

*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**



Pepnet 2 is funded by the Research to Practice Division, Office of Special Education Programs, U.S. Department of Education via Cooperative Agreement #H326D110003. Funding is provided from October 1, 2011 to September 30, 2016.



## Section Eight Online Accessibility

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### 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.<sup>1</sup>

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.<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup>

## **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.<sup>5</sup> 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.<sup>6</sup>

## **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.<sup>7</sup> This is the view that the DOJ has taken in litigation.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup>

## **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.<sup>12</sup>

### **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.<sup>13</sup>

## **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).<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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

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<sup>1</sup> 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).

<sup>2</sup> 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.

<sup>3</sup> 34 C.F.R. § 104.44(a).

<sup>4</sup> 34 C.F.R. § 104.44(d).

<sup>5</sup> 28 C.F.R. § 35.130.

<sup>6</sup> 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).

<sup>7</sup> 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).

<sup>8</sup> 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](http://www.ada.gov/briefs/netflix_soj).

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

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

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

<sup>12</sup> The full settlement agreement is available at [www.ada.gov/louisiana-tech.htm](http://www.ada.gov/louisiana-tech.htm).

<sup>13</sup> The full settlement agreement is available at [www.ada.gov/edx\\_sa.htm](http://www.ada.gov/edx_sa.htm).

<sup>14</sup> The briefs that DOJ filed are available at [www.ada.gov/briefs/harvard\\_soj](http://www.ada.gov/briefs/harvard_soj) and [www.ada.gov/briefs/mit\\_soj](http://www.ada.gov/briefs/mit_soj).

<sup>15</sup> *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).

<sup>16</sup> The settlement agreements are available at [www.ada.gov/louisiana-tech.htm](http://www.ada.gov/louisiana-tech.htm) and [www.ada.gov/edx\\_sa.htm](http://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>.