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## EDUCATION LAW

# School Bells Ring in Brave New World of Digital Compliance

BY ANDREA GOSFIELD AND  
CHRISTINE E. WELLER

As students settle in to their physical and virtual seats for the semester, administrators at public and private institutions of higher education are already scurrying to prepare for the next academic year. This is true from both a course planning as well as internal compliance perspective. An area currently meriting extra attention is digital and web access for students with disabilities.

The clock is ticking, because in July 2010 the Department of Justice (DOJ) released a notice of proposed rulemaking for website accessibility under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. Section 12101. After delays, the rules are anticipated in 2018. This impending regulatory change, as well as two recent actions involving edX and Harvard University over the accessibility of online course offerings, has many schools



Andrea Gosfield



Christine E. Weller

contemplating appropriate digital accessibility plans.

### What laws prohibiting disability discrimination apply to schools?

Schools in the United States are subject to two main federal laws against disability discrimination: Title II and Title III of the ADA, and The Rehabilitation Act, 29 U.S.C. Section 701 (1973). Title II of the ADA covers public universities, while Title III covers private colleges and universities. Analogous state and local laws may also apply. Specifically, as amended, Section 794

of the Rehabilitation Act (referred to as Section 504) provides jurisdiction over schools receiving federal financial assistance.

Under these laws, schools are prohibited from discriminating against disabled individuals, and denying them access to school programs or activities on the basis of their disability.

### How many people suffer from a disability?

According to a recent opinion piece in The New York Times, roughly one in five Americans live

with a disability. This translates to about 56 million people in the United States. For schools, this means many different types of students must be considered, particularly for online courses with the capacity to reach the masses. As a result, schools face the daunting task of making their digital offerings accessible to a variety of needs that may not be readily apparent.

## **How does the ADA currently define ‘disability’?**

Under the ADA, the legal term “disability” means, with respect to an individual— “a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.”

Does the ADA currently cover website and digital accessibility?

The ADA and interpreting regulations were written before the tech boom of the 1990s. Thus, the plain language of the ADA does not require that web technologies be made accessible. However, as online access and activities become increasingly pervasive in our daily lives, and critical to how we interact with the world, the DOJ recognizes the need for accessibility to extend to the web. Thus, while the interpreting regulations of the ADA do not explicitly address website access, it has consistently been the position of the DOJ that the ADA covers the internet and website

access. One of the goals of the new 2018 ADA regulations is to make the DOJ’s position more explicit in light of inconsistent court decisions on website-related obligations, as well as differing technical standards for determining web accessibility.

## **What guidance has been issued by the federal government?**

The OCR has addressed accessible technology in a “Dear Colleague” letter, jointly released with the DOJ on June 29, 2010. The letter indicated that federal law prohibits the use of any electronic book reader or digital technology that was not accessible to all students. On May 26, 2011, the OCR released a follow-up letter which clarified that the previously issued guidance covered all school operations and programs, even where a school did not have an individual with a particular disability enrolled in its programs. Further, it explained that coverage extended to emerging technologies, as well as a school’s online and virtual offerings. From a practical standpoint, the letters put schools on notice that web accessibility is the new frontier of enforcement—and federal regulations are catching up.

## **What actions have the DOJ and the OCR taken to enforce the ADA?**

Since the issuance of the 2010 and 2011 Dear Colleague letters, both the DOJ and the OCR issued enforcement actions against

numerous colleges and universities, and reached several public settlement resolutions. It remains to be seen whether the forthcoming legislation will result in an upswing of enforcement actions or other legal proceedings.

## **EdX Inc.**

While not a school in the traditional sense, edX Inc. owns and operates open source software, a mobile application, and a platform that allows participants to take many different massive open online courses (MOOCs). EdX contracts with more than 60 organizations to provide a wide variety of virtual courses, on topics from biology to music (see “The United States of America and edX Inc.” (Apr. 2, 2015)). In 2015, the DOJ initiated a compliance review of edX under Title III of the ADA and found that its website [www.edx.org](http://www.edx.org) and its platform were not fully accessible to some individuals with disabilities. Without conceding liability, edX agreed to make modifications to its website and mobile apps in order to increase accessibility. Notably, edX agreed that within 18 months, October 2017, it would: conform [www.edx.org](http://www.edx.org) and its mobile apps with, at the minimum, WCAG 2.0 AA guidelines; notify its partners of the settlement; and update its contracts and operating agreements to make it easier for its partners to provide accessible content. Interestingly, edX was also tasked with providing

a best practices guide with accessibility resources to its partners on how to create and distribute inclusive course content.

## Harvard University

A class action brought against Harvard University by the National Association of the Deaf offers insight into the minds of the regulators at the DOJ and the OCR, in *National Association of the Deaf v. Harvard University*, No. 3:15-cv-30023-MGM (D. Mass., Feb. 2, 2015). The plaintiffs allege that Harvard violated Title III of the ADA, and Section 504 of the Rehabilitation Act, by denying individuals who are deaf or hard of hearing equal access to online programming by failing provide closed-captioning. Harvard filed a motion to stay or dismiss the complaint, arguing that the plaintiffs' claims did not fall under the protections of Title III or the Rehabilitation Act, or, in the alternative, that the case should be stayed pending the release of the new ADA regulations on website accessibility. The DOJ and the OCR argued against Harvard's motion in an amicus curiae brief. It is their position that the plaintiffs' claims involve a straightforward application of current accessibility requirements provided by the statutes and their corresponding regulations. The DOJ and the OCR reiterated that as Harvard provided its online programming to the general public

for free, it must consider all members of the general public—including those that require aids to utilize the programming. The disposition of Harvard's motion is currently pending.

## Practical tips

As 2018 approaches, schools should closely follow enforcement actions, litigation, guidelines and evolving industry standards regarding accessible web technologies. Schools should seek outside support, including that of legal, compliance, and systems experts, to assist in these efforts. By doing so, schools will gather valuable information that will guide their approach to accessibility in the digital age, and mitigate the risk and costs of a finding of noncompliance. Schools should not defer until 2018—but should begin developing a transition plan now.

Schools can prepare for 2018 by engaging in internal training and education efforts. Modifying accessibility policies will present challenges, and potentially competing interests. Schools need to be prepared for potential tension with faculty resistant to changing how they provide information to online learners. Where a school's intellectual property policy extends ownership of syllabus and course content to the creating faculty member, Schools must be prepared for the possibility that faculty may

resist change. Intellectual property policies should be reviewed in anticipation, to ensure that a school has maximum flexibility to comply with accessibility requirements.

Where possible, schools should also employ contractual requirements for outside software vendors to provide compliant and accessible platforms. As the accessibility laws and best practices evolve, schools need to remain knowledgeable and committed to providing high quality education opportunities to all learners regardless of disabilities. •

*Special to the Law Weekly* **Andrea Gosfield** is a senior associate at *Griesing Law* where she focuses her practice on corporate structuring and acquisitions, public finance, real estate transactions, and regulatory compliance matters. **Christine E. Weller** is an associate at the firm where she focuses her practice on new media, intellectual property, nonprofit, and employment law matters.