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## Section 3

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# Auxiliary Aids and Services: The Basics<sup>1</sup>

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## Overview

The Americans with Disabilities Act (ADA)<sup>2</sup> and Section 504 of the Rehabilitation Act<sup>3</sup> (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.<sup>4</sup>

## Key points to remember

- The choice of the auxiliary aid is made on a case-by-case basis, after an individual’s request.<sup>5</sup>
- Institutions are to consult with the person and take into account his or her usual or preferred method of communication.<sup>6</sup>
- Public institutions specifically are required to give “primary consideration” to the expressed choice of auxiliary aids.<sup>7</sup> 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.<sup>8</sup> 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 resources<sup>9</sup> (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, PowerPoint presentations, or other media with an audio component).<sup>10</sup>

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

## 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).<sup>12</sup> 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.)<sup>13</sup>

The individual is the best source of information about his or her customary or preferred method of communication.<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup> 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.<sup>17</sup> 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 answers<sup>11</sup> 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.<sup>18</sup>

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 University*<sup>19</sup>

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 note-taking 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 court<sup>20</sup> 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.<sup>21</sup> 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

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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

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- <sup>1</sup> 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.
- <sup>2</sup> 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](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](http://www.ada.gov/regs2010/titleIII_2010/titleIII_2010_regulations.htm).
- <sup>3</sup> 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>.
- <sup>4</sup> 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](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](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](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](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](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\\_fct\\_sht.pdf](http://www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_fct_sht.pdf); Dear Colleague Letter, [http://www.ada.gov/doe\\_doj\\_eff\\_comm/doe\\_doj\\_eff\\_comm\\_ltr.htm](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](http://www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_ltr.pdf).
- <sup>5</sup> Letter to Harvard University, No. 01-04-2029 (OCR, Eastern Division, Boston (Massachusetts) 01/20/2005).
- <sup>6</sup> 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).
- <sup>7</sup> 28 CFR 35.160(b)(2).
- <sup>8</sup> See 34 CFR 104.4, 104.43, 104.44(d).
- <sup>9</sup> 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](http://www.ada.gov/sacramento_ca_settle.htm).
- <sup>10</sup> See Guide 3, *Beyond the Classroom*, for information about non-academic activities or those not related to a particular class.
- <sup>11</sup> 28 C.F.R. 35.130(f), 36.301(c)

- <sup>12</sup> 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).
- <sup>13</sup> Letter to Atlanta Christian College, No. 04-09-2100 (OCR 05/26/2011).
- <sup>14</sup> 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.
- <sup>15</sup> <https://www.fcc.gov/guides/video-relay-services>
- <sup>16</sup> 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).
- <sup>17</sup> Letter to Highline Community College, No. 10052007 (OCR 5/17/2005).
- <sup>18</sup> Letter to New Mexico Highlands University, No. 08-10-2069 (OCR 08/30/2010)
- <sup>19</sup> Argenyi v. Creighton University, 703 F.3d 441 (8th Cir. 2013)
- <sup>20</sup> Argenyi v. Creighton University, 44 N.D.L.R. 13 (D. Neb. 2011).
- <sup>21</sup> 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](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>.

