

# ACCESSIBILITY REQUIREMENTS FOR PRIVATE U.S. ONLINE POSTSECONDARY SCHOOLS AND BENEFITS TO STUDENTS WITH LEARNING DISABILITIES: A LEGAL ANALYSIS AND REVIEW OF THE LITERATURE

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## ABSTRACT

While postsecondary online classes have become increasingly popular in the United States, they have also brought increased concerns about lack of access to online classrooms for students with learning disabilities. Title III of the Americans with Disabilities Act (ADA) does not address commercial websites, so no specific guidelines define how private online postsecondary schools can ensure accessibility. As a result, students with learning disabilities have varying degrees of access to private online college classrooms, and private postsecondary schools fear discrimination lawsuits resulting from the lack of accessibility. Many of these schools have voluntarily put measures in place to try to ensure that their online classrooms are accessible. Guidelines that many schools are voluntarily following include Section 508 of the Rehabilitation Act (Section 508), the World Wide Web Consortium's Web Content Accessibility Guidelines (WCAG), and/or Universal Design for Learning (UDL). Accessible classrooms greatly benefit students with learning disabilities, empowering many to succeed without needing to disclose their disabilities or request specific accommodations. This article examines the current state of U.S. accessibility law as applied to private online postsecondary schools, identifies the most widely-used accessibility guidelines, and provides an overview of how students with learning disabilities benefit from accessible online classrooms.

## INTRODUCTION

As postsecondary online classes have become increasingly popular in the United States, accessibility concerns for students with learning disabilities have also increased. Many people mistakenly believe that the legal accessibility requirements mandated by Title III of the Americans with Disabilities Act (ADA) for private online postsecondary schools extend to their online classrooms; however, this is not the case. In fact, the degree to which U.S. federal law requires the online classroom to be accessible to students with learning disabilities varies by jurisdiction, and federal law does not yet define the specific requirements that private U.S. online postsecondary schools must meet to ensure accessibility. This ambiguity has spawned multiple lawsuits as disability advocates seek to broaden the protection provided by federal anti-discrimination laws for students in online courses on behalf of people with disabilities.

As a result, many private U.S. online postsecondary schools find themselves in the position of trying to avoid lawsuits by taking steps to ensure accessibility to students with disabilities without being provided clear guidance by Congress or the Department of Justice (DOJ) for how to do so. The DOJ has indicated that it will not publish specific guidelines until fiscal year 2018 (Burke, Clapper, & McRae, 2016). In the meantime, some elements of online courses inherently provide a format that negates the need to request some specific accommodations while other aspects can remain inaccessible to students with learning disabilities, depending

upon the degree to which an individual private postsecondary school chooses to apply accessibility guidelines voluntarily.

This article provides an analysis of the current state of U.S. accessibility law as applied to private online postsecondary schools, an overview of accessibility standards that many private online postsecondary schools are voluntarily applying to the online classroom, and specific ways that students with learning disabilities benefit from accessible online classrooms.

### LITERATURE REVIEW AND LEGAL ANALYSIS OF U.S. ACCESSIBILITY REQUIREMENTS

U.S. federal law requires postsecondary institutions to provide equal access to students with disabilities (Betts, 2013). However, no individual piece of federal legislation specifically requires private online postsecondary schools to ensure that their websites are accessible (Crow, 2008). Blanck (2014) stated that “U.S. disability non-discrimination law has yet to be applied systematically to web content equality for people with cognitive disabilities” (p. 30). As a result, while figures vary, literature published to date show that the number of accessible higher education websites is consistently low (Huss & Eastep, 2016).

If they receive federal funding, private U.S. online postsecondary schools are subject to the ADA as well as to Section 504 of the Rehabilitation Act, both of which prohibit discrimination on the basis of disability (Betts, 2013). However, because the ADA was enacted before the Internet became a staple in American life, website accessibility was not included in the statute (Crowley, 2013). Crowley (2013) explained the significance of Title III’s application to websites:

“The ADA differs from other civil rights legislation—where a place of public accommodation is typically only prohibited from *denying* access to its goods or services on the basis of some characteristic—by requiring places of public accommodation to *affirmatively ensure* that individuals with disabilities have equal access to the goods or services.” (p. 651)

In other words, if Title III of the ADA applies to the websites and online platforms of postsecondary institutions, then private U.S. online postsecondary schools have a legal duty to *proactively* ensure accessibility to students with learning disabilities.

To date, Title III has not been consistently applied to the Internet or commercial websites, which has resulted in a large segment of the population (those with disabilities, who account for roughly one-sixth of the U.S. population) being excluded from those websites (Areheart & Stein, 2015, p. 455). According to Briggs & Sass (2016), the number of U.S. individuals with disabilities that affect their ability to use web technology in is the millions. Despite this disparity, Areheart & Stein (2015) stated that “courts have essentially punted the issue [of commercial website accessibility] to Congress, leaving people with disabilities to hope businesses will be convinced of the justice or economic benefits of making their websites accessible” (p. 473).

While the DOJ indicated through an advisory letter over a decade ago that Internet services “deemed to be public accommodations” (which would include private online postsecondary schools) are subject to Title III of the ADA, it does not plan to provide guidelines for which specific services are subject to the ADA or how a private company can ensure website accessibility compliance until fiscal year 2018 (Burke et al., 2016, pp. 141 & 142). Areheart & Stein (2015) noted that the DOJ has yet to issue a ruling on mandatory Internet accessibility despite commentators requesting this for over a decade, and Crowley (2013) pointed out that despite issuing numerous other regulations regarding Title III, the DOJ has yet to address private website accessibility, nor has Congress taken action.

As a result, lawsuits and courts are shaping these requirements with different jurisdictions applying different standards (Burke et al., 2016). One landmark case that could directly affect private online postsecondary schools involved the video-streaming company Netflix. Two lawsuits were filed against Netflix for failing to provide captioning for streamed videos. The Ninth Circuit U.S. Court of Appeals affirmed the district court’s dismissal of one case, ruling that because Netflix’s business is not connected to a physical location (only transacts business over the Internet), it is not subject to the ADA (*Cullen v. Netflix*, 2015). However, a Massachusetts district court, which is in the First Circuit, ruled that a website can be subject to the ADA despite the company being solely Internet-based (*Nat’l Ass’n of the Deaf v. Netflix*, 2012). The parties settled out of court with Netflix agreeing to add captioning to all streamed videos and to pay \$755,000 in attorneys’ fees and costs (*Nat’l Ass’n of the Deaf v. Netflix*, Consent Decree, 2012). A legal requirement to add captioning to videos would likely be extended to private online postsecondary schools.

Additional settlements regarding Internet accessibility have taken place but are not binding on other businesses (Areheart & Stein, 2015). Because of “contradictions and conflicts in the operation of many of these laws and policies as affecting persons with disabilities,” individuals with disabilities are having to advocate for themselves and challenge discrimination through lawsuits in their quest to seek changes in both law and policy in educational environments (Blanck, 2014, p. 28).

The appellate courts are split on the application of Title III to the websites of private businesses, which would extend to private online postsecondary schools. The Third, Sixth, Ninth, and Eleventh Circuits require “a nexus between an actual physical structure and the goods, services, or privileges provided via web technologies” before they will apply Title III to a private business’ website to prevent discrimination against those with disabilities (Briggs & Sass, 2016, p. 42). However, the First, Second, and Seventh circuits “have declined to limit ‘places of public accommodation’ to actual physical places under Title III of the ADA” (Briggs & Sass, 2016, p. 43). Despite this broader interpretation, no appellate court has ruled that every website of every private businesses is covered by the ADA (Areheart & Stein, 2015), although it does appear that the trend is moving toward applying the ADA to commercial websites (Gallegos & Sealey, 2015).

Gallegos & Sealey (2015) noted that federal courts are addressing this issue in one of three ways:

- The ADA only applies to physical places, not the Internet (original view).
- The ADA applies to the Internet “so long as there is a nexus between the service and a physical place of public accommodation” (majority view) (p. 9).
- The ADA applies broadly, including non-physical locations, and regulates the Internet (minority view).

The U.S. Supreme Court has not heard any cases regarding whether the ADA applies to commercial websites (Gallegos & Sealey, 2015), so Title III is being applied differently to private companies’ websites based upon jurisdiction. Those rulings would, by extension, directly affect private online postsecondary schools. As a result, college students with disabilities who are denied equal access to websites are receiving different levels of federal protection based upon which circuit has jurisdiction.

In 2015, the DOJ filed statements of interest in discrimination cases against postsecondary schools for failing to provide captioning on videos, indicating that the DOJ views “the online programming of private universities” to be subject to Title III (Burke et al., 2016, p. 149). Also in 2015, the DOJ was involved in a settlement agreement regarding massive open online courses (MOOCs), which provides further support that private online postsecondary schools are wise to ensure that their websites and online learning platforms are accessible to students with disabilities (Burke et al., 2016).

In addition to litigation concerns under federal law, Liburt, Corbett, & Del Castillo (2015) pointed out that businesses are also vulnerable to being sued under state laws that protect people with disabilities from discrimination when seeking access to websites. Yang & Chen (2015) noted that while state law is much more varied than federal law on website accessibility requirements, state requirements are typically written using one of the following guidelines:

- The ADA
- Section 508 of the Rehabilitation Act (Section 508)
- The World Wide Web Consortium’s Web Content Accessibility Guidelines (WCAG)

Yang & Chen (2015) noted that in most states, website accessibility laws apply to state entities and specifically exclude private entities, and state laws that do apply to private entities are typically limited in scope. Section 508, which is a federal law, specifically excludes private entities from its coverage.

Despite the varying interpretations of federal law, Gallegos & Sealey (2015) asserted that the ADA does, in fact, apply to websites, and Reindl & Linde (2016) advised businesses that have not made their websites accessible to do so soon to avoid increasing litigation risks. Reindl & Linde (2016) pointed out that advocacy groups are actively targeting businesses that only operate online as well as large businesses that have physical structures and inaccessible websites. Private online postsecondary schools, with or without a physical place of public accommodation, are wise to proactively ensure that their websites and online classrooms are accessible to avoid becoming the next target of a discrimination lawsuit.

## **GUIDELINES USED TO ENSURE ACCESSIBILITY**

Because Congress and the DOJ have not defined the specific requirements for ensuring that a website is accessible, private U.S. online postsecondary schools must seek out guidelines for how to provide accessible online classrooms. Many schools are voluntarily following one or more of the guidelines described below, none of which is legally required for private online postsecondary schools as of yet. By following any of these guidelines, schools are better able to ensure accessibility to students with learning disabilities, and they can use their voluntary compliance as a defense in a discrimination lawsuit.

### **Section 508**

Section 508 is federal legislation that requires “federal agencies to make their electronic and information technology (EIT) accessible to people with disabilities” (U.S. General Services Administration, n.d., para. 1). Because the DOJ enforces Section 508, some private online postsecondary schools choose to follow these guidelines as the DOJ could use those parameters for defining accessibility requirements for private businesses’ websites in the future. Section 508 provides specific guidelines for minimum steps that must be taken to ensure a website is accessible to people with disabilities.

Note that Section 508 does not apply to the private sector, which includes private online postsecondary schools. However, many schools voluntarily comply with Section 508 so that electronic course materials and online classrooms and curricula are compatible with assistive technology and fully accessible to all students. Some of the tools that are used in this endeavor are the captioning of videos and ensuring that screen readers work with written materials (United States Access Board, n.d.).

### **WCAG**

The international organization World Wide Web Consortium (W3C) has developed the WCAG, which are technical standards for creating web content that is accessible to people with disabilities (WC3, 2012b). WCAG is “the most widely used standard for providing guidelines for accessibility solutions and measuring their success” (Burke et al., 2016, pp. 166). Using WCAG is attractive for private online postsecondary schools because of their applicability to educational websites (Burke et al., 2016).

The WCAG are especially geared toward web content developers, and the W3C Web Accessibility Initiative provides extensive resources for writing HTML code and designing websites that are fully accessible. The WCAG advocates strategies such as the use of text alternatives or captions for audio, video, and images; presenting content that is compatible with assistive technologies, such as screen readers; ensuring that all functions are available through a keyboard; giving users control of timed elements, such as the ability to pause videos and presentations; ensuring that content is readable, understandable, and predictable; and more (WC3, 2012a).

### **Universal Design for Learning (UDL)**

UDL “is a set of principles for curriculum development that give all individuals equal opportunities to learn” (National Center on UDL, 2014b, para. 1). It is predicated on the idea that human beings learn in a variety of ways and that most of these different ways of learning can be addressed through flexible approaches that result in curriculum that is accessible to all learners.

Some private online postsecondary schools follow UDL because of its ability to help ensure accessibility for students in the online classroom (Pittman & Heiselt, 2014). Schools can use UDL to design common templates to assist online instructors in keeping their classrooms accessible (Pittman & Heiselt, 2014). UDL includes accessibility strategies for students with disabilities, but it encompasses more than that to include all students with their individual modes of learning (e.g., auditory, visual, read/write, etc.).

The UDL guidelines are based on three principles that address multiple ways of learning. The first principle is to “provide multiple means of representation (the ‘what’ of learning); the second principle is to “provide multiple means of action and expression (the ‘how’ of learning); and the third principles is to “provide multiple means of engagement (the ‘why’ of learning)” (National Center on UDL, 2014a, sections 1-3).

The first principle addresses the needs of students with sensory or cognitive disabilities, ensuring that they are able to comprehend the curriculum. The second principle helps to ensure that students with physical or language

disabilities are able to communicate their ideas. The third principle seeks to help students to be able to engage with the curriculum in ways that are comfortable for them, such as with more or less structure and with more or less interaction with other students.

## **BENEFITS OF ACCESSIBILITY TO STUDENTS WITH LEARNING DISABILITIES**

U.S. colleges and universities must provide reasonable accommodations for student disabilities. However, as explained by Community for Accredited Online Schools (2017), “there are limitations regarding what are considered ‘reasonable accommodations.’ A college or university is not required to make any modifications or provide any aid or services that would result in a fundamental alteration in the nature of a program” (para. 30). This is much more of a concern in a physical school setting. Many, if not most, of the accommodations considered difficult in a physical classroom are not even issues in the online classroom. The built-in accessibility inherent in online learning can eliminate the need to request accommodations.

Many of the built-in aspects of the online classroom automatically benefit students with learning disabilities—along with everyone else. The freedom to choose where and when to learn, as well as how to learn, puts the students in charge of their learning...often for the first time since elementary school. Countless students entering college have become used to parental intervention and are reticent to self-disclose disabilities, especially to professors they do not know, in an environment in which they are not yet comfortable.

“As society in general continues to perceive disability in a negative light, it is quite understandable that many students with disabilities are reluctant to begin important relationships by discussing their disability; and hence, they choose not to disclose their disability at all. This failure to disclose closes the door to the available disability support services and academic accommodations that might enhance their postsecondary success.” (Timmerman & Mulvihill, 2015, p. 1613)

With online learning, this concern can be avoided. Students can use whichever learning modality they choose when information is presented in written, video, and audio form that are captioned and transcribed.

The hardware and software accommodations that tend to be accompanied by red tape and long wait times in traditional schools are an integral part of online classroom design. Students who learn online can set up their work and study areas to match their individual needs and preferences, enabling them to direct time and energy toward their studies. “In addition to the convenience, online learning offers students with disabilities some benefits in terms of flexibility that may not be as readily available in a [face-to-face] delivery format” (OnlineUniversities.com, 2017, para. 6). Many of these benefits mirror accommodations traditionally given to students in Kindergarten through 12<sup>th</sup> grade (K-12 students). The difference in an online college environment is that many students no longer need to request accommodations. The accessibility benefits everyone, whether or not they have any specific disabilities.

Simply being able to take breaks whenever a student wishes helps a student with attention-deficit hyperactivity disorder (ADHD), and the organization necessary within an online class (such as syllabi broken down by weeks, assignments, and concepts) can take the place of the separate schedules that help so many students with executive functioning, memory, and processing issues. Post-secondary student demographics are changing rapidly as more students with disabilities gain access to higher education. Due to the recognized need for accessibility,

“the emerging technologies have allowed educational institutions, educators, and students to achieve education on a much higher playing field – in a virtual learning environment... One reason for this increase in online enrollment is due to [the] online learning environment allowing for more barrier-free opportunities to education for students with disabilities.” (Barrett, 2013, p. 56)

In this media-centric society, the desire and need for online learning is at an all-time high. However, as more academic content goes online, post-secondary schools are struggling to make their online courses accessible. With the likelihood that federal law will demand accessibility and that universities could be at risk for being found in noncompliance, it is more important than ever that online learning content be made accessible to students with disabilities (Burke et al., 2016). This frequently places choice, as well as responsibility, for accessibility options squarely in the hands of educators. According to Taylor (2016), “faculty need to take responsibility for both the technology that they choose to use and that which they choose not to use. Both decisions can have a significant impact on student accessibility” (p. 126).

The technology choices available when designing a universally accessible classroom are expanding exponentially. An Internet search turns up assistive technology options applicable to a variety of uses. The range of keyboard and mouse adaptations and alternatives, speech and alternative input methods, and vision and reading alternatives available is extensive and growing. When course designers make logical decisions about this technology, this simultaneously takes the burden off students with learning disabilities while giving them autonomy to choose how they will learn. “In human-computer interaction, computer accessibility (also known as accessible computing) refers to the accessibility of a computer system to all people, regardless of disability or severity of impairment” (Disabled World, 2015, para. 1). As this accessibility is equally available to all students, no stigma is attached to technological assistance.

Many of the same aspects of accessibility benefit students with a variety of learning issues. According to Heiman & Shemesh (2012),

“Given the variety of different ways to access to technology, [assistive technologies] provide students with [learning disabilities] with adaptive ways to compensate for their deficiencies, enabling them to gain access to previously inaccessible materials and information and lessening the academic barriers to reading, writing, information organization, and memory areas.” (p. 315)

The organization built into an online class’ syllabus makes it second nature for students to see course content in related blocks building upon each other.

Additionally, the structure of the syllabus highlights patterns, such as due dates for assignments falling on the same day each week or the same number of discussion posts being due each week. This encourages habits, such as logging in at the same time each day or visiting learning activities in a specific order. Many online classes begin with previews of the week’s objectives as well as wrap-ups and reviews at the end of each week. The step-by-step instructions and, particularly, the ability to revisit all instructions and content reduce stress and often eliminate the need for extra time or organizational assistance. All of this is beneficial for the busy working student without specific disabilities; it is invaluable for those with dyslexia, ADHD, auditory or visual processing disorders, slow processing speed, or students with nonverbal learning disabilities or executive functioning issues.

An example is provided by Schaffhauser (2013): “For students who are dyslexic or who have trouble ‘decoding’ text, digital books or text-to-speech programs can read text to them while highlighting each word as it’s read—in essence acting as a virtual special education aide” (p. 54). In the same vein, students with dysgraphia benefit greatly from working on a computer. Indeed, personal access to technology has opened new worlds for students with learning disabilities. The social and emotional benefits of having this technology integrated within an online classroom and used along with the rest of the class are immeasurable.

The universal design behind this technology extends much further. The assistive technology required for full access in a physical classroom also applies with online learning. Audio books, text-to-speech, speech-to-text, transcripts, and captioned videos all combine to give students a choice of how they want content delivered to them. Charts, illustrations, videos, and written material combine to reinforce key concepts, integrating valuable repetition while retaining interest. Assistive technology can help students with dyslexia develop more learning independence (Radovan & Perdih, 2016). Even students with dyscalculia, who often rely on manipulatives, may be adequately accommodated by the interactive educational gaming that is becoming part of the online learning experience. The accessibility built into online courses addresses a broad enough population to be almost virtually inclusive. Interestingly, gifted students, who are often also diagnosed with ADHD or other disabilities, frequently find the online learning environment simultaneously useful when dealing with disabilities and galvanizing for extrapolation of course content.

The motivational aspect of online learning should not be underestimated, and comfort with online classes is growing as quickly as the availability of assistive tools. The accessibility page on Microsoft’s website includes links to an array of assistive technology products offering autonomy through alternative input devices, refreshable Braille displays, screen enlargers, magnifiers, readers, speech recognition, and more (Microsoft, 2017). Apple takes this even further, stating “the most powerful technology in the world is technology that everyone, including people with disabilities, can use” (Apple, 2017, para. 1).

Today’s postsecondary students are often able to transition from their high school Individualized Education Plans (IEPs) to online learning naturally, as they are generally using similar technology on their own.

“Digital personal management tools offering image, audio, and video options are now available as apps for smartphones and tablet computers. In addition to students with intellectual disabilities, many ubiquitous tools for personal management as well as educational apps for managing assignments are available for use for students with learning and behavioral disabilities.” (Peterson-Karlan, 2015, p. 65)

At times in a physical classroom, the needs of particular students may be in conflict. Some students with learning disabilities benefit from receiving the same information using a variety of modalities. Other students with learning disabilities may then find it difficult to concentrate as their needs require a more focused approach (Zentel, Opfermann, & Krewinkel, 2007). Both of these strategies may further impact students with visual or auditory impairments. An online environment removes the conflict as students have the autonomy to choose which tools they find most useful and comfortable, if and when they need them.

Educators are becoming increasingly aware of the educational potential possible through personalization in online classrooms. Throughout the evolution of distance learning, there has been more reliance on a variety of approaches, targeting learning styles and aptitudes of individual students. The availability of assistive technology expands the potential for even further individualization. When online classroom materials can be adapted for individual needs, they can empower all learners, including students with dyslexia, to more easily access the classroom content (Radovan & Perdih, 2016).

Yet as often happens with progress, each improvement brings accompanying concerns. Accessibility issues must be addressed within the course development and design. Individual instructors must be equally cognizant both of laws and of common sense approaches to ensure that teacher-created multimedia materials adhere to accessibility guidelines and are available to all students. Because of differences in the types of technology utilized within each school, and even within individual classes, students must thoroughly research the accessibility and comfort level of any online university before making any decisions. According to Barrett (2013),

“while not all instructors are educated or trained to work with students with disabilities, the use of technology can be quite helpful in this educational mission in order to bring this student population and instructor (and overall class) closer together during the learning process.” (p. 57)

Teachers who are themselves adept at and experienced in using technology, such as full-time online professors, are more likely to understand and be proactive about ensuring that material is accessible to all students. As stated by Bennett-Bealer (2012), “the ever-expanding and constantly evolving storehouse of technology requires our vigilance as end-users to make sure that all students can easily access learning” (p. 39).

## CONCLUSION

Online private postsecondary schools will likely continue to grow in size and number as more students seek out the convenience of an online classroom versus a traditional classroom, making the need for ensuring that online postsecondary schools have classrooms that are accessible to all students paramount. Specifically, students with disabilities see advantages to this type of environment, and with approximately 11% of undergraduate students reporting some type of disability (U.S. Department of Education, 2016, para. 9), it is important that online private U.S. postsecondary schools address the needs of this population. In addition, advocates of students with disabilities are calling for action from these schools to ensure accessibility for these students.

As laid out in this article, many online U.S. private postsecondary schools are following established practices (Section 508, WCAG, and/or UDL) to take action and ensure accessibility. These schools are likely to continue implementing practices that ensure accessibility of all online classroom material, both to be inclusive and to avoid potential lawsuits. Additionally, many elements of the online environment are already conducive to students with learning disabilities. The technology used in online postsecondary classes continues to evolve and advance with curriculum and interface designers focusing on designing materials that are readily available and accessible to all students. The next phase in ensuring online classrooms that are fully accessible to students with learning disabilities, however, will require the DOJ to define specific guidelines and mandate that all private online postsecondary schools implement them.

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