

*Equitable Access
for Deaf or Hard of Hearing Students:
Understanding Legal Responsibilities for Institutions*



pepnet 2
deaf and hard of hearing
connecting people, building capacity



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Table of Contents

Section 1: Understanding Laws, Regulations, Case Law, and Guidance

Section 2: For Law to Practice

Section 3: Auxiliary Aids and Services: The Basics

Section 4: Auxiliary Aids and Services: Common Challenges

Section 5: Beyond the Classroom: Non-Academic Programs

Section 6: Access to Facilities

Section 7: Technical Standards

Section 8: Online Accessibility

Section 9: Internships and Accessibility

About the Authors



Foreword

The organization of this guide first leads the novice professional through an understanding of the requirements of the law and how to apply it when developing policies. Each subsequent section contains reviews of Federal agency guidance, and summaries of relevant complaint investigations. These sections can be downloaded with the entire guide, or used as a stand-alone resource. Practitioner pointers are provided for real world tips on how to develop procedures based in the law and which help to provide equal opportunity and access for individuals who are deaf or hard of hearing.

Section One

Understanding Laws, Regulations, Case Law, and Guidance: What's the difference and why does it matter?

Irene Bowen

Overview

All post-secondary institutions are “bound by the law” and should keep the law in mind when setting policy or deciding how to handle a particular situation. But how do you know what to pay the closest attention to: federal regulations and guidance, settlement agreements, court decisions, or all of these?

Some of these sources are binding, or mandatory. These include statutes and agency regulations and decisions. Other sources, including agency guidance and settlement agreements, are not binding but can provide helpful guidance about policies and factual situations.

Court cases interpret and apply the law to particular situations. Your institution is bound by decisions of the Supreme Court, federal courts of appeals in your geographic circuit, and some district court decisions.

The most useful authority is generally the one that addresses the legal issues and facts that are closest to your situation.¹

Laws, regulations, policies, and such

Think of these as a hierarchy: the first categories listed are binding, and the degree to which a particular institution is bound decreases down the list.

Laws: Congress passed the two laws (statutes or legislation) that are the focus here: Section 504² of the Rehabilitation Act (Section 504) and the Americans with Disabilities Act (ADA).³ Section 504 applies to colleges and universities that receive federal financial assistance. Title II of the ADA covers public colleges and universities, and Title III covers private ones.

Regulations: The laws direct certain agencies to write implementing regulations (or rules or regs): the Department of Justice (DOJ) for the ADA, and the Department of Education (ED) for post-secondary institutions to which it gives federal assistance.⁴ The regulations give more details about what the law means. DOJ issued ADA regulations in 1991 and revised them in 2010.⁵ Generally, the regulations are binding and enforceable, as if they were laws.

Guidance: The agencies can give guidance or state their interpretations of the law and regulations in several ways.

- In a regulation, the “preamble,” “section-by-section analysis,” or “guidance” explains the reasons for making certain decisions, with examples of how to apply the regulations.
- The agencies develop policy guidance to assist covered entities in meeting their obligations, and to provide members of the public with information about their rights under laws and regulations that they enforce. The Department of Education, sometimes joined by DOJ, usually does this through “Dear Colleague” letters.⁶ This guidance does

not add requirements to applicable law, but provides information and examples about how the agencies evaluate whether covered entities are complying with their legal obligations.

- DOJ and ED also post/publish “technical assistance” (TA) documents.⁷

DOJ briefs: The Department of Justice is the federal government’s litigator and enforcer of the ADA and Section 504. The briefs it files in lawsuits state the government’s official position, at times expressing interpretations that are not clear from the regulations.⁸

Letters of finding: The Department of Education’s Office for Civil Rights (OCR) has administrative enforcement authority under Section 504 and Title II of the ADA. Its ten federal regional offices can investigate complaints against covered entities or conduct compliance reviews. Sometimes an investigation or review will lead to a letter of finding (LOF) by an OCR regional office. An LOF of a violation sets out the factual findings, the legal analysis used in the matter, and OCR’s legal findings applying that analysis. An LOF of no violation will explain why OCR found the entity to be in compliance. Either type of LOF can be quite detailed and can clarify OCR’s interpretation of the statutes and regulations in a particular fact situation.⁹

Proposed rules: Although they do not have the force of law, proposed regulations can also offer some insight into how DOJ or ED view an area in which they have not regulated or issued guidance or rulings.¹⁰

Court decisions

The federal courts decide how the laws and regulations apply to specific facts and/or make decisions about legal principles, when they resolve disputes between opposing parties. There is also a hierarchy of federal case law.

The Supreme Court: A federal Supreme Court decision binds all lower federal courts, both courts of appeals and district courts.

Courts of appeals: The 13 courts of appeals hear appeals of district court decisions (below) and generally set legal principles. Each court of appeals covers a geographical area called a circuit, so these courts are also called circuit courts. A circuit court decision binds only those federal courts within its circuit. For example, a 6th Circuit decision binds the U.S. district courts in the four states within the 6th Circuit, but not federal courts in any other circuit.

District courts: The trial courts (the ones that make factual findings) are called United States district courts.

Even if a decision (for example, of a district court or a circuit other than yours) is not binding on your institution, it may still be viewed as persuasive authority in your jurisdiction, depending on factors such as the fact situation, the larger context, and the level of detail and quality of reasoning of the decision. Again, you or your legal counsel should locate the most relevant and persuasive cases available.

Settlement agreements and agency case resolutions

Federal agency investigations or compliance reviews can lead to findings, settlements, or federal litigation.

Sometimes OCR will resolve an investigation by a resolution agreement, before the matter gets to the stage of an LOF, or after an LOF of violation is issued. Similarly, DOJ enters into numerous settlement agreements without going to court.

- Lawsuits filed by DOJ are often resolved with consent decrees (court-approved, enforceable agreements).
- These agreements can sometimes be used as a benchmark for measuring the agencies' expectations as to the issues presented, or as a model for developing policies. This is particularly true if DOJ or OCR has entered into a number of agreements with similar provisions.
- But remember that each agreement results from a particular set of circumstances and is the result of compromise between the parties. As a result of a compromise with an agency, an entity may commit to doing more or less than the law requires.

Private entities and individuals can also bring court actions under the ADA and Section 504, and these actions may result in similar out-of-court settlements or in consent decrees. Again, while these will offer valuable insights and may serve as models to some extent, the same caveats apply.

Help from Pepnet 2, the government, and others

Pepnet 2 has a variety of resources available that will provide stakeholders with information about current strategies and evidence-based practices on a wealth of topics and issues.¹¹

The Association on Higher Education And Disability (AHEAD) also offers an array of resources to stakeholder groups ranging from members to the general public.¹²

Through its ten regional centers, the ADA National Network (funded by the Department of Education) provides information, guidance and training on the ADA.¹³ The centers' services are tailored to meet the needs of business, government, and individuals at local, regional and national levels.

DOJ staffs an information line that answers calls from individuals or entities five days a week at 800 - 514 - 0301 (voice) or 800 - 514 - 0383 (TTY). DOJ also posts numerous technical assistance documents on line.¹⁴

Endnotes

¹ NOTE: This guide is intended to provide basic information. It should not be relied upon as a precise or complete explanation of legal requirements.

² 29 U.S.C. § 794, <http://www.law.cornell.edu/uscode/text/29/794>.

³ 42 U.S.C. §§ 12101 et seq., <http://www.ada.gov/pubs/adastatute08.htm>.

⁴ ED's regulations are at 34 C.F.R. part 104, <http://www2.ed.gov/policy/rights/reg/ocr/edlite-34cfr104.html>.

⁵ 28 C.F.R. part 35 (Title II), http://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.htm; 28 C.F.R. part 36 (Title III), http://www.ada.gov/regs2010/titleIII_2010/titleIII_2010_regulations.htm.

⁶ For example, see DOJ and ED letter of June 29, 2010, to college and university presidents about use of emerging technology, sometimes known as the "Kindle letter," http://www.ada.gov/kindle_ltr_eddoj.htm; DOJ and ED letter of November 12, 2014, http://www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_ltr.htm, enclosing technical assistance document, Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools,

http://www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_fags.htm ;

PDF version, http://www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_fags.pdf;

Fact Sheet, http://www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_fact_sht.htm ;

PDF version, http://www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_fact_sht.pdf ;

Dear Colleague Letter, http://www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_ltr.htm ;

PDF version, http://www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_ltr.pdf .

⁷ For example, see Revised ADA Requirements: Effective Communication, <http://www.ada.gov/effective-comm.htm>; DOJ, January 31, 2014.

⁸ For example, see appellate brief filed in *Argenyi v. Creighton University*, 703 F.3d 441 (8th Cir. 2013), <http://www.ada.gov/briefs/creighton-soi.pdf>.

⁹ For example, see letter of finding to Utah Valley University, No. 08102026 (7/16/2010). <http://www.galvin-group.com/media/89211/ocr%20letter%20Utah%20valley.pdf>

¹⁰ For example, see DOJ's proposed regulation on captioning,

http://www.ada.gov/regs2014/movie_nprm_index.htm, advance notice of proposed rulemaking on website accessibility, <http://www.regulations.gov/#!documentDetail;D=DOJ-CRT-2010-0005-0001>

¹¹ Pepnet 2 Resources, <http://www.pepnet.org/resources>

¹² Association on Higher Education and Disability (AHEAD) Learn, <https://www.ahead.org/learn>

¹³ Americans with Disabilities Act National Network, <http://adata.org/>

¹⁴ Information and Technical Assistance on the Americans with Disabilities Act, <http://www.ada.gov/ta-pubs-pg2.htm>

Section Two

From Law to Practice:

Using the law to set policies and procedures which keep us compliant

L. Scott Lissner

Overview

Attorneys, acting as legal counsel for institutions, will read the statutes, case law, and guidance for jurisdiction, precedent, fact patterns, ambiguities, and legal theory in the context of the client institution's needs and obligations. However, disability resource staff should read the law as a foundation for policy and procedure in the context of their office and institutional missions. Generally the statutes provide a rationale and goals that set the scope of policies; regulations add the details that shape it.

The broad mandate in the ADA—to assure equality of opportunity, full participation, independent living, and economic self-sufficiency by eliminating discrimination, including intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers—sets the stage for policy¹. The regulations for Section 504 and the ADA provide the details of the scene, requiring effective access to programs, benefits, and services for qualified individuals with disabilities in the most integrated manner possible. To furnish this scene, regulations identify specific elements (notice, reasonable accommodation, auxiliary aids and services, equally effective communications, grievance process...) ² that should be included in policy. Finally, guidance and case law provide interpretation, insight into enforcement issues, and models for application in different contexts.

Developing a sound process

A sound process is necessary to guide institutions in determining if a requirement is essential and if a requested accommodation would be a fundamental alteration. In the resolution of cases^{3 4}, courts have looked for an objective and conscientious process to review the impact of the requested accommodations on the curriculum. The process is expected to include experts on both the curriculum and accommodations and to explore alternative accommodations if the requested accommodations were denied.

The Department of Education's Office for Civil Rights (OCR) modeled this process using the common factors weighed by the courts as mentioned to craft its letters to Mt. San Antonio College⁵ and SUNY Albany.⁶ A read of these cases suggests the following pointers for an institutional process to address questions of fundamental alteration:

- Institutions cannot merely rely on their past practices and decisions, including those involving similar disabilities.
- Decisions of fundamental alteration related to academics must include input from individuals knowledgeable and experienced in the discipline and pedagogy as well as disability and the accommodation process.
- A timely, thorough, and rational review of the academic program, its requirements, potential accommodations, and alternative experiences that might substantially approximate essential

elements for the student making the request must be conducted and approved by the President of the institution or their designee.

Guidance from recent case law

In *Argenyi v. Creighton University*, the court provided some further guidance that highlights an additional requirement of the process.

“...it is especially important to consider the complainant's [student's] testimony carefully because ‘the individual with a disability is most familiar with his or her disability and is in the best position to determine what type of aid or service will be effective.’”⁷

This statement reflects not just the facts of the one case but the court’s broader understanding that the regulations and existing case law give deference to the auxiliary aid or service requested by deaf and hard of hearing individuals.

It is these general principles and common elements in resolutions, rather than the facts and simple outcomes, which make reading cases useful to the day-to-day work of ensuring access and compliance.

Public or private: undue burden, readily achievable, and other differences

Public post-secondary institutions are covered by Title II of the ADA; private post-secondary institutions, including for-profit schools, are covered by Title III of the ADA. Both are covered by Section 504 of the Rehabilitation Act if they receive any federal funding. The overlapping regulations can be confusing but fortunately in the higher education context there are really only two areas where institutions need to be aware of the differences. If the institution is controlled by a religious organization **and** receives no federal dollars (including student financial aid), then it is not covered by Section 504. Because Section 504 and the ADA have the same core mandates on a practical level, most of the distinctions based on Title II and III disappear. Post-secondary institutions cannot discriminate on the basis of disability and must provide reasonable accommodations (modifications to policy and practice, modifications to the environment, and the provision of auxiliary aids and services such as assistive listening devices, interpreters and captioning).

Who decides what auxiliary aid or services should be provided? The answer is different for private and public post-secondary institutions because of differences in Titles II and III of the ADA.

Private post-secondary institutions

“...should consult with individuals with disabilities wherever possible to determine what type of auxiliary aid is needed to ensure effective communication. In many cases, more than one type of auxiliary aid or service may make effective communication possible. While consultation is strongly encouraged, the ultimate decision as to what measures to take to ensure effective communication rests in the hands of the public accommodation, provided that the method chosen results in effective communication.”⁸

Public post-secondary institutions

*“...must provide an opportunity for individuals with disabilities to request the auxiliary aids and services of their choice and must give primary consideration to the choice expressed by the individual. ‘Primary consideration’ means that the public entity must honor the choice, unless it can demonstrate that another equally effective means of communication is available, or that use of the means chosen would result in a fundamental alteration in the service, program, or activity or in undue financial and administrative burdens”.*⁹

As you can see, public post-secondary institutions must defer to the individual’s preference unless they can show that an alternative is equally effective or it poses a burden. Private post-secondary institutions can give more consideration to the cost and administrative ease of alternative, but still effective, communication services.

When does the cost and difficulty of implementing an auxiliary aid or service become prohibitive, providing a reason to reject a particular request? For auxiliary aids and services like interpreting and captioning, Titles II and III of the ADA require institutions to demonstrate “undue financial or administrative burden”. Undue burden is a very high standard. Determining that a request would result in such a hardship must be made by the president of the post-secondary institution or his or her designee after considering all of the resources available to the institution as a whole (not the specific academic department or disability resource office). A written statement summarizing the process and providing the rationale must be available for review. Under either standard, if the college or university proves a hardship related to a particular request, they must seek an alternative that would not create a hardship and would, to the maximum extent possible, provide effective communication.¹⁰

Endnotes

¹ 42 U.S.C. §§ 12101 et seq., <http://www.ada.gov/pubs/adastatute08.htm>

² 28 C.F.R. part 35 (title II), http://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.htm ; 28 C.F.R. part 36 (title III), http://www.ada.gov/regs2010/titleIII_2010/titleIII_2010_regulations.htm ; Section 504 Regulations, U.S. Dept. of Education - 34 C.F.R. § 104, http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title34/34cfr104_main_02.tpl

³ Southeastern Community College v. Davis, 442 U.S. 397 (99 S.Ct. 2361, 60 L.Ed.2d 980)

⁴ Wynne v. Tufts University School of Medicine, 976 F.2d 791, <http://openjurist.org/976/f2d/791>

⁵ Mt. San Antonio College Docket Number 09-96-2151-I (Office for Civil Rights)

⁶ University at Albany, State University of New York, No. 02-06-2027 (Office for Civil Rights 11/16/2006)

⁷ Argenyi v. Creighton University, 703 F.3d 441 (8th Cir. 2013).

⁸ The Americans With Disabilities Act Title III Technical Assistance Manual, <http://www.ada.gov/taman3.html>

⁹ The Americans With Disabilities Act Title II Technical Assistance Manual, <http://www.ada.gov/taman2.html>

¹⁰ Letter to Bakersfield College, No. 09-10-2048 (Office for Civil Rights 11/14/2011) http://www.galvin-group.com/media/171299/09_10_2048_bakersfield_ocr.pdf . The Americans with Disabilities Act Title II Technical Assistance Manual, <http://www.ada.gov/taman2.html> . The Americans with Disabilities Act Title III Technical Assistance Manual, <http://www.ada.gov/taman3.html> .

Section Three

Auxiliary Aids and Services: The Basics¹

Irene Bowen

Overview

The Americans with Disabilities Act (ADA)² and Section 504 of the Rehabilitation Act³ (Section 504) require post-secondary institutions to ensure an opportunity for people with disabilities to access services and benefits, including all aspects of academic offerings and student life. The opportunity must be equal to the opportunity provided to others.

As part of this guarantee, institutions are to ensure “effective communication” with people who are deaf or hard of hearing. This means that, when necessary and not an undue burden, a post-secondary institution must provide “auxiliary aids and services” that are appropriate for the individual and the particular situation. Those situations include in-person interactions (whether one-on-one or in groups), classes, web-based learning, and other online communication.

Auxiliary Aids and Effective Communication

Auxiliary aids and services include a broad range of devices, services, and other methods of making aurally delivered information available to individuals who are deaf or hard of hearing, such as:

- qualified interpreters (on site or through video remote interpreting services [VRI]);
- speech-to-text services, for example Communication Access Real-time Translation (CART);
- captioning of online and in-class videos;
- notetakers and class notes, other written or printed materials;
- assistive listening devices (ALDs) and systems;
- telephone handset amplifiers, telephones compatible with hearing aids, closed caption decoders;
- voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices;
- printed materials, keyboard systems, or the exchange of written notes (in limited situations), telecommunications relay services; and
- accessible information technology and electronic technology, in classroom settings and online.⁴

Key points to remember

- The choice of the auxiliary aid is made on a case-by-case basis, after an individual’s request.⁵
- Institutions are to consult with the person and take into account his or her usual or preferred method of communication.⁶
- Public institutions specifically are required to give “primary consideration” to the expressed choice of auxiliary aids.⁷ In other words, they must honor the person’s choice, unless they can demonstrate that another equally effective means of communication is available, or that the use of the means chosen would result in a fundamental alteration or an undue burden (see Real-life example: [Argenyi v.](#)

Creighton University). Private institutions are *encouraged* to consult with the person with a disability to discuss what aid or service is appropriate and effective.

- The post-secondary institution has flexibility in choosing among methods, as long as the one chosen is effective.
- In some settings, such as large open meetings or graduation ceremonies, auxiliary aids and devices such as interpreters, captioning, and ALDs should generally be provided without requiring that individuals request them. For smaller group gatherings/meetings and classes, the post-secondary institution can require that requests be made a reasonable amount of time in advance.

The same principles will apply to class-related activities that take place outside the classroom. A post-secondary institution cannot exclude people with disabilities from any part of its education program or activity and must ensure effective communication in all these activities.⁸ For example:

- The institution must ensure provision of necessary auxiliary aids for computer labs, assigned small group work, tutoring offered by the college or university, field trips, and meetings with professors.
- The institution has a responsibility to ensure accessibility of library resources⁹ (including works used in research or completing class assignments).
- The institution must ensure access to information on its web site about the class or related activities (for example, videos, Power Points, or other media with an audio component).¹⁰

A post-secondary institution cannot impose a fee or surcharge for required auxiliary aids or services.¹¹

Exactly what is “effective” communication, and who decides?

A person with relevant experience and training must make this decision, with student involvement, and in time for the auxiliary aids to be in place as soon as they are needed (e.g., on the first day of class).¹² The choice depends on several factors:

- context or setting (including mode of presentation);
- length, complexity, and importance of the communication; and
- communication preferences of the individual (for example, whether they have used and prefer an interpreter rather than speech-to-text services.)¹³

The individual is the best source of information about his or her customary or preferred method of communication.¹⁴ For example:

- It is important to have a good match between the student’s preferred mode of communication (e.g. American Sign Language or signed English) and the skills of the interpreter. A sign language interpreter will not be effective for an individual who is hard of hearing and does not know sign language.
- A written transcript may not work well for a person who is deaf or hard of hearing and for whom English is a second language. A written transcript, produced after the fact, also does not provide immediate access to a meeting, class, or event; and one provided at the same time as the aural communication is difficult to read while trying to follow other activity in the room.
- Many people who are deaf or hard of hearing, including those who are skilled lip-readers, may benefit from speech-to-text services such as CART.
- Some people who are hard of hearing will use ALDs and assistive listening systems, which transmit an auditory signal such as a speaker’s voice from a transmitter to a person wearing a receiver.

Even though the post-secondary institution has the final say, its choice must be “effective,” geared not only to the individual’s preference but also to other factors set out above, such as the setting and the length and complexity of the communication. For example, video relay services are provided as a free service by each state in lieu of telephone communication when one or both individuals do not use a standard telephone. These services are not effective for simultaneous communication in a classroom. As well, the Federal Communications Commission specifically cautions that video relay services are not to be used for communication when two parties are meeting in the same location.¹⁵

As another example, in some instances students have requested word-for-word real-time captioning, but an institution has inappropriately substituted transcription based on a meaning-to-meaning system, such as C-Print.¹⁶ In one case, the Department of Education’s (ED) Office for Civil Rights (OCR) found that the substitute was not effective for a student who was deaf or hard of hearing in a paralegal class because she missed details of the lecture or information was inaccurately interpreted.¹⁷ The student had supported her request with medical information showing the need for word-for-word real-time captioning, and after five weeks of classes reiterated that request because she did not think the service provided was adequate. Comparing the transcripts given the student with audio tapes offered by another student, OCR found that the transcripts did not include important legal terminology that was discussed in class, examples used by the instructor to illustrate legal concepts, and questions and answers that would have assisted the student in comprehending the moderately complex legal concepts addressed in the class, which emphasized not only questions and answers¹¹ but small group discussions. The transcripts also contained many instances of missing or inaccurately interpreted information. The college agreed to provide the necessary accommodations and to furnish appropriate auxiliary aids to ensure effective communication in the future for other students.

At times, effective communication will require two or more auxiliary aids or services for one individual. For example:

- Video media shown in class will need to be captioned, even if the student uses another in-class service; and
- In a class with a high level of student and faculty interaction, or where more than one person talks at once, CART can be helpful in addition to an interpreter.

On the other hand, even if a student uses a sign language interpreter in class, an interpreter may not be required in other settings. One university provided an interpreter for a student who was deaf for most but not all sessions of computer labs, because the student could type on the computer to ask questions of lab assistants.¹⁸

In the end, the individual who is deaf or hard of hearing will need to be involved in the process of determining effective communication across different settings and contexts.

Real-life example:

Argenyi v. Creighton University¹⁹

One recent case from the 8th Circuit illustrates the application of a number of the principles discussed above. When he was admitted to Creighton University’s medical school, Michael Argenyi, who has a severe hearing loss and a cochlear implant, requested CART for lectures, cued speech interpreters for labs, and an FM system for

small groups. He presented medical documentation and a history of using cued speech interpreters and CART; he had used them effectively before, as an undergraduate student. The school offered him preferential seating and an FM system, but use of the system led to stress, fatigue, and information gaps. Creighton then offered enhanced notetaking services, and (later) an interpreter. Argenyi himself paid for a CART system and an interpreter for part of his first year. Then Creighton refused to allow an interpreter for lectures during Argenyi's second year, even if he paid for it. He sued under the ADA and Section 504. After the district court²⁰ found no violation, he appealed.

The 8th Circuit Court held that the correct standard was whether the school failed to afford the student "meaningful access or an equal opportunity" to gain the same benefit as students who did not have disabilities, and sent the case back to the district court for trial. The jury found that Creighton discriminated against Argenyi by not providing the necessary auxiliary aids, and that it would not have been an undue burden to do so. The judge ordered CART in "didactic settings" (classes) and sign-supported oral interpreters in small group and clinical settings, and awarded almost \$500,000 in Argenyi's attorneys' fees.²¹ The case was later settled under confidential terms.

The significance of this case comes from the court's affirmation of the principle that a student does not need to show that he was "effectively excluded" when claiming a "necessary" auxiliary aid was not provided. The question is whether he was provided "meaningful access" and an equal opportunity to gain the same benefit as others. The court emphasized the importance of considering the individual's own statements and experience.

Practitioner's pointers

Jamie Axelrod and Lauren Kinast

When meeting with students to plan for accommodations, ask students questions about their preferred method of communication. Some questions practitioners can ask are:

- What is the student's typical form of communication?
- Have they used other forms of communication in the past? Was it effective?
- Are there forms of communication they have not used but which may be effective? This may mean introducing them to different communication options.
- Do the students' communication needs change in different settings (large lecture hall, small classroom, one-on-one meetings)?
- What is the most effective way for them to access multimedia or video-based content?

Endnotes

¹ NOTE: This guide is intended to provide basic information. It should not be relied upon as a precise or complete explanation of legal requirements. The statements and guidance are based on the sources cited as well as technical assistance documents from the Department of Justice (DOJ) and Department of Education (ED), not all of which are specifically cited.

² 42 U.S.C. §§ 12101 et seq., <http://www.ada.gov/pubs/adastatute08.htm>; DOJ regulations: 28 C.F.R. part 35 (title II), http://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.htm; 28 C.F.R. part 36 (title III), http://www.ada.gov/regs2010/titleIII_2010/titleIII_2010_regulations.htm.

³ 29 U.S.C. § 794, <http://www.law.cornell.edu/uscode/text/29/794>. ED regulations: 34 C.F.R. part 104, <http://www2.ed.gov/policy/rights/reg/ocr/edlite-34cfr104.html>.

⁴ See DOJ and ED letter of June 29, 2010, to college and university presidents about use of emerging technology, sometimes known as the “Kindle letter,” http://www.ada.gov/kindle_ltr_eddoj.htm; DOJ and ED letter of November 12, 2014, http://www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_ltr.htm, enclosing technical assistance document, Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools, http://www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_faqs.htm; PDF version, http://www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_faqs.pdf; Fact Sheet, http://www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_fact_sht.htm; PDF, http://www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_fact_sht.pdf; Dear Colleague Letter, http://www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_ltr.htm; PDF version, http://www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_ltr.pdf.

⁵ Letter to Harvard University, No. 01-04-2029 (OCR, Eastern Division, Boston (Massachusetts) 01/20/2005).

⁶ See *K.M. v. Tustin Unified School District*, 725 F.3d 1088 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1493 (2014), <http://cdn.ca9.uscourts.gov/datastore/opinions/2013/08/07/11-56259%20web%20revised.pdf> (applying the ADA in a secondary education setting).

⁷ 28 CFR 35.160(b)(2).

⁸ See 34 CFR 104.4, 104.43, 104.44(d).

⁹ See settlement agreement between the United States, the National Federation of the Blind, and the Sacramento (California) Public Library Authority, http://www.ada.gov/sacramento_ca_settle.htm.

¹⁰ See Guide 3, *Beyond the Classroom*, for information about non-academic activities or those not related to a particular class.

¹¹ 28 C.F.R. 35.130(f), 36.301(c)

¹² Letter to Yuba Community College, No. 09-02-2173 (OCR, Western Division, San Francisco (California) 05/30/2003), Letter to Atlanta Christian College, No. 04-09-2100 (OCR 05/26/2011).

¹³ Letter to Atlanta Christian College, No. 04-09-2100 (OCR 05/26/2011).

¹⁴ See OCR’s implied criticism of Yuba College, fn. 12 above, for relying initially on an aerobics instructor’s representation that interpreters were not needed for each day of class.

¹⁵ <https://www.fcc.gov/guides/video-relay-services>

¹⁶ *Alexander v. SUNY Buffalo*, 932 F.Supp.2d 437, W.D.N.Y. (2013), <https://casetext.com/case/alexander-v-state-univ-of-ny-at-buffalo>; *Poway v. Unified Sch. Dist. V. K.D. by Cheng*, 48 N.D.L.R. 102 10CV897-GPC(DHB), S.D. Cal. (2014) (IDEA and ADA in high school).

¹⁷ Letter to Highline Community College, No. 10052007 (OCR 5/17/2005).

¹⁸ Letter to New Mexico Highlands University, No. 08-10-2069 (OCR 08/30/2010)

¹⁹ *Argenyi v. Creighton University*, 703 F.3d 441 (8th Cir. 2013)

²⁰ *Argenyi v. Creighton University*, 44 N.D.L.R. 13 (D. Neb. 2011).

²¹ The Court of Appeals decision and later district court decision and order on remand are gathered here: http://www.disabilityrightsnebraska.org/what_we_do/michael_argenyi_case.html. DOJ’s appellate brief is here: <http://www.justice.gov/crt/about/app/briefs/argenyibrief.pdf>.

Section Four

Auxiliary Aids and Services: Common Challenges

Irene Bowen

Overview

Understanding how to ensure effective communication for deaf or hard of hearing students can be challenging if practitioners are not knowledgeable in this specialized area. As well, even practitioners with specialized experience in working with students who are deaf or hard of hearing may struggle with some challenging situations, such as complaints about interpreting services. It is important to develop and apply a consistent process when students feel their auxiliary aid or service is not effective. This section outlines some of the more common areas of concern for many practitioners and provides examples and tips for an improved process.

Qualified interpreters

To provide effective communication, an interpreter must be “qualified” to provide services in a particular context for the particular student.¹ The Department of Justice (DOJ) has defined a “qualified interpreter” as one that is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary.² For example, an interpreter would need familiarity with legal terminology for a paralegal class.³ Although the ADA does not require that sign language interpreters be certified, some states may require that they be certified and/or hold a license to work as an interpreter in the state.

It is helpful to have a systematic process in place for obtaining, recording, and responding to student feedback on interpreter quality.^{4,5} In determining whether communication is effective, the institution should:

- use objective and reliable measures for evaluating the quality of an individual’s interpreting and his or her understanding of ethical obligations,⁶ and
- take into account the student’s subjective experience.⁷

Real-life example: Santa Ana College⁸

Shortly before the decision in the Argenyi case (discussed in From Law to Practice and Auxiliary Aids and Services: The Basics), the Office for Civil Rights (OCR) of the Department of Education investigated a complaint by a student that she was not provided effective communication for a biology class. The student, who considered American Sign Language her primary language, had complained to Santa Ana College that one of two interpreters used a combination of Pidgin Sign English and Signed Exact English, finger-spelled many words, made up her own signs, and frequently requested assistance from the second interpreter – all resulting in an incomplete and less detailed rendition of the teacher’s lecture. But the college determined that the communication had been effective, due to the student’s passing grade and the opinion of the senior interpreter who, based on observation of the interpreters in the class, said that the team as a whole was conveying the message accurately and completely.

In its letter of finding, OCR noted that often an interpreter coordinator will be qualified to determine the effectiveness of a particular interpreter’s services, and that Santa Ana had experienced budget cuts.⁹ However, OCR found that:

- The college violated the ADA and Section 504 by failing (1) to give primary consideration to the student’s request and (2) to take into adequate consideration the student’s subjective experience with the interpreter, especially in light of the significance of the message.
- Prevailing law¹⁰ grants deference to the student, not the institution, as to the adequacy of auxiliary aids.
- The student is in the best position to determine what type will be effective.

OCR closed its investigation when the college entered a resolution agreement to develop a plan to change an interpreter or provide an independent evaluation of effective communication if a student complains.

Substituting auxiliary aids and services

A post-secondary institution can substitute another auxiliary aid, but only if it is effective. As explained in *Auxiliary Services: The Basics*, there are two exceptions for undue burdens or a fundamental alteration.

Effectiveness

If a post-secondary institution seeks to provide an auxiliary aid or service that is different from the type requested, by a person who is deaf or hard of hearing, that substitute aid or service must be effective.

Cost and difficulty

A post-secondary institution may seek to substitute an auxiliary aid or service because of cost or difficulty. But it can only claim these exceptions if the difficulties rise to the level of an undue burden. Institutions are almost never successful in claiming these exceptions because of the high legal threshold for them and the inherent flexibility of the overall requirement for effective communication. The institution must show that the service that would otherwise be provided would impose an undue financial or administrative burden (“significant difficulty or expense”)¹¹ or cause a fundamental alteration to a college’s program.¹² It must consider all the resources available to pay for the accommodation (not just the resources of the disability services office), for example,¹³ and in some cases the entire budget of the institution. In addition, if the institution is a public one, the decision that a particular aid or service would result in an undue burden must be made by a high level official, no lower than a department head, and must include a written statement of the reasons for reaching that conclusion. The college must still provide “effective” communication up to the point of the burden. In addition, covered entities are not required to provide any particular aid or service in those rare circumstances where it would fundamentally alter the nature of the goods or services they provide to the public. While there is very little case law on undue burdens,¹⁴ OCR has clearly indicated that it will not respond favorably to these claims.¹⁵

One example of a substitution, which may or may not be effective in a given setting or context, is video remote interpreting (VRI). Because of expense, short notice, or a local shortage of interpreters, some institutions have recently turned to VRI rather than on-site interpreters. Through VRI, a sign language interpreter at another location appears via video conferencing technology on a computer screen or videophone. VRI is effective only when properly configured and supported by a high-speed internet connection, and it must meet specific DOJ standards:

- Real-time, full-motion video and audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality video images that do not produce lags, choppy, blurry, or grainy images, or irregular pauses in communication;

- A sharply delineated image that is large enough to display the interpreter’s face, arms, hands, and fingers, and the face, arms, hands, and fingers of the person using sign language, regardless of his or her body position;
- A clear, audible transmission of voices; and
- Adequate staff training to ensure quick set-up and proper operation.¹⁶

Even then, VRI may not be useful in highly interactive courses where there are multiple speakers and group discussions.

Real-life example: Bakersfield College¹⁷

One college recently responded to a shortage of interpreters by videotaping class sessions without interpreters, but still mandating that students with hearing loss attend class and set up appointments to view the videotapes with an interpreter at a later time. OCR found that although the college had taken well-intended and creative steps to mitigate the impact of the shortage, it had not provided other effective means of communication. Under the substitute approach, students with hearing loss were not able to participate in classroom activities and were under an additional burden because they had to sit through each class twice.¹⁸ OCR required the institution to take effective steps to acquire additional resources.¹⁹

Real-life example: Thomas M. Cooley Law School²⁰

In another investigation (discussed in greater detail in “Beyond the Classroom”), OCR found that a law school and the Student Bar Association (SBA) denied a student who was hard of hearing an equal opportunity to participate in a tutorial program sponsored by the SBA, by failing to provide services that were as effective as those provided to other students. The student had requested Communication Access Real-time Translation (CART) for the free, highly-interactive tutorials, which covered the law school’s required courses. The SBA provided the services for a few weeks but then, based on the expense of CART, discontinued them. It offered other alternatives such as Dragon Naturally Speaking software at the student’s expense or a volunteer interpreter. OCR found that these alternatives did not allow the student (who did not use sign language) access to the tutorials.

Charging fees for students who repeatedly skip class

Imposing fees on a student for missing classes that are interpreted may violate the ban on surcharges for necessary accommodations. But in one letter of finding, OCR said that a university’s particular no-show policy did not violate the ADA or Section 504. The policy allowed for imposition of fees under carefully limited circumstances to which the student agreed in advance, provided for emergency situations, and permitted waivers with explanation. Although other post-secondary institutions could use this decision as guidance in developing their own policies, they should do so with caution, making sure that the fees do not result in a surcharge and are not used as a source of revenue. The letter is discussed below (Utah Valley University).

Real-life example: Utah Valley University²¹

In a detailed letter responding to a complaint about fees imposed by a university for no-shows for interpreted classes, OCR found no violation of the ADA and Section 504 with respect to the specific policy.

A student complained to OCR that Utah Valley University penalized him when he missed classes without providing two hours' notice so that the university could cancel his sign language interpreters. The university's published "no-show" procedure imposed charges for excessive absences for interpreted classes.

OCR based its analysis on the principle that the university cannot convert the right to necessary auxiliary aids into a revocable privilege or a service for which it charges a fee. OCR emphasized that surcharges for services required by Section 504 and the ADA are prohibited but acknowledged that delivering interpreters on a cost-effective basis requires advance planning and the cooperation of students. It explained that the policy

- was agreed to by students prior to the assignment of interpreters;
- counted a "no-show" when a student failed to provide at least two hours' notice of an absence, which could be given in six possible ways;
- imposed charges for subsequent no-shows after three no-shows in one course;
- allowed for emergencies; and
- allowed for waiver of charges if the students later cured or explained the no-shows.

Essentially, OCR found that the policy as implemented was acceptable, because the services for which the fee was imposed were not serving any purpose; in other words (not OCR's), they were not "necessary" auxiliary aids because they were not being used. OCR found no indication that the policy violated Section 504 or the ADA.

Practitioner's Pointers

Jamie Axelrod and Lauren Kinast

Responding to complaints about interpreter quality

A thorough new student meeting is an important first step in managing possible complaints about interpreting services. It is important to recognize that interpreters are not a one-size-fits-all accommodation. To gain an understanding of what type of interpreting will result in effective communication, coordinators should discuss with the student their language background and preferences. This is also the time to share with the student the process for submitting feedback or concerns about their interpreting services. Some important steps in resolving concerns are:

- Meet with the student to discuss their concerns.
- For simple issues that do not involve communication specifically, notify the interpreter directly of the concern and offer some easy solutions. It can be small changes, such as attire or seating arrangements, which are easy to remedy.
- For more significant issues which involve effective communication, work with the student to develop specific feedback for the interpreter. Encourage the student to be specific and provide examples.
- Encourage the student to address what they can directly with the interpreter. If they don't feel comfortable doing so, discuss the concerns with the interpreter. Occasionally, additional preparation time with class materials or meetings to discuss sign choice between the student and interpreter may help.
- Follow up with the student quickly to see if their initial concerns have been rectified. Check to see if things have improved by the next one or two class sessions. If the student continues to complain about the quality and can give specific examples about how their communication is impacted, a replacement may be necessary.

- Consider conducting a classroom observation to determine if there is a solution to the ongoing problem. For coordinators who do not have the relevant training and experience to conduct an evaluation, seek external evaluators, as appropriate.
- Consider the importance of the student’s subjective experience. Defer to the student’s assessment of their communication needs and the quality of the accommodation. There are times when a change of interpreter is necessary.

Will another less expensive accommodation suffice?

If a less expensive alternative exists that will meet a student’s communication needs, be sure to communicate with the student and confirm whether s/he agrees it will be effective for the given course or situation. The new student appointment process should include questions about what forms of communication are effective for the individual student. The same method of communication will not necessarily be effective for all deaf or hard of hearing students. Focus on the type of service that is most effective in providing communication access for the student. Expense should not be taken into consideration when determining accommodations.

Recruiting qualified interpreters

Generally interpreters with several years of professional interpreting experience, college-level interpreting experience, and more than minimum level credentials are needed to provide quality interpreting services in the higher education arena.

- Institutions can develop creative strategies for recruiting qualified personnel. Offering competitive pay rates in their geographic areas, covering travel costs, offering paid preparation time, and providing funds for professional development are a few examples to help recruit quality interpreters.
- If working with outside agencies, institutions should be sure that the business contract outlines credentials and qualifications required of service providers to meet the institution’s needs.

Endnotes

¹ See Hayden v. Redwoods Community College District, No. 05-01785, 2007 WL 61886 (N.D. Cal. Jan. 8, 2007), 33 Nat'l Disability L. Rep. ¶ 250 (inadequate interpreter claim), to be found at http://www.galvin-group.com/media/54528/hayden_vs_college_of_redwoods_deaf_meaningful_access.pdf.

² 28 C.F.R. 36.104, 28 C.F.R. 35.104, definitions, "qualified interpreter."

³ Letter to Highline Community College, No. 10052007 (OCR 5/17/2005).

⁴ Of course it is important to seek feedback and implement monitoring for Communication Access Real-time Translation (CART) and other accommodations as well.

⁵ For an example of a response to complaints about quality that OCR found appropriate, see Letter to Idaho State University, No. 10-03-2030 (OCR, Western Division, Seattle (Idaho)) 08/29/2003). Also see Letter to Yuba Community College, No. 09-02-2173 (OCR, Western Division, San Francisco (California) 05/30/2003), Letter to Atlanta Christian College, No. 04-09-2100 (OCR 05/26/2011).

⁶ See Yuba letter, endnote 5, above.

⁷ See letter to Santa Ana College, discussed in Common Questions and Challenges.

⁸ Santa Ana College, letter of finding of violation by OCR and resolution agreement, No. 09-12-2114 (12/20/2012)

⁹ The letter noted that severe funding cuts have often fallen in a disproportionate way on services for students with disabilities but that, because the obligation to comply with the laws falls on the college as a whole, additional expenses to achieve compliance may have to come out of a college's non-categorical budget.

¹⁰ Wong v. Regents of Univ. of Cal., 192 F.3d 807 (9th Cir. 1999), found at <https://law.resource.org/pub/us/case/reporter/F3/192/192.F3d.807.98-15757.html>.

¹¹ See the definition of and factors related to "undue burden," set out in the DOJ regulation for title III, 28 C.F.R. 36.104, Definitions, "Undue burden." See Hayden v. Redwoods Community College District, endnote 1.

¹² A fundamental alteration is a modification that is so significant that it alters the essential nature of the goods, services, or accommodations offered. DOJ's ADA Title III Technical Assistance Manual, Supplement, 3-4.3600, found at <http://www.ada.gov/taman3.html>.

¹³ See Letter to Dr. T. Benjamin Massey, President, University of Maryland, University College College Park, 1 NDLR 36 (OCR LOF), MD 20742-1668 Office for Civil Rights, Region III 03-89-2039 May 17, 1990: "Because a recipient's average cost of accommodating each of its handicapped student enrollees is not likely to be unreasonably large, compliance with 34 C.F.R. Section 104.44(d) does not impose undue burdens on recipients, especially when one takes into account all resources available to recipients, including their capacity to pass on costs of operation to the larger population they serve through tuition charges or other means." See also the Hayden case, endnote 1, which went to trial on undue administrative burden issues and whether spending 50% of the disability services office's annual budget for personal interpreters for eight deaf students would be an undue financial hardship.

¹⁴ The primary case law discussion of the cost of accommodations in higher education is in U.S. v. Board of Trustees of the University of Alabama, 908 F. 2d 740 (11th Cir. 1990) (expenditure of \$15,000 for accessible vehicle not likely to cause undue financial burden in light of annual transportation budget of \$1.2 million).

¹⁵ See OCR letter to New College of California, 4 NDLR 264 (July 1993), "Financial considerations do not relieve [a college] ... from its obligations under Section 504." But see OCR's statement about adaptive technology: "The larger and more financially endowed the entity is, the higher the expectation for the availability of adaptive technology." California State University, 11 NDLR 71 (April 1997).

¹⁶ 28 C.F.R. 35.160(d) and 36.303(f) (DOJ regulations).

¹⁷ Bakersfield College, letter of finding of violation by OCR, No. 09-10-2048 (OCR 11/14/2011)

¹⁸ Letter to Bakersfield College, No. 09-10-2048 (OCR 11/14/2011).

¹⁹ See Letter to Thomas M. Cooley Law School, No. 15-08-2067 (OCR 11/03/2010), discussed in further sections.

²⁰ Thomas M. Cooley Law School, finding of violation by OCR as to "significant assistance" to student organization and failure to provide auxiliary aids, No. 15-08-2067 (OCR 11/03/2010)

²¹ Letter of finding to Utah Valley University, No. 08102026 (7/16/2010). <http://www.galvin-group.com/media/89211/ocr%20letter%20Utah%20valley.pdf>

Section Five

Beyond the Classroom: Non-Academic Programs

Irene Bowen

Overview

Institutions must ensure equal opportunity to students with disabilities in class-related activities outside the classroom, as well as in non-academic programs such as housing, student organizations, events, and student activities. This extends to participation by family members and friends, and other members of the public with disabilities, in attendance at public gatherings such as graduation and sporting events. All aspects of the experiences and activities offered by a post-secondary institution are covered by Section 504 of the Rehabilitation Act (Section 504)¹ and the Americans with Disabilities Act (ADA).^{2 3}

Types of activities covered and individuals entitled to accommodation

Activities covered

By establishing and maintaining academic or non-academic programs, a post-secondary institution has an obligation to provide those programs on a nondiscriminatory basis.⁴ This means that the institution must:

- Ensure that people with disabilities have an equal opportunity to enjoy and benefit from the programs, and
- Apply the principles of effective communication discussed in *Auxiliary Aids and Services: The Basics*.

This mandate applies to:

- housing, counseling, recreation, transportation, food service, and research activities;⁵
- extracurricular programs, placement services, and athletics;⁶ and
- online learning and other technology.⁷

For example, a post-secondary institution should, when necessary:

- Secure qualified interpreting or captioning services for a student who is deaf or hard of hearing for institution-sponsored events, such as award ceremonies,⁸ and
- Consider captioning for announcements made over public address systems at athletic events, such as basketball and football games, which may be required by the ADA and Section 504.

After a lawsuit filed by an Ohio State University (OSU) sports fan about OSU's failure to provide captions, OSU agreed, in 2010, to provide captioning for public announcements, play descriptions, and calls by game officials on its scoreboards and stadium televisions at athletic events.⁹ One federal court has imposed similar requirements on a professional football stadium by applying the principles of effective communication under Title III of the ADA.¹⁰

Organizations related to the post-secondary institution. There is an additional layer of obligation: The institution is responsible for discriminatory acts of any organization to which it provides "significant assistance."¹¹ These organizations will often include fraternities, sororities, and student organizations,

depending on the nature of the relationship between the university and the organization.¹² For example, a post-secondary institution may sponsor or provide financial benefits or assistance to a group of this sort or to another association, club, or local organization. Or it may allow a group to use the program's facilities at a significantly reduced fee or no charge. It may provide administrative assistance, staff to one of these groups, or space on a continuing basis. Placing students in internships or work-study positions may also be considered a form of significant assistance to those with whom the students are placed. An institution cannot provide that type of assistance to an organization that discriminates, and the institution has a responsibility to be sure that the organization provides auxiliary aids and services as necessary.

The post-secondary institution should monitor these and other programs connected to the university to ensure the institution's compliance with the law. In addition, the organization receiving assistance is itself prohibited from discriminating.

Individuals entitled to accommodations

The nondiscrimination requirements protect not just students who are deaf or hard of hearing, but others who seek to participate in or benefit from the institution's programs or activities. People who are deaf or hard of hearing and entitled to accommodations such as auxiliary aids and services include:

- parents and other family members,
- companions of students, and
- members of the public.¹³

A post-secondary institution must provide "meaningful access" for parents with disabilities to activities that the college offers to all parents. For example, the institution would need to provide accommodations to a father who is deaf and whose son is graduating¹⁴ or a woman who is hard of hearing and who is attending an advising and registration session for new students with her son.¹⁵

Real-life example: Letter to Thomas M. Cooley Law School¹⁶

A 2010 letter of finding by the Office for Civil Rights (OCR) of the Department of Education illustrates when and how the effective communication provisions may come into play with respect to organizations, extracurricular activities, and fraternities and sororities.

Thomas M. Cooley Law School gave funding and other assistance to the Student Bar Association (SBA). The SBA offered a series of free, highly-interactive tutorials for law students, covering the law school's required courses. A law student who was hard of hearing requested Communication Assistance Real-time Translation (CART) for the tutorials. The law school said that the SBA, not the law school, had to provide the accommodation because it was an organization independent of the law school, that it considered the tutorials optional and "not part of her class requirements," that the SBA offered the tutorials as a supplemental service, and that tutorials were a "personal service."

The SBA then provided CART services for a few weeks but discontinued them based on cost. It offered alternatives such as Dragon Naturally Speaking software (to be paid for by the student) or a volunteer interpreter, neither of which would allow the student (who did not use sign language) access to the interactive tutorials. The SBA then said it was not responsible for paying for CART services.

In OCR's letter, it recounted the Section 504 regulation's prohibitions on aiding or perpetuating discrimination by providing "significant assistance" to an organization or person that discriminates in providing any benefit or service to beneficiaries of the recipient's program or activities (in this case, the students of the university). The criteria to be considered are:

- The substantiality of the relationship between the recipient and the other entity, including financial support, and
- Whether the other entity's activities relate so closely to the recipient's program or activities that they fairly should be considered activities of the recipient itself.¹⁷

OCR found that the law school:

- Collected mandatory fees, from which most SBA funding derived, with tuition;
- Allowed the SBA to use the law school's name and maintain a presence on its web site;
- Provided a free office suite on law school premises;
- Loaned SBA computer equipment; and
- Allowed use of its classrooms for the tutorials.

OCR concluded that because of the substantial relationship between the SBA and the law school, and because their activities were so closely related, the activities of the SBA could be considered activities of the law school. OCR held both entities in violation of Section 504. Specifically, OCR found that the law school and the SBA denied the student an equal opportunity to participate in the tutorial program by failing to provide her with tutorial services that were as effective as those provided to other students, and the law school aided or perpetuated discrimination by providing significant assistance to the SBA.¹⁸

Practitioner's Pointers

Jamie Axelrod

Student organizations and extracurricular activities

All students, including deaf or hard of hearing students, should have the opportunity to participate in the college experience, such as; student groups, fraternities/sororities, and campus sponsored clubs/organizations.

- Inform students they can request services for extracurricular activities.
- Have students follow a standard request processes when requesting services for extracurricular events and meetings.
- If a centralized process for funding interpreters for these types of events is in place, the disability services office should be responsible for arranging and scheduling services rather than the event organizer. This will ensure the services are in place.
- If a decentralized process is used in which the event organizer funds the interpreters for their events, consider arranging and scheduling the service through the disability services office. No matter which office funds such activities and events, utilizing staff with relevant experience to make the arrangements can ensure that appropriate services are in place.

Campus events

Campus events are an integral activity at a college or university and should be accessible to all.

- For smaller events like performances, theatre or public lectures, create an institutional policy that includes a statement to be placed on all event advertising. This statement should have contact information for the office designated to provide accommodations, such as ASL or CART,

at these events. Be sure to have a posted policy related to how much advance notice is necessary to provide the requested service.

- Create a plan for responding to “short notice” or last minute requests. Most providers have a designated way to respond to these types of requests because unplanned situations do arise. Whenever possible, honor these “short notice” requests. These situations may be critical for the individual making the request.
- Have working assistive listening devices available at events. Have information available at the venue about how to access these devices. Some of these devices should be hearing aid compatible.
- Larger events such as graduation ceremonies should follow a similar process to request accommodations. Keeping in tune with universal design concept, many campuses now provide large screen captioning for the ceremony or event. In addition to meeting the institution’s obligation for access, captions may also accommodate attendees who do not have disabilities or do not typically use accommodations in day-to-day settings. If large screen captioning is provided, be sure there is still a process to request services for those whose primary method of communication is American Sign Language.
- Several recent cases outline the need to proactively provide access to athletic events and stadium communications. Athletic event organizers can assist in establishing a process for providing access to stadium and event communications, even if no request is made.

Endnotes

- ¹ 29 U.S.C. 794, <http://www.law.cornell.edu/uscode/text/29/794>. The Section 504 regulations of the Department of Education (ED) are at 34 C.F.R. part 104, <http://www2.ed.gov/policy/rights/reg/ocr/edlite-34cfr104.html>.
- ² 42 U.S.C. 12101 et seq., <http://www.ada.gov/pubs/adastatute08.htm>. The ADA regulations of the Department of Justice (DOJ) are at 28 C.F.R. part 35 (title II), http://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.htm; 28 C.F.R. part 36 (title III), http://www.ada.gov/regs2010/titleIII_2010/titleIII_2010_regulations.htm.
- ³ See United States' Brief as Amicus Curiae in opposition to Emory University's Motion to Dismiss (Emory Brief), *Barker v. Emory University*, NO. 1 02-CV-2450-CC (N.D.Ga., filed December 2002), p. 8, www.ada.gov/briefs/barkopbr.pdf.
- ⁴ See Emory Brief, endnote 3, pp. 7-8; U.S. Department of Justice, "Americans with Disabilities Act Technical Assistance Letters," Doc.#488, http://www.justice.gov/crt/foia/readingroom/frequent_requests/ada_tal/tal488.txt (May 2, 1994), stating that fraternity houses, owned and operated by a university, "like all other aspects of a university experience, are part of the place of education, and are covered by title III".
- ⁵ Emory Brief, endnote 4 above, at page 4 and footnote 3 of the brief.
- ⁶ ED section 504 regulation, 34 CFR 104.43, 104.45 (Housing), 104.47 (athletics, social organizations, counseling, placement).
- ⁷ See DOJ and ED letter of June 29, 2010, to college and university presidents about use of emerging technology, sometimes known as the "Kindle letter," http://www.ada.gov/kindle_ltr_eddoj.htm.
- ⁸ See Letter to J.F. Drake State Technical College, No. 04-10-2010 (OCR 12/17/2009).
- ⁹ See *OSU Adds Captioning for Hearing-Impaired*, COLUMBUS DISPATCH (Ohio), Sept. 26, 2009, at C2; <http://nad.org/news/2010/11/score-accessibility-osu-provide-stadium-captions>.
- ¹⁰ *Feldman v. Pro Football, Inc.*, No. 09-1021, 419 Fed.Appx. 381, 2011 WL 1097549 (4th Cir. Mar. 25, 2011), <http://www.leagle.com/decision/in%20FCO%2020110325102> (an unreported and thus non-precedential decision). The U.S. Court of Appeals for the 4th Circuit decided that the effective communication provision of the ADA required provision of auxiliary aids (such as captioning or printed lyrics) beyond assistive listening devices, which were useless to the deaf plaintiffs, to ensure full and equal enjoyment of the entire football game "entertainment experience" at a professional stadium. The court found that plaintiffs were entitled to all aural content broadcast over the public address system, including game-related information, the words to music, play information, referee calls, safety/emergency information, and other announcements.
- ¹¹ See 34 CFR 104.4(b)(v), 104.47(c) (Section 504 regulation); 28 CFR 35.130(b) (DOJ's ADA regulation).
- ¹² See example under analysis of Letter to Thomas M. Cooley Law School, above.
- ¹³ See DOJ ADA regulations, 28 C.F.R. 35.160(a) and (b) (title II), 36.303(c)(1) (title III); ED section 504 regulation 104.3(l)(4), *Definitions, qualified individual with a disability*.
- ¹⁴ See Letter to National Holistic University, No. 09-03-2042 (OCR, Western Division, San Francisco (California) 06/11/2003).
- ¹⁵ See Letter re: Bemidji State University, No. 05-10-2037 (OCR 06/11/2010).
- ¹⁶ Letter to Thomas M. Cooley Law School, finding of violation as to "significant assistance" to student organization and failure to provide auxiliary aids, No. 15-08-2067 (OCR 11/03/2010)
- ¹⁷ Factors considered included whether the university conferred significant financial benefit by providing facilities at no or little charge and at convenient locations on the premises, providing publicity, and distributing information about the organization; the history of involvement between the organization and the recipient; and coordination between the organization and the recipient.
- ¹⁸ The Department of Justice (DOJ) takes the same approach to this issue, as illustrated in a letter assessing a university's responsibility for accessibility in fraternity housing. See DOJ letter #488, endnote 4, above.

Section Six Access to Facilities

Irene Bowen

Overview

In addition to ensuring effective communication, post-secondary institutions must also take into account the needs of people who are deaf or hard of hearing by following accessibility standards for new construction and alterations, and ensuring access to programs as a whole.

Accessibility standards: new, altered, and existing facilities

The standards for new construction and alterations¹ include some specific requirements that affect people who are deaf or hard of hearing. For example:

Assembly areas

Assistive listening systems are required in certain assembly areas, such as classrooms, theaters, and stadiums if audio amplification is provided (in other words, if there is a built-in means of amplifying sound).²

Fire alarm systems

Where emergency warning systems are provided, they must include permanently installed audible *and* visible alarms.³

Residence halls and apartments

The requirements vary, depending on which sections of the 2010 DOJ regulations apply.⁴ Generally, a certain percentage of the total number of dwelling units must have communication features,⁵ including:

- visible alarms within the dwelling unit, activated on smoke detection or fire alarm in that portion of the building and
- a hard-wired electric doorbell with an audible tone and visible signal.

Hotels

There are similar provisions for hotels, such as university conference centers.⁶ A certain percentage of guest rooms must have communication features such as:

- permanently installed visible alarms, as well as visible notification devices to alert room occupants of incoming telephone calls and a door knock or bell and
- telephones with volume controls compatible with the telephone system.

Two-way communication systems

These must be provided in elevators, and where they are provided in other locations they must have visible signals.⁷ For example:

- Emergency two-way communication systems in elevators must have a visible indication acknowledging the establishment of a communications link to authorized personnel.

- Where a two-way communication system is provided to gain admittance to a building or facility or to restricted areas within a building or facility, or where one is provided for communication between a residential dwelling unit and an entrance (e.g., a closed-circuit system), the system must have visible signals, as well as the capability of supporting voice and TTY communication with the residential dwelling unit interface.

Section 504 and Title II of the ADA also require that programs as a whole be accessible to people with disabilities. This “program accessibility” requirement means that in some instances post-secondary institutions will have to make changes to existing facilities in order to ensure that people are not discriminated against because of inaccessible facilities. This is particularly true with respect to housing, where the program is so closely connected to a building’s features and location. For example, with respect to housing offered to students, the Department of Education has specified that Section 504 requires that a post-secondary institution provide comparable, convenient, and accessible housing to students with disabilities so that the scope of their choice of living accommodations is, as a whole, comparable to the choice of students without disabilities.⁸

In order to provide that choice, an institution may have to make alterations to existing housing, including the addition of the features listed above such as visible alarms.

Real-life example: Letter to Porterville College⁹

In 2009, OCR issued a detailed Letter of Finding (LOF) of a violation of Title II and Section 504, addressing the absence of visible fire alarms in parts of Porterville College’s campus buildings that had audible alarms. The letter is significant for several reasons:

- It highlights the need to plan carefully when carrying out new construction and alterations in order to avoid costly mistakes that require later correction.
- It points out the overlap of accessibility with important life safety issues.
- It sets out a clear and comprehensive explanation of new construction, alteration, and program accessibility requirements.¹⁰

A student had filed a complaint alleging that the college campus, which included newly constructed buildings, lacked visible fire alarms. OCR found that the college had undertaken a fire alarm system upgrade for the entire campus in 2008, but that areas of some of the buildings did not have visible fire alarms. Significantly, these included the Disability Resource Center, the President’s conference room, a dark room, the Wellness Center in the gym, and a restroom.

In the letter, OCR methodically explained the principles of accessibility in new construction, altered buildings, and existing buildings, detailing the applicability of accessibility standards according to the date of construction or alteration. OCR used the 1991 ADA Accessibility Guidelines to measure compliance in the new and altered buildings.¹¹ OCR summarized the relevant requirements as follows: Where an emergency warning system (either a self-contained or a building-wide system) is installed in new construction or as an alteration, it must include both audible and visible alarms (i.e., those with flashing lights that activate as fire alarm signals), meeting certain specifications, in common rooms and spaces. This requirement is triggered by upgrading or replacing a fire alarm system.

OCR found the college to be in violation of the new construction and alterations provisions by failing to install visible alarms in some locations where there were audible fire alarms.¹²

Practitioner's Pointers

Jamie Axelrod

- Reach out to the facilities department to establish a relationship regarding accessibility features. From assistive listening systems to safety systems, it is important to ensure that deaf or hard of hearing individuals have equal access to information and alerts.
- Work with the facilities department to identify the accessibility features which are in place and identify those that are not. For buildings where accessibility features are missing, create a plan and prioritize what needs to be addressed to ensure the campus is accessible. If all items cannot be completed quickly, have an interim plan to accommodate individual requests.
- Most campuses have a system in place to alert students, faculty, and staff to emergency situations. Work with emergency managers, campus police, or campus safety officers to ensure the system used on your campus, includes a text-based alert. Most systems that are designed to send a voice message to a phone number also come with an option to sign up for a text message or email alert. If the system only sends a voice message, work with campus officials to establish a system to send a text-based alert at the same time the voice message is sent.

End Notes

¹ The references here are to DOJ's 2010 ADA Standards for Accessible Design, part of DOJ's 2010 regulations for title II and title III of the ADA, effective March 15, 2011. <http://www.ada.gov/regs2010/ADAREgs2010.htm>. For a thorough explanation of to what extent recipients of funds from the Department of Education and entities covered by the ADA should follow these or other standards, based on the date of construction or alteration, see ED's notice of interpretation as to standards, issued March 14, 2012, <http://www.gpo.gov/fdsys/pkg/FR-2012-03-14/pdf/2012-6122.pdf>. State and local standards may also apply, and the college or university must ensure compliance with all applicable standards.

² ADA Standards 219.2. See 216.10.

³ ADA Standards 702, 215.

⁴ It is important for those planning or constructing campus housing to understand the applicability of the Fair Housing Act and the implementing regulations of the Department of Housing and Urban Development, see <http://www.fairhousingfirst.org/>, as well as the approach of the DOJ 2010 regulations to "housing at a place of higher education." DOJ has established two categories of housing with differing requirements, based on who occupies the facilities (e.g., faculty or students), whether they are leased on a year-round basis, and whether they contain public use or common use areas available for educational programming. 28 CFR 35.151(f) and 36.406(e).

⁵ See ADA Standard 233, 809.

⁶ See ADA Standards 806.3.

⁷ See ADA Standards 407.4.9, 708.

⁸ 34 C.F.R. 104.45.

⁹ Letter to Porterville College, finding of violation as to failure to provide visible fire alarms where there are audible fire alarms, No. 09-09-2004 (OCR 4/23/2009)

¹⁰ The letter also makes findings about the college's failure to provide an interpreter to the complainant, applying the principles of effective communication and undue burdens and addressing substitution of note-taking, audio recording, and live captioning services for requested interpreter services.

¹¹ Applying the 2010 ADA Standards, issued after the Letter of Finding, most likely would have led to the same outcome. It does not appear that the college claimed that it had complied with the alterations requirements "to the maximum extent feasible," which is an exception available under both standards in limited circumstances.

¹² The college agreed to inspect the parts of buildings that were not inspected by OCR, to correct the deficiencies by installing visible alarms, and to provide documentation of the changes to OCR.

Section Seven

Technical Standards

Michael Stein and Mary Vargas

Overview

Increasing numbers of individuals who are deaf and hard of hearing are entering professions such as nursing, pharmacy, veterinary practice, and medicine raising questions about the proper use of technical standards to assess whether a student with a disability is qualified to be in an educational program. Both the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (Section 504) require educational institutions to provide qualified individuals with a disability with an opportunity equal to that of other students to participate in and benefit from educational programs, services, and activities.¹ A qualified student is one who can meet the essential eligibility requirements or academic and technical standards, of a program.² Recent case law provides guidance on how to draft and apply essential eligibility requirements or technical standards.

Technical Standards: Organic vs. Functional

Technical standards set forth the competencies that a student must be able to perform in order to succeed in an educational curriculum. There are two types of technical standards. Organic technical standards focus on how students will perform tasks while functional technical standards focus on the ability to complete the task.³ For example, an organic technical standard might specify that a medical student must be able to hear heart and lung sounds while a functional technical standard might specify that a student must be able to assess heart and lung status. Notably, the functional technical standard does not require the student to assess heart and lung sounds through hearing. Although a medical student who is deaf or hard of hearing may not be able to hear sounds using an auditory stethoscope, a visual stethoscope would provide the student with the ability to assess heart and lung sounds and get the job done. The goal of these functional technical standards is to ensure that medical students possess the skills necessary to be effective doctors, without dictating the precise means that they must use to do so.⁴ Schools that employ functional technical standards are well-positioned to accommodate students who may not be able to hear but otherwise possess the skills necessary to become excellent doctors, nurses, and pharmacists.

In 1979, the United States Supreme Court held that a nursing school did not violate Section 504 when it refused to admit a student who was deaf into its program.⁵ However, the Supreme Court noted that advances in technology could make it possible to accommodate students who are deaf in the future and render discriminatory future exclusions from such programs.⁶ That prediction has been borne out by three recent cases involving students with disabilities that highlight the importance of adopting functional technical standards.

Real-life example: Argenyi v. Creighton University

In *Argenyi v. Creighton University*, a medical student who was deaf alleged that his medical school violated the ADA and Section 504 by failing to provide the interpreters and real-time captioning necessary for effective communication. The medical student further alleged that the school discriminated against him by refusing to permit him to use interpreters in the clinical setting.⁷ The United States Court of Appeals held that the ADA and Section 504 require medical schools “to provide reasonable auxiliary aids and services to afford [medical students with a disability] ‘meaningful access’ or an equal opportunity to gain the same benefit as his nondisabled peers.”⁸ Following a jury verdict in favor of the medical student the United States District Court ordered the school to provide interpreters and real-time captioning, including for clinical rotations.⁹

Real-life example: Featherstone v. Pacific Northwest University of Health Sciences

In *Featherstone v. Pacific Northwest University of Health Sciences*, a medical student who was deaf alleged that his medical school violated the ADA and Section 504 by withdrawing his admission because he was deaf. The school alleged that providing interpreters would fundamentally alter the curriculum and that the student’s use of interpreters might threaten patient safety.¹⁰ The United States District Court ordered the school to enroll the student, holding that the school’s concerns were “unfounded based upon the growing trend of successful deaf health care professionals.”¹¹ The court held that sign language interpreters are “nothing more than a communication aid” and that such auxiliary aids do not alter “the fact that [the medical student] will have to successfully complete the labs, communicate with patients, and complete the clinical program, just as his classmates would.”¹² The court rejected the argument that the use of interpreters would threaten patient safety, noting that interpreters are routinely used in the course of medical care and doctors who are deaf use interpreters “in even emergency situations without creating a danger.”¹³ The court ordered the school to provide interpreters and real-time captioning to ensure effective communication.¹⁴

Real-life example: Palmer School of Chiropractic v. Davenport Civil Rights Commission

In another case, the Supreme Court of Iowa held that a chiropractic school discriminated against a student who was blind when it relied on its technical standards in refusing to provide accommodations.¹⁵ The school had organic technical standards that required that degree candidates have “sufficient vision, hearing, and somatic sensation necessary to perform chiropractic and general physical examination.”¹⁶ The school had accommodated prior students who were blind but asserted that its current organic technical standards precluded the student’s requests for accommodation including a sighted assistant.¹⁷ The Supreme Court of Iowa rejected the school’s assertion that “all chiropractic students must be able to see radiographic images,” noting that “at least twenty percent of current chiropractic practitioners practice without the ability to take plain film radiographs in their office” and “frequent consultation” with “radiology specialists is oftentimes part of the clinical practice of chiropractic.”¹⁸ The court further noted that “numerous medical schools” have “admitted blind students and made accommodations in recent years.”¹⁹ For these reasons, the court rejected the school’s assertion that accommodating the student who was blind would fundamentally alter its technical standards.²⁰

Together, these cases show that courts have taken note of the growing number of health care professionals with disabilities and are unlikely to be sympathetic to the argument that technical standards preclude accommodating students who are deaf or hard of hearing. These cases underscore the importance of adopting functional technical standards. Such functional standards are flexible and permit the use of auxiliary aids such as sign language interpreters, real-time captioning, visual stethoscopes, and sighted assistants to demonstrate required skills such as diagnostic ability.

Practitioner's Pointers

Universities can take the following steps to comply with the ADA and Section 504:

- Pre-emptively review technical standards to ensure that the standards are functional rather than organic.
- When analyzing a student's ability to meet the technical standards, consider the student's ability to meet the standards *with* accommodations.
- Consult with other institutions offering similar educational programs that have successfully educated students who are deaf or hard of hearing.

Endnotes

¹ The ADA prohibits universities from discriminating on the basis of disability in their programs, services, and activities. 42 U.S.C. § 12101 *et seq.*; 28 C.F.R. § 35.160 (public universities); 28 C.F.R. § 36.303 (private universities). Universities receiving Federal financial assistance must comply with Section 504's prohibition on disability discrimination. 29 U.S.C. § 794; 34 C.F.R. § 104.44. Although these laws theoretically permit universities to assert that providing accommodations would be an undue burden, no court has recognized such a defense in practice given the large financial resources of universities.

² 42 U.S.C. § 12131(2); 34 C.F.R. § 104.3(l)(3); 34 C.F.R. § 104.44(a).

³ http://www.rit.edu/ntid/hccd/system/files/FINAL_REPORT_Building_Pathways_March_2012.pdf, p. 58.

⁴ http://www.rit.edu/ntid/hccd/system/files/FINAL_REPORT_Building_Pathways_March_2012.pdf, p. 58.

⁵ *Davis v. Southeastern Community College*, 442 U.S. 397 (1979).

⁶ *Davis v. Southeastern Community College*, 442 U.S. 412 (1979).

⁷ *Argenyi v. Creighton University*, 703 F.3d 441, 443-445 (8th Cir. 2013).

⁸ *Argenyi v. Creighton University*, 703 F.3d 441, 449 (8th Cir. 2013). *Id.*

⁹ *Argenyi v. Creighton University*, 2014 WL 1838980 (D.Neb. May 8, 2014). The court further ordered the school to pay the deaf student \$478,372.42 in attorneys' fees and costs, in addition to taxed costs.

¹⁰ *Featherstone v. Pacific Northwest University of Health Sciences*, No. 1:CV-14-3084-SMJ, 2014 U.S. Dist. LEXIS 102713 (E.D. Wa. July 22, 2014), at *4, *11.

¹¹ *Featherstone v. Pacific Northwest University of Health Sciences*, No. 1:CV-14-3084-SMJ, 2014 U.S. Dist. LEXIS 102713 (E.D. Wa. July 22, 2014), at *2.

¹² *Featherstone v. Pacific Northwest University of Health Sciences*, No. 1:CV-14-3084-SMJ, 2014 U.S. Dist. LEXIS 102713 (E.D. Wa. July 22, 2014), at *12.

¹³ *Featherstone v. Pacific Northwest University of Health Sciences*, No. 1:CV-14-3084-SMJ, 2014 U.S. Dist. LEXIS 102713 (E.D. Wa. July 22, 2014), at *15-*16.

¹⁴ *Featherstone v. Pacific Northwest University of Health Sciences*, No. 1:CV-14-3084-SMJ, 2014 U.S. Dist. LEXIS 102713 (E.D. Wa. July 22, 2014), at *22.

¹⁵ *Palmer College of Chiropractic v. Davenport Civil Rights Commission*, 850 N.W.2d 326 (Iowa 2014).

¹⁶ *Palmer College of Chiropractic v. Davenport Civil Rights Commission*, 850 N.W.2d 329 (Iowa 2014).

¹⁷ *Palmer College of Chiropractic v. Davenport Civil Rights Commission*, 850 N.W.2d 330 (Iowa 2014).

¹⁸ *Palmer College of Chiropractic v. Davenport Civil Rights Commission*, 850 N.W.2d 345 (Iowa 2014)./

(quotation marks and brackets omitted).

¹⁹ *Palmer College of Chiropractic v. Davenport Civil Rights Commission*, 850 N.W.2d 345 (Iowa 2014).

²⁰ *Palmer College of Chiropractic v. Davenport Civil Rights Commission*, 850 N.W.2d 346 (Iowa 2014). The Supreme Court of Iowa drew on ADA and Section 504 guidance in holding that the school violated the Iowa Civil Rights Act. *Id.* at 333-34.

Section Eight Online Accessibility

Michael Stein and Mary Vargas

Overview

Colleges and universities are increasingly using online resources to further their educational missions. The Rehabilitation Act and the Americans with Disabilities Act (ADA) require colleges and universities to ensure that these online components are accessible to individuals with a disability. The United States Department of Justice (DOJ) has noted the growing use of the Internet in higher education and identified barriers including:

- Videos and other materials with aural content that are not captioned;
- websites that are not compatible with screen reader software that many individuals with vision disabilities use to access the computer;
- websites that do not allow for the modification of font size or color contrast for individuals with limited vision;
- websites that are incompatible with assistive technology such as keyboard commands and voice recognition technology that individuals with limited manual dexterity use instead of typing or using a mouse; and
- websites that do not allow sufficient time for individuals with intellectual and vision disabilities to respond.¹

This section includes information about the legal obligations of colleges and universities to ensure that their online resources are accessible and provides practical tips for ensuring such accessibility. The section reviews Section 504 of the Rehabilitation Act and ADA Titles II and III as they apply to online education as well as several real life examples. This publication is not a substitute for legal advice.

Section 504 of the Rehabilitation Act

Section 504 of the Rehabilitation Act applies to all colleges and universities that offer federally guaranteed student loans or otherwise accept federal financial assistance. This statute applies to all universities receiving federal financial assistance whether they are public or private institutions. Section 504 does not distinguish between physical classroom settings and virtual learning components; its requirements apply to all of the “programs and activities” of an institution of higher education.²

Pursuant to section 504, colleges and universities must ensure that its academic requirements “do not discriminate or have the effect of discriminating” against prospective or current students with a disability.³ Colleges and universities must ensure that no student with a disability is “denied the benefits of, excluded from participation in,

or otherwise subjected to discrimination” due to the lack of auxiliary aids and services such as captioning.⁴

Title II of the ADA and public post-secondary institutions

Public universities are also subject to Title II of the ADA. Title II applies to the “programs, activities, and services” of public universities. This term covers all that a public university offers, including online resources. Public universities must afford individuals with a disability – whether prospective students, students, or members of the public – the same opportunity to benefit from all that the institution offers similarly situated individuals without a disability.⁵ This includes, for example, captioning educational videos posted online so the videos are as accessible to students with hearing disabilities as to students without disabilities.⁶

Title III of the ADA and private post-secondary institutions

Private universities must comply with Title III of the ADA. The statute applies to “places of public accommodation” which are defined to include private institutions of higher education. Courts are divided whether the ADA applies only to those services offered by a “*place* of public accommodation” that have a connection to a physical location. Some courts have held that a website is a virtual “place” subject to Title III.⁷ This is the view that the DOJ has taken in litigation.⁸ Other courts have held that there must be a “nexus” between the website and the physical location – with the implication that universities entirely online with no campus are not subject to the statute.⁹ Under either standard, a traditional university with a physical campus must make its online components accessible to ensure that individuals with a disability have an opportunity equal to that of their peers to participate in and benefit from educational programs and services.¹⁰ This includes the obligation to provide auxiliary aids and services such as captioning when necessary for effective communication, unless doing so would result in undue burden or fundamental alteration.¹¹

Enforcement action

In recent years, the DOJ and the United States Department of Education, Office of Civil Rights (OCR) have taken enforcement action against institutions of higher education for not making online resources accessible to students with disabilities. Two such enforcement actions are described below.

Real-life example: Louisiana Tech University

In the spring of 2011, a blind student registered for a course that required participation in an online learning module offered through a third-party vendor. Access to the online learning module was necessary to submit homework and take exams. The online learning

module also provided tutorials to reinforce material taught in class. The student found the module inaccessible. After more than a month of continued inaccessibility, the student fell so far behind that he was compelled to withdraw from the course. The student filed a complaint with DOJ.

In July 2013, following the DOJ investigation under Title II, Louisiana Tech agreed to adopt new policies to ensure the accessibility of its online components. Specifically, the university agreed to:

- Ensure that instructional materials and online courses are fully accessible to individuals with a disability at the same time that they are available to students without a disability;
- purchase, develop, or use only technology and instructional materials that are accessible to individuals who are blind or have other vision disabilities;
- ensure that web content posted since January 2010 and available to students, prospective students, or applicants comply with web accessibility guidelines (and make accessible in timely manner upon request any prior content);
- train administrators, faculty, and staff on the policies set forth in the agreement; and
- compensate the blind student and purge from his transcript any reference to the course he had to withdraw from due to the course's inaccessibility.¹²

Real-life example: edX Inc.

EdX is a not-for-profit organization that operates a platform that makes available hundreds of massive open online courses (MOOCs) pursuant to contracts with more than 60 institutions of higher education.

DOJ initiated a compliance review and determined that the platform was not accessible to individuals with a disability in violation of Title III. Following this determination, edX agreed in April 2015 to modify its platform to make new and existing courses more accessible. As part of the agreement, edX agreed to:

- Ensure that its website, mobile applications, and platform comply with web accessibility guidelines;
- ensure that its platform permits content providers to develop and post accessible content;
- ensure that technical problems that result in inaccessibility are given the same priority as similar bugs that result in equivalent loss of function for individuals without disabilities;
- retain website accessibility consultant to conduct annual accessibility evaluations; and
- train personnel on the accessibility policies set forth in the agreement.

DOJ also stated in the settlement agreement that many contributors to the platform are also independently covered by the ADA and subject to its requirement to make content accessible.¹³

The legal landscape ahead

DOJ has initiated a rulemaking process to promulgate regulations that would require covered entities, including public and private universities, to make their online components fully accessible. Although a release date for the final regulations has not been announced, the DOJ has filed statements of interest in litigation, including in a case that the National Association of the Deaf brought against Harvard University and the Massachusetts Institute of Technology for failing to caption their Massive Open Online Courses (MOOCs).¹⁴ In February 2016, a magistrate judge recommended that the case go forward, construing the ADA and section 504 to hold that the universities could be required to caption online content.¹⁵ The case is pending.

Regardless of the outcome of the DOJ rulemaking process and judicial interpretation of the scope of Title III, Title II and section 504 require public institutions of higher education and colleges and universities receiving federal financial assistance to make their online components accessible. DOJ and OCR appear likely to continue enforcement actions against institutions of higher education with inaccessible online content.

Practitioner's Pointers

In light of the foregoing, colleges and universities should be proactive in making all online resources accessible to the maximum extent that their resources allow. When colleges and universities create online content, they should ensure that the components are accessible for if and when a student with a disability enrolls in the course. Proactive policies will reduce the need to retrofit online content once a student enrolls who needs the accessibility features.

DOJ has not provided specific guidance as to the accessibility standards colleges and universities should follow in ensuring that their online resources are accessible. Colleges and universities may, as a starting point, review the Web Content Accessibility Guidelines (WCAG) and section 508 standards for internet accessibility. Regardless of what standards the college or university consults, it must make sure that the online content is *accessible* to individuals with a disability.

Examples of steps to take include, but are not limited to:

- Adopting an internet accessibility policy that employs standards that result in accessibility;
- Training administrators, faculty, and staff on this policy;

- Captioning of online videos and multimedia content for individuals who are deaf or hard of hearing;
- Ensuring that websites are compatible with screen reader software that blind individuals use;
- Adopting a policy of purchasing only technology and instructional materials that are accessible to individuals with a disability; and
- Identifying one or more individuals to ensure that the institution’s online resources are accessible.

Colleges and universities can consult DOJ publications, including technical guidance for public entities, on how to make websites accessible and the settlement agreements in the Louisiana Tech University and edX cases.¹⁶ Colleges and universities should also consult with individuals with a disability, including current students with a disability, about what accessibility features they need to access online resources.

Endnotes

¹ Department of Justice, *Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, 75 Fed. Reg. 43460, 43462 (July 26, 2010).

² See, e.g., *Innes v. Bd. of Regents of the Univ. Sys. of Maryland*, Civ. A. No. DSC 13-2800, 2015 U.S. Dist. LEXIS 31955, at *27-*28 (D. Md. Mar. 16, 2015) (applying section 504 to a university's sports website). In *Innes*, the court held that captioning does not constitute a fundamental alteration of a website. *Id.* at *30.

³ 34 C.F.R. § 104.44(a).

⁴ 34 C.F.R. § 104.44(d).

⁵ 28 C.F.R. § 35.130.

⁶ 28 C.F.R. § 35.160 (requiring public entities to provide auxiliary aids and services necessary to ensure that communication with individuals with a disability is as effective as communication with individuals without a disability).

⁷ See, e.g., *National Federation of the Blind v. Scribd Inc.*, Case No. 2:14-cv-162, 2015 U.S. Dist. LEXIS 34213 (D. Vt. March 19, 2015); *National Association of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196 (D. Mass. 2012).

⁸ See, e.g., the brief that the DOJ filed in the *Netflix* case cited in endnote 7. The brief is available online at www.ada.gov/briefs/netflix_soj.

⁹ See, e.g., *National Federation of the Blind v. Target Corp.*, 452 F. Supp. 2d 946 (N.D. Cal. 2006).

¹⁰ 42 U.S.C. § 12182(b)(1)(A); 28 C.F.R. § 36.202.

¹¹ 42 U.S.C. § 12182(b)(2)(A)(iii); 28 C.F.R. § 36.303.

¹² The full settlement agreement is available at www.ada.gov/louisiana-tech.htm.

¹³ The full settlement agreement is available at www.ada.gov/edx_sa.htm.

¹⁴ The briefs that DOJ filed are available at www.ada.gov/briefs/harvard_soj and www.ada.gov/briefs/mit_soj.

¹⁵ *National Association of the Deaf v. Harvard Univ.*, Case No. 3:15-cv-30023-MGM, slip op. (D. Mass. Feb. 9, 2016); *National Association of the Deaf v. Massachusetts Institute of Technology*, Case No. 3:15-cv-30024-MGM, slip op. (D. Mass. Feb. 9, 2016).

¹⁶ The settlement agreements are available at www.ada.gov/louisiana-tech.htm and www.ada.gov/edx_sa.htm. DOJ has also provided technical guidance for public entities about website accessibility that is available online at <http://www.ada.gov/pcatoolkit/chap5toolkit.htm>.

Section Nine

Internships and Accessibility

Michael Stein and Mary Vargas

Overview

When a college student does an internship or clinical experience, who is responsible for ensuring that the experience is accessible for the student? Colleges, universities, and the entity hosting the student's placement must independently examine their legal obligations to ensure full accessibility for the student. Another entity that may be responsible is the state vocational rehabilitation agency charged with assisting eligible individuals with a disability to find employment. When more than one party is responsible, each must take the steps necessary to ensure full accessibility. An institution may be liable if it refuses to provide accommodations on the ground that another institution is responsible; it may not "contract away" to another entity its liability.¹

Whether any particular party bears responsibility for ensuring accessibility is a highly fact-specific question that will turn on the particular situation. Several different federal laws may apply and state and local laws may offer additional protections to students with a disability who do internships or clinical experiences. This publication provides an overview of the federal disability antidiscrimination laws but is not a substitute for legal advice.

Colleges and Universities

The Americans with Disabilities Act requires colleges and universities – public and private – to ensure that students with a disability have an opportunity equal to that of their peers to participate in any and all educational programs and activities.² Colleges and universities accepting federal financial assistance must also ensure equal opportunity to participate pursuant to section 504 of the Rehabilitation Act.³ Under both statutes, colleges and universities must provide auxiliary aids and services such as interpreters or make reasonable modifications to ensure that educational programs are fully accessible to students with a disability, unless doing so would result in fundamental alteration or undue burden.⁴

When a college or university requires or provides students with the option to do internships for academic credit, it must ensure that the experience is accessible.

Hosting Organization

Title I of the Americans with Disabilities Act prohibits discrimination on the basis of disability in job application procedures, the hiring, advancement, or discharge of employees, employee compensation or training, or in "other terms, conditions, and privileges of employment."⁵ Title I requires covered entities to provide reasonable accommodation to ensure that the individual with a disability can do the essential functions of the job.⁶ Title I protects job applicants and employees from discrimination based on disability.⁷ Title I also protects other individuals who are not employees, including in the following circumstances:

- The intern is a volunteer who receives “significant remuneration” such as pension, group life insurance, worker’s compensation, or access to professional certifications (even if from the educational institution).⁸ Courts have held that academic credit and practical experience do not qualify as significant remuneration.⁹
- The intern is a volunteer in a program that regularly leads to employment with the hosting organization or with another employer.¹⁰
- The intern participates in an apprenticeship or training program.¹¹

Even if Title I does not apply, other disability laws may apply. Section 504 applies to entities receiving federal financial assistance.¹² Title II of the ADA applies to public entities.¹³ Some courts have held that Title III of the ADA applies to places of public accommodation that use independent contractors or otherwise provide volunteering opportunities for the public at large.¹⁴

Vocational Rehabilitation Services

A possible resource is your state’s vocational rehabilitation agency. Each state has a vocational rehabilitation agency charged with assisting individuals with a disability in finding employment. Each state has its own eligibility requirements – for instance, some will assist only those individuals who demonstrate financial need. Eligible individuals with a disability may receive financial support to obtain the skills necessary for employment, including but not limited to accommodations necessary for that education. The agency may provide financial and logistical support in placing the student in an internship and ensuring that the experience is accessible, especially if the internship will lead to employment. Check with your state’s agency to determine what services it will provide for eligible individuals with a disability.

In a 1982 case predating the ADA, a federal appeals court held that as between the university and vocational rehabilitation agency, the state agency is primarily responsible for paying for auxiliary aids and services for eligible clients.¹⁵ In that case, the court held that the vocational rehabilitation agency rather than the university had to pay for the interpreter services for a deaf college student.¹⁶ In light of this holding, institutions should consider requesting that the state agency cover the cost of auxiliary aids and services. However, an agency’s refusal to pay for auxiliary aids and services for eligible clients does not excuse universities or hosting organizations from compliance with disability laws.¹⁷ If neither the institution nor the agency provides auxiliary aids and services, courts may hold both entities liable.

Real-life example: University of Texas at Houston Medical School

The University of Texas at Houston Medical School (UT-Houston) provided medical students with the option to do away rotations for academic credit at programs not affiliated with the medical school. A deaf medical student applied for and received approval for an away rotation at the University of California at San Francisco (UCSF) for academic credit. The deaf medical student contacted UCSF to request interpreting services. UCSF stated that it would require reimbursement from UT-Houston for interpreter services.

UT-Houston initially refused to provide interpreters because doing an away rotation for academic credit was optional and not necessary for a medical degree. UT-Houston reconsidered and agreed

to pay up to \$12,375 for interpreter services. This amount represented the approximate cost of interpreter services in the deaf student's two previous rotations. UT-Houston stated that the student would be responsible for the rest of the cost. UCSF estimated that the total cost of interpreter services would be nearly \$22,000. The student was unable to participate in the away elective due to the lack of sufficient committed funding for interpreter services.

The student filed a complaint against UT-Houston with the United States Department of Education's Office of Civil Rights (OCR). OCR issued a letter of finding stating that UT-Houston violated section 504 of the Rehabilitation Act and Title II of the ADA in limiting the student's ability to do an away rotation on the basis of disability, when students without a disability were permitted to do such rotations for academic credit. Since the student filed only against UT-Houston, OCR did not address UCSF's independent obligation to pay for interpreter services.

Real-life example: University of San Francisco & Stanford Hospital

A nursing student with a learning disability enrolled at the University of San Francisco (USF). USF contracts with local hospitals to host clinical courses conducted by USF faculty. During the clinic, the nursing student interacted with Stanford Hospital patients and undertook nursing tasks including changing IV bags and administering medication. Neither USF nor Stanford Hospital paid the nursing student for her work in the clinical course. The student failed the course and alleged that USF and Stanford Hospital failed to accommodate her disability in violation of the Rehabilitation Act, the ADA, and California antidiscrimination law.¹⁸

The court held that a jury should determine whether Stanford Hospital was an employer within the meaning of the state antidiscrimination statute.¹⁹ The ruling meant that Stanford Hospital faced considerable risk that it would lose the case. Soon thereafter, the parties entered into a confidential settlement agreement and the court did not have occasion to decide the Rehabilitation Act and ADA claims.²⁰ This case demonstrates that institutions and internship sites are potentially liable if they do not act proactively to accommodate students with a disability.

Practitioner's Pointers

The institution, internship site, and if applicable, the vocational rehabilitation services agency, should work with the student to identify possible barriers and develop a plan for ensuring that the internship experience is accessible. The parties should check in regularly with the student to ensure the placement is accessible. As the internship progresses, the student may encounter new or unexpected barriers. Should this occur, the parties should work with the student to remediate these barriers to ensure a continued successful placement.

In cases where more than one party is jointly responsible, the parties can work out a cost-sharing agreement to cover the costs of any necessary accommodations. Such cost-sharing will reduce the financial burden on any one entity. In all cases, however, each responsible institution must independently ensure that the internship experience is accessible to the student or face liability. Covered entities may be able to claim tax write-offs for accommodations expenses.²¹

Regardless of who pays for accommodations, collaboration will help ensure the placement is successful for the student. The parties can work together with the student to anticipate and eliminate any barriers prior to the start of the internship. For instance, the hosting organization will likely be most familiar with the day-to-day requirements of the placement. The vocational rehabilitation services agency may have expertise in how to effectively accommodate the student during the internship. The college or university can provide guidance to ensure that the student meets the academic requirements associated with the placement. Working together, the parties can increase the chances that the placement is successful for the student.

Endnotes

¹ *E.g.*, 42 U.S.C. § 12112(b)(2) (prohibiting employers from “participating in a contractual or other arrangement or relationship that has the effect of subjecting” a qualified individual to disability discrimination); 28 C.F.R. § 35.130(b)(1) (prohibiting public entities from discriminating on the basis of disability “directly or through contractual, licensing, or other arrangements”); 28 C.F.R. § 36.202(a) (same prohibition for places of public accommodation).

² 28 C.F.R. § 35.130 (Title II regulation applicable to public institutions of higher education); 28 C.F.R. § 36.202 (Title III regulation applicable to private institutions of higher education).

³ 29 U.S.C. § 794; 34 C.F.R. 104.4(b)(2).

⁴ 34 C.F.R. § 104.44(d) (section 504); 28 C.F.R. § 35.160 (Title II); 28 C.F.R. § 36.303 (Title III).

⁵ 42 U.S.C. § 12112(a).

⁶ *See, e.g.*, the guidance that the United States Equal Employment Opportunity Commission (EEOC) has published for employers about their obligations under the ADA, available at www.eeoc.gov/facts/ada17/html. Covered entities must engage in an interactive process with the individual with a disability regarding what reasonable accommodations to provide. *See, e.g.*, the EEOC enforcement guidance on reasonable accommodations and undue hardship available at www.eeoc.gov/policy/docs/accommodation.html.

⁷ *See, e.g.*, 42 U.S.C. § 12112(b)(1). Individuals labeled as “independent contractors” may be employees if they establish that on the job they were actually employees and not independent contractors. *See, e.g.*, *Gulino v. N.Y. State Educ. Dep’t*, 460 F.3d 361, 377-78 (2d Cir. 2006).

⁸ *See, e.g.*, the informal guidance that the EEOC has published on when interns may be employees, available at www.eeoc.gov/foia/letters/2011//when_interns_may_be_employees.html; *but see, e.g.*, *O’Connor v. Davis*, 126 F.3d 112 (2d Cir. 1997) (sex discrimination case holding that a student’s receipt of federal work-study funding through the school did not establish her as an employee for the hosting organization).

⁹ *See* the informal guidance that the EEOC has published on when interns may be employees, available at www.eeoc.gov/foia/letters/2011//when_interns_may_be_employees.html (collecting cases).

¹⁰ 42 U.S.C. § 12112(a); *see also, e.g.*, *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 198 n.4 (3d Cir. 1994), *cert denied*, 513 U.S. 1022 (1994).

¹¹ 42 U.S.C. § 12112(a); *see also* the informal guidance that the EEOC has published on when interns may be employees, available at www.eeoc.gov/foia/letters/2011//when_interns_may_be_employees.html.

¹² 29 U.S.C. § 794.

¹³ 42 U.S.C. § 12132; *see also, e.g.*, *McElwee v. County of Orange*, 700 F.3d 635, 643 (2d Cir. 2012) (holding that volunteer opportunities are a “benefit” offered by public entities that are covered by Title II).

¹⁴ 42 U.S.C. § 12181 *et seq.* *See, e.g.*, *Hetz v. Aurora Med. Ctr. of Manitowoc Cty.*, Case No. 06-C-636, 2007 U.S. Dist. LEXIS 44115 (E.D. Wis. Jun 18, 2007) (collecting cases on both sides of the issue).

¹⁵ *Jones v. Illinois Dept. of Rehabilitation Services*, 689 F.2d 724 (7th Cir. 1982).

¹⁶ *See id.*

¹⁷ *See id.* at 728-29.

¹⁸ *Avalos v. University of San Francisco*, Case No. C 12-5290 RS, 2013 U.S. Dist. LEXIS 49153, at *1-*4 (N.D. Cal. Apr. 4, 2013); *Avalos v. University of San Francisco*, Complaint, Case No. C 12-5290 RS, Docket Entry No. 1 (N.D. Cal. Oct. 10, 2012).

¹⁹ *Avalos*, 2013 U.S. Dist. LEXIS 49153, at *16-*19.

²⁰ *See Avalos v. University of San Francisco*, Stipulation and Order of Dismissal, Case No. C 12-5290 RS, Docket Entry No. 41 (N.D. Cal. Aug. 29, 2013).

²¹ Businesses may be able to deduct up to \$15,000 per year in accessibility expenditures. *See* Section 190 of the Internal Revenue Code. Further, small businesses with fewer than 30 employees or less than \$1 million in revenues can claim a federal tax credit up to \$5,000. *See* Section 44 of the Internal Revenue Code. State and local taxing authorities may provide for additional deductions and credits for accommodations expenses. Entities interested in learning more should consult with their tax accountants.

About the Authors

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Jamie Axelrod earned a B.A. in Psychology from New York University and an M.S. in Counseling at the University of Wisconsin-Madison.

After graduating with his M.S., Mr. Axelrod worked for the University of Wisconsin-Madison athletic department in the Student Affairs office. He then worked as a mental health therapist in Valparaiso, Indiana and Lander, Wyoming. After thirteen years at community mental health centers Mr. Axelrod went to work for Protection and Advocacy Systems, Inc., a disability rights advocacy law firm. At Protection and Advocacy Systems, Mr. Axelrod served as an advocate assisting individuals with disabilities with claims that their civil rights had been violated.

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Irene Bowen, J.D., is President of ADA One, LLC, and a nationally recognized ADA consultant, trainer, and speaker. Before starting her firm in 2009, she was Deputy Chief of the Disability Rights Section at DOJ, where she oversaw enforcement of the ADA and spearheaded initiatives on higher education as well as effective communication. She was actively involved in the development of the ADA accessibility guidelines as well as DOJ's Title II and Title III regulations. She had also served as Deputy General Counsel of the U.S. Access Board. She achieved ADA compliance through landmark litigation, settlements, and education. She helped found the National Center for Law and Deafness, housed at Gallaudet University, when she was a law student.

Ms. Bowen doesn't just know, study, and apply the laws and regulations – she wrote and enforced many of their provisions. She grasps what the federal government expects for compliance and how compliance can be achieved.

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