at 3:00 p.m. to allow the parties an opportunity to address any of the above issues.

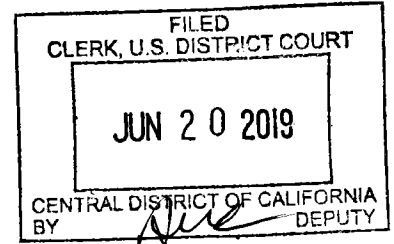
IT IS SO ORDERED.

Initials of Preparer

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PMC

EXHIBIT B



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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Roy Payan, Portia Mason, The
National Federation of the Blind,
Inc., and The National Federation of
the Blind of California, Inc.,

Plaintiffs,

v.

Los Angeles Community College
District,

Defendant.

Case No. 17-CV-1697-SVW (SK)

SPECIAL VERDICT FORM

We, the Jury, in the above-entitled case, answer the questions submitted to us as follows:

1 1. Was Defendant's failure to provide Mr. Payan with a reasonable
2 accommodation to give Mr. Payan meaningful access to course materials in the
3 math classes in which Mr. Payan enrolled, as stated on page 11 of the Court's
4 instructions to you, done intentionally or with deliberate indifference?

5
6 Check one: Yes No

7
8
9 2. Was Defendant's failure to provide Ms. Mason with a reasonable
10 accommodation to give Ms. Mason meaningful access to the course handbook
11 used in Professor Blythe Daniel's abnormal psychology class, as stated on page 11
12 of the Court's instructions to you, done intentionally or with deliberate
13 indifference?

14
15 Check one: Yes No

16
17
18 3. Was Defendant's failure to provide blind students with a reasonable
19 accommodation to give blind students meaningful access to Defendant's website
20 for Los Angeles City College, as stated on pages 12 of the Court's instructions to
21 you, done intentionally or with deliberate indifference?

22
23 Check one: Yes No

PROOF OF SERVICE

I am over the age of 18 and not a party to the within action; my business address is 1720 Winchuck River Road, Brookings, OR 97415

On **September 15, 2021**, I served the within document described as:

APPLICATION TO FILE AMICUS BRIEF; AMICUS BRIEF AND REQUEST FOR JUDICIAL NOTICE

on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as set forth in the attached mailing list.

Solicitor General of California 1515 Clay St. Oakland, CA 94612 (for Attorney General of California)	Contra Costa County Superior Court Attn: Hon. Charles Treat 1020 Ward Street Martinez, CA, 94553 (for Charles Treat)
	Court of Appeal, First Appellate District 350 McAllister Street San Francisco, Ca. 94102

By Mail: By depositing with the U.S. Postal Service on this day with postage thereon fully prepaid at Brookings, OR.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 15, 2021 at Brookings, OR.

Sharon J. Arkin

SHARON J. ARKIN

1 4. Was Defendant's failure to provide blind students with a reasonable
2 accommodation to give blind students meaningful access to library databases, as
3 stated on page 12 of the Court's instructions to you, done intentionally or with
4 deliberate indifference?

5
6 Check one: Yes ___ No X

7
8 If your verdict was "Yes" as to any of the above questions, please proceed to
9 Question 5. Otherwise, you have completed this verdict form.

10
11
12 5. We find that Plaintiffs were damaged in the following amount:

13
14 Mr. Payan: ~~REDACTED~~ 40,000

15
16 Ms. Mason: 0

17
18
19 When you have finished answering all applicable questions, please sign and
20 date the verdict form, and notify the Court that the jury has finished deliberating.

21
22
23
24 DATED: June 29, 2019

25
26 REDACTED AS TO FOREPERSON'S NAME

27 Jury Foreperson

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **B. (BRENNON) v. S.C. (WEST CONTRA COSTA UNIFIED SCHOOL DISTRICT)**

Case Number: **S266254**

Lower Court Case Number: **A157026**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **sarkin@arkinlawfirm.com**
3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	CAOC Amicus Brief
MOTION	RJN

Service Recipients:

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		Serve	4:31:31 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

9/15/2021

Date

/s/Sharon Arkin

Signature

Arkin, Sharon (154858)

Last Name, First Name (PNum)

The Arkin Law Firm

Law Firm