



October 19, 2020

Legal Opinion 2020-11: Live Synchronous Online Classes and Real-time Captioning

The California Association for Postsecondary Education and Disability has asked the following question:

Is real-time captioning required in live synchronous online classes offered in California community colleges?

Answer:

An auxiliary aid or service is required if the class includes deaf or hearing impaired students. Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, and relevant provisions of state law, require auxiliary aids or services to be provided to deaf and hearing impaired students to ensure they are able to participate in their educational program. In most cases, this requirement will be satisfied by the provision of real-time captioning in live, synchronous online classes. However, community colleges also must give “primary consideration” to the choice of aid or service requested by deaf or hearing impaired students, and weight such requests against the burdens they would impose upon the college program.

**A. BACKGROUND**

The COVID-19 Pandemic has caused California community colleges to move courses into an online format that often includes live, synchronous instruction. The California Association for Postsecondary Education and Disability (CAPEd) asks whether real-time captioning is required by law to ensure deaf or hard of

hearing students have an equal opportunity to participate in live synchronous classes.

There are a number of different technologies available to make audio accessible to deaf and hard of hearing students. The National Deaf Center on Post-Secondary Outcomes describes them as follows:

- “Offline captioning” refers to captions that are added in the postproduction process. Offline captioning allows for the most accurate captioning possible.
- “Real-time captioning” refers to captions that are created in real-time while an event is taking place. Due to the nature of some events . . . some captions must be produced live. This type of captioning has a higher rate of errors and should be used only when offline captioning is not possible.
- “Speech-to-text” is an umbrella term used to describe an accommodation in which spoken communication and other auditory information are translated into text in real-time. A service provider types what is heard and the text appears on a screen for the consumer to read.
- “Open captions” refers to captions that are part of the video image. They are always present and cannot be turned off.
- “Closed captions” refers to captions that are encoded in the video signal. They can be turned on or off.

(“*Why Captions Provide Equal Access: Tip Sheet*,” University of Texas, Nat’l Deaf Center on Post-Secondary Outcomes.)<sup>1</sup>

The question presented by CAPED focusses on live synchronous online classes. For purposes of this opinion, we assume that if these classes are being recorded, they are not being posted online and available to the general public, but the recordings are retained only for use by students enrolled in the class.<sup>2</sup>

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<sup>1</sup> Available at <https://www.nationaldeafcenter.org/resource/why-captionsprovide-equal-access>, last visited Oct. 18, 2020.

## **B. ANALYSIS**

The resolution of this question requires consideration of related provisions of federal and state law. Two federal laws are most relevant: Section 504 of the Rehabilitation Act of 1973 prohibits discrimination based on disability in any program or activity operated by recipients of federal funds (29 U.S.C. § 794.); and Title II of the Americans with Disabilities Act of 1990 (ADA) prohibits discrimination based on disability by public entities, regardless of whether they receive federal financial assistance (42 U.S.C. § 12131). The regulations implementing Section 504 and Title II are enforced by the United States Department of Education, Office of Civil Rights. In addition, state laws also impose obligations created by the Rehabilitation Act and the ADA upon state and local governmental entities. (Cal. Code Regs., tit. 5, § 55200.)<sup>3</sup> These laws are described below.

### **1. The Rehabilitation Act, Section 504.**

Section 504 of the Rehabilitation Act prohibits discrimination on the basis of disability in programs or activities that receive federal financial assistance from the U.S. Department of Education, including colleges, universities, and postsecondary vocational education and adult education programs. (29 U.S.C. § 794d; see also Cal. Code Regs., tit. 5, § 55200 [acknowledging that the ADA applies to distance education within the California Community Colleges].) To be protected under Section 504, a student must: (1) have a physical or mental impairment that substantially limits one or more major life activities; or (2) have a record of such an impairment; or (3) be regarded as having such an impairment.

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<sup>3</sup> Public posting of class recordings would raise additional issues under the Family Educational Rights and Privacy Act, California's student records privacy law (Ed. Code, §§ 76200 et seq.), and Section 508 of the Rehabilitation Act of 1973, which governs the electronic accessibility of publically-posted materials. These laws are not directly applicable to the issues addressed in this opinion.

Higher educational institutions must provide disabled students who qualify for Rehabilitation Act protection with necessary and appropriate academic adjustments and auxiliary aids and services to provide “an equal opportunity to participate in a school's program.” California community colleges therefore must provide their deaf and hearing impaired students with auxiliary aids or services to ensure they are not denied “the benefits of [or] excluded from participation in” an educational program. (29 Code Fed. Regs. § 104.44(d)(1).)

Relevant here, an auxiliary aid includes an “effective method[] of making orally delivered materials available to students with hearing impairments.”<sup>4</sup> (29 Code Fed. Regs. § 104.44(d)(2).) Real-time captioning, as defined by the National Deaf Center on Post-Secondary Outcomes, will often be an appropriate auxiliary aid to ensure access to an educational program for a deaf or hearing impaired student.

## **2. The American with Disabilities Act, Title II.**

The Americans with Disabilities Act of 1990 (ADA), imposes upon public entities, including state and local entities, similar obligations as Section 504 of the Rehabilitation Act, but does so without regard to the receipt of federal funds. (42 U.S.C. § 12100 et seq.) It also requires public entities to give “primary consideration” to the requests of individuals with disabilities to determine an appropriate accommodation to their circumstances. (28 Code Fed. Regs. § 35.160(a); see also Cal. Code Regs., tit. 5, § 55200 [acknowledging that the ADA applies to distance education within the California Community Colleges].)

Accordingly, the ADA also requires community colleges to provide appropriate auxiliary aids or services to deaf and hearing impaired students in live

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<sup>4</sup> Colleges are not required by the Rehabilitation Act “to provide [students] attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature” as an auxiliary aid. (29 Code Fed. Regs. § 104.44(d)(2).) Nor are colleges required to make adjustments or provide aids or services that would result in a fundamental alteration of the program, or impose an undue burden on the college.

synchronous online classes to ensure they have “an equal opportunity to participate” in classes. (28 Code Fed. Regs. § 35.160(a)(1).)

Under the ADA, the type of auxiliary aid or service that will be necessary to ensure effective communication of class content in real time may vary according to the method of communication used by the individual student, and according to the nature, length, complexity and context of the communication involved. To determine the appropriate auxiliary aid or service, the college must “give primary consideration” to requests of individual students with disabilities, and they must be provided in accessible formats, and in a way that is timely and protects student privacy and independence. (28 Code Fed. Regs. § 35.160(a)(2).)

It would appear that real-time captioning would in most cases constitute a timely and appropriate auxiliary aid or service to ensure participation by deaf and hearing impaired students in live online synchronous classes. Even so, colleges must also give “primary consideration” to a student request for an alternative auxiliary aid or service that could be provided without undue burden to the college or a fundamental alteration to the course. Accordingly, there may be situations where real-time captioning would not be appropriate to the circumstances of an individual student, but another aid or service would be preferable.

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