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## LET'S REVIEW: THE BASICS

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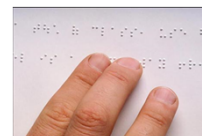
### General

- **Title II and III entities** must ensure "effective" communication, providing appropriate auxiliary aids and services "where necessary."
- **Title II entities** must --
  - ensure that communications with individuals with disabilities are "as effective" as communications with others.
  - in determining types of auxiliary aids and services give primary consideration to

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### Examples of "communication"

- Face-to-face
- Written communication
- Bulletin boards
- Aural communication (phone, internet)
- Television programs, video tapes, DVDs that you produce



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### Burden/fundamental alteration

- Not required to take action that would
  - fundamentally alter the nature of the program or service
  - impose undue financial or administrative burdens (for title III: undue burden, *i.e.*, significant difficulty or expense).
- Still required to take steps up to that point
- Under title II, decision by head of agency on fundamental alteration or burdens
  - In writing
  - Considering all resources
  - With reasons

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### Sections of DOJ regulations amended in 2010

- Title II: Sections 35.104, 35.160, 35.161
- Title III: Sections 36.104, 36.303

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### 2010 additions: examples of auxiliary aids and services (1)

- Exchange of written notes
- Accessible electronic and information technology
- “Real time” computer-aided transcription services and captioning
- Video remote interpreting (defined)



NEW

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### 2010 additions: examples of auxiliary aids and services (2)

- Brailled materials and displays
- Screen reader software
- Secondary auditory programs (SAP)
- Magnification software
- Optical readers



NEW

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### “Qualified reader” and “qualified interpreter”

- “Qualified reader” defined
  - One who reads effectively, accurately, impartially
  - One who can use necessary specialized vocabulary
- “Qualified interpreter” modified
  - Includes sign language, oral, and cued speech interpreters/transliterators
  - Includes VRI



NEW

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### Communication with everyone

- Covers communication with applicants and participants, not just “primary” communicator
  - Anyone who would be able to communicate/participate in the activity
  - Family members, friends, associates
- Key: whether companion is appropriate person with whom entity should communicate
  - Financial aid -- parent
  - Graduation -- guests

NEW

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## Companions



- Can't require person to bring own interpreter
- Can't rely on companions to interpret except in emergency or by request

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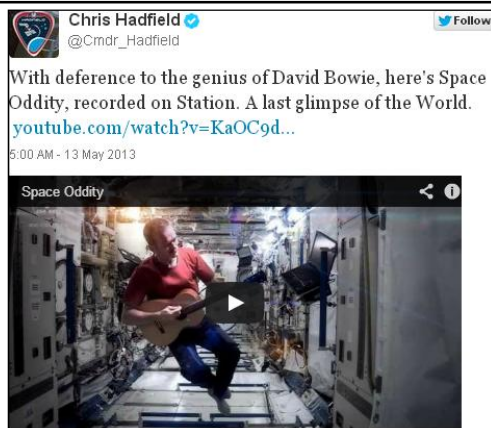
## ISSUES, GUIDANCE, AND CASES

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## ISSUES

- What's effective and who decides what to provide
- Application to electronic technology, web, on-line learning
- Private litigation
- What standard -- when the regulations say little...
- Undue burden
- Who's responsible for compliance
- Plan to comply

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## ADA's civil rights principles

- Nondiscrimination in full and equal enjoyment of all goods and services
- Equal opportunity to participate
- Reasonable modifications
- Integration

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## WHAT'S "EFFECTIVE" AND WHO DECIDES?

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### Argenyi v. Creighton University Medical School (1)

- 8<sup>th</sup> Circuit – Title III and section 504
- Medical student with cochlear implant wanted CART, cued speech interpreter, and/or direct FM link
- University offered FM system, notetakers, power points, seating in front of class
  - Eventually offered interpreters but only for class, not clinical settings
- Appellate court decision (reversing summary judgment for defendant) January 15, 2013: Case will proceed to trial

703 F. 3d 441

<http://www.ca8.uscourts.gov/opndir/13/01/113336P.pdf>

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### Argenyi v. Creighton University (2)

- ADA general rule: person with disability shall not be discriminated against on the basis of disability “in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations”
  - “Equal opportunity” standard: equal opportunity to gain same benefits as non-disabled persons/peers
  - Meaningful access to program/service
  - Start by considering how a university’s educational programs] are used by non-disabled students and then take reasonable steps to provide this student with a like experience.
- Decision consistent with DOJ’s brief

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## TECHNOLOGY

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### E-readers in the classroom



Joint Dear Colleague Letter (DCL) from DOJ and Ed to colleges and universities, June 2010:

- Requiring use of electronic book readers in classroom settings that are not accessible to students who are blind or have low vision violates ADA and section 504 –
  - unless those students are provided accommodations or reasonable modifications that allow them to receive all the educational benefits of the technology in an equally effective and integrated manner
- Emphasis on “substantially equivalent” ease of use
- Settlement resolutions by the Department of Justice at same time with universities

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### OCR FAQs, 2011 (1): It’s not just e-readers

DCL applies to –

- Online programs that are part of operations of school (directly or through contracts or other arrangements)
- Pilot programs
- Classes/programs where no visually impaired student enrolled
  - Plan for immediate delivery of accessible devices or technology

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### OCR FAQs 2011 (2)

- Emerging technologies in the classroom: ensure
  - equal access to the educational benefits and opportunities afforded by the technology and
  - equal treatment in the use of the technology.
- Not necessarily identical ease of use

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### OCR FAQs 2011 (3)

- Must a school always provide the same form of emerging technology to a student who is blind or has low vision as it provides to all other students?
- **No:** The legal duty imposed by Section 504 and Title II is to provide equal opportunity — access to the educational benefit at issue in an equally effective and equally integrated manner.
- **Uh – Maybe that's a YES!**

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### OCR Letter to Strayer University (1)

- March 2011 LOF to Strayer University-Newington
- Online learning division violated section 504
- Lack of reasonable procedures for responding to students' requests for academic adjustments and auxiliary aids (failed to notify student whether accommodations were approved)
  - Inconsistent information about who to contact for academic adjustments (printed materials)
  - "Restrictive, inflexible" requirement to submit accommodations requests at least 30 days before classes began

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### OCR Letter to Strayer University (2)

- Denial of necessary academic adjustments
  - Failed to provide graphs in textual or alternative formats
- Inaccessible website and online student portal
  - Many images missing alt tags
  - Can comply by providing information and services through other accessible means

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### OCR agreement with SC Technical College System

- OCR findings after compliance review: South Carolina Technical College System (SCTCS) and two college websites were not accessible to people with print disabilities, violating section 504 and ADA
  - SCTCS had directed colleges to follow section 508 and W3C/WAI: Web Content Accessibility Guidelines but they had failed to do so
  - Agreement: SCTCS will –
    - Develop resource guide
    - Direct that websites be accessible
    - Annually review and monitor
- <http://www.ed.gov/news/press-releases/civil-rights-agreement-reached-south-carolina-technical-college-system-accessibi>

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### PRIVATE LITIGATION

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### On-line videos: NAD v. Netflix

- June 19, 2012: Massachusetts District Court allowed case re: captioning of streaming videos to proceed
  - Congress intended ADA to adapt to changes in technology
  - Case later settled
- Decision: [http://www.lewisfeinberg.com/wp-content/uploads/case/national-association-of-the-deaf-v-netflix/Netflix\\_Order.pdf](http://www.lewisfeinberg.com/wp-content/uploads/case/national-association-of-the-deaf-v-netflix/Netflix_Order.pdf)

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### Penn State agreement with NFB (October 2011)

- Penn State to develop strategy to make electronic and information technology (EIT) systems used on campuses fully accessible to blind persons
  - Covers course management systems, web sites, classroom technology, library resources, banking services, and more.
  - PSU will
    - Conduct accessibility audit
    - Develop policy and procedures to purchase or recommend only EITs that provide same programs, benefits, and services that they do to individuals without disabilities, except when technically infeasible.
    - Make library website and clickers
    - Ensure that only accessible ATMs are on campus
- <http://nfb.org/nfb-penn-state-resolve-accessibility-complaint>

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### UC Berkeley agreement, 2013 (1)

- Significant agreement with Disability Rights Advocates on behalf of three students with print disabilities
- <http://dralegal.org/sites/dralegal.org/files/casefiles/settlement-ucb.pdf>
- Program for students with disabilities will almost double staff
- Professors who knowingly and without good cause fail to submit textbook adoptions seven weeks before start of class can be punished per faculty code of conduct

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### UC Berkeley agreement, 2013 (2)

- University will implement new policies
  - Provide textbooks in 10 days and course readers in 17 (shorter on some occasions)
  - New Library print conversion system to allow students to request that specific book be converted into accessible digital format (average time 5 days)
  - Encourage instructors to identify course readings well before start of classes
  - Personal readers as needed
  - Students can self-scan materials
  - Will remedy barriers in online library catalogue

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### WHAT STANDARDS TO FOLLOW

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### Guidelines

- See collected references in FAQs
- W3C/WAI: Web Content Accessibility Guidelines
- Standards for federal procurement, contractors Section 508 standards
- State regulations
- System wide rules
- Other standards that produce comparable results – best practices, etc.
- Best practices and tools: University of Connecticut: UDI Online  
<http://www.udi.uconn.edu/index.php?q=content/about-udi-online-introduction>

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### UNDUE BURDEN

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### OCR on undue burden

When an entity selects software programs and/or hardware equipment not adaptable for people with disabilities, "...the subsequent substantial expense of providing access is not generally regarded as an undue burden when such cost could have been significantly reduced by considering the issue of accessibility at the time of the initial selection."

Letter of Finding of April 4, 1997, to California State University – Los Angeles, 09-07-2002.RES

<http://www.washington.edu/accessit/webpslegal.html>

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### Hayden v. Redwoods Community College District

- Court: Question of undue burden is not one to decide here on summary judgment – whether \$85,000 for interpreters for one student per year is undue financial burden
- No. 05-01785, 2007 WL 61886 (N.D. Cal. Jan. 8, 2007)

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### WHO'S RESPONSIBLE FOR COMPLIANCE

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### The college has the duty to comply (1)

- College must tell the student where he/she can go for services
- College establishes a grievance process and other infrastructure
- College establishes policies and procedures
- College sets clear expectations for faculty, staff, and administrators and ensures that they are met

### The college has the duty to comply (2)

**BUT almost anyone can bring the college into non-compliance**

- Faculty
- Teaching assistants
- Administrators
- Technology staff

There is no academic freedom to discriminate.

### From FAQs

- All faculty and staff must comply
- If professor assigns inaccessible course content, school can be held legally responsible
- Schools should provide professional development about
  - accessibility and emerging technology
  - Role of faculty and staff in helping school comply



## PLAN TO COMPLY

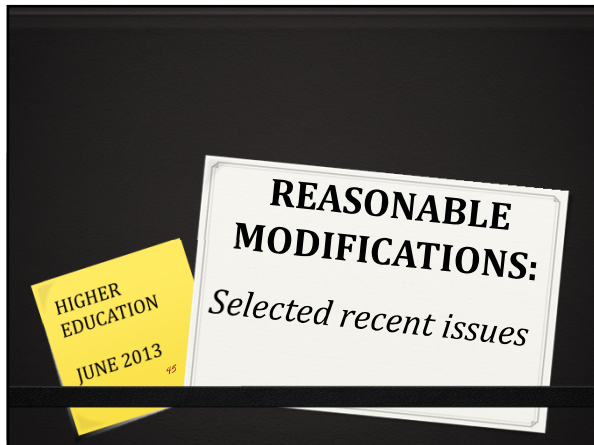
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## Facing forward: plan for compliance

- Adopt clear policies
- Publicize the policies
- Adopt and publish a plan for compliance
- Clearly define – and be sure everyone understands -- responsibilities
- “Enforce” the policies/plan internally and centrally



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## Reasonable modifications: The rule

“A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability –

unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”

## FOOD ALLERGIES

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## Food allergies: Lesley University (1)

- DOJ agreement of December 2012 resolved complaint investigation about mandatory meal plan and students with celiac disease
- University will --
  - Provide ready-made gluten- and allergen-free food options
  - Develop individualized meal plans for students with allergies
  - Allow those students to pre-order allergen free meals



### Food allergies: Lesley University (2)

- University will (continued) --
    - Provide a dedicated space to store and prepare food
    - Allow requests for food made without allergens
    - Work to retain vendors that offer food without allergens
    - Display notices about food allergies
    - Train food service and University staff
    - Pay \$50,000 in compensatory damages
- [http://www.ada.gov/lesley\\_university\\_sa.htm](http://www.ada.gov/lesley_university_sa.htm)

### Food allergies: DOJ Q and A

Q and A about agreement, January 2013

- Issue in Lesley case involved a mandatory meal plan
- Not necessarily applicable to other plans or to restaurants
- But restaurants and universities with other types of plans should evaluate their policies

[http://www.ada.gov/q&a\\_lesley\\_university.htm](http://www.ada.gov/q&a_lesley_university.htm)

### EXTRACURRICULAR ATHLETICS

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### OCR Dear Colleague Letter January 25, 2013

- Covers extracurricular athletics at all education levels as to people with disabilities
  - Club, intramural, and interscholastic athletics
- Issued under section 504
- Why?
  - To provide equal opportunity and because these activities provide health and social benefits to all students
  - Socialization, leadership skills, improved teamwork, athletic skills

<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.pdf>

### “Qualified”

- Appropriate age
  - Of an age for which the school provides these programs for all students
  - Age that State law or IDEA (Federal Law) requires the provision of school services for students with disabilities
- Selective or competitive program
  - May require level of skill or ability to participate
  - As long as selection criteria are not discriminatory

### Requirements (1)

- Do not act on generalizations or stereotypes about disability generally or about a specific disability
- Example: Lacrosse player with a learning disability that coach won't play because the coach thinks she can't play successfully under time constraints of an actual game

### Requirements (2)

- Must make reasonable modifications in program if necessary to ensure equal opportunity to participate
- But school does not have to make fundamental alterations in program
- May adopt bona fide safety standards

### Fundamental Alteration

- A change that alters such an essential element or aspect of the activity or game that it would be unacceptable (even if it affects everyone equally)
- A change that gives an unfair competitive advantage to the student with the disability and thus fundamentally alters the character of the competition

### Separate teams?

- The provision of unnecessarily separate services is discriminatory; section 504 requires provision of services in the most integrated setting appropriate for the student with the disability
- But schools should create additional opportunities for students with disabilities when they cannot participate in existing programs, even with reasonable modifications or aids
- Examples: wheelchair tennis, wheelchair basketball, sled hockey

### Athletic associations

- Athletic association is subject to section 504 if
  - it receives Federal financial assistance itself or
  - its members receive Federal financial assistance and they have ceded controlling authority over portions of their athletic programs to the association
- Note: an athletic association may also be covered by Title III of the ADA

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