Understanding the revised ADA Title II Web Accessibility Regulation

Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities

Disclaimers

Your presenters are not attorneys and cannot give legal advice. This information is presented for educational purposes only.

Opinions expressed are my own and do not represent the view of my employer.

I am speaking on my own behalf as a practitioner and consultant in this field and am not speaking on behalf of Thomson Reuters.

History of Web Accessibility

- When the Americans with Disabilities Act (ADA) was drafted, the internet as we know it was in its infancy and did not play the pivotal role in access to every aspect of society it does today.
- As a result, the statute itself says nothing about access to websites, applications, or other digital content.

History of Web Accessibility (Continued)

- As the internet evolved and began to be used in every-day interactions with government agencies and in educational institutions, disability rights organizations and individuals impacted by lack of access to technology began to seek remedies through the courts, relying on pre-existing non-discrimination mandates in Section 504 of the Rehabilitation Act and the ADA.

Non-discrimination mandate of Section 504 of the Rehabilitation Act of 1973

- No otherwise qualified individual with a disability in the United States, as defined in section 705 (20) of this title, shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance(…)
- As most, if not all, state and local government entities and institutions of higher education receive federal financial assistance, this mandate has broad coverage.

(See 29 United States Code Section 794)

Non-discrimination mandate of the Americans with Disabilities Act

- No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or denied the benefits of the services, programs, or activities of a public entity.
- The ADA extended obligations regardless of if the entity receives federal financial assistance.

(See 42 United States Code Section 12132)

“The issue is not whether the student with the disability is merely provided access, but the issue is rather the extent to which the communication is actually as effective as that provided to others.” OCR Letter to San Jose State 1996 (OCR 09-95-2206.RES)

“There is no doubt that the internet sites of State and local government entities are covered by Title II of the ADA. Similarly, there is no doubt that the websites of recipients of Federal financial assistance are covered by Section 504 of the Rehabilitation Act.” Principal Deputy Assistant Attorney General for Civil Rights Samuel R. Bagenstos in testimony before the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, 4/22/2010

“Congress understood in shaping the ADA that including individuals with disabilities among people who count in composing '*We the People*,' would sometimes require not blindfolded equality, but responsiveness to difference; not indifference, but accommodation.” Ruth Bader Ginsburg, Tennessee v. Lane 541 US 509 (2004)

History of Web Accessibility (Continued)

- While hard to imagine how, these mandates proved insufficient to compel state and local government entities to make accessibility of the technology they deployed an essential part of selection and deployment requirements. Even though the U.S. Department of Justice and Department of Education made clear they viewed technology-driven interactions to fall into the category of program, service, benefit, and activity.

2005-2009 enforcement begins

- Disability rights organizations, and individual plaintiffs, finding that they continue to lack equal access to technology begin bringing significant legal actions, mostly in the higher education space, but also branching out to private businesses.
- These actions are brought under Title II and Title III of the ADA or under Section 504 for government and higher education entities.
- Notable cases are Penn State, Target.

2010 Advanced Notice of Public Rulemaking (ANPRM)

- The U.S. Department of Justice proposes revising the ADA Title II and Title III regulations to make clear that websites are, in fact, Programs and Services of Title II entities, and are places of public accommodations for businesses, and thus are subject to the non-discrimination requirements of the ADA.
- This produces significant concern around these entities on how to comply, and some work begins in response to the ANPRM and the emerging success of litigation.

Government changes course

- Feeling that the body of settlement agreements, and unofficial guidance provided by the Department of Justice and Department of Education has made it clear that web content and services are in fact covered by existing law, the ANPRM is not pushed to the remaining administrative rule making process.
- While the rules for Title II are eventually submitted once again in 2016, they are ultimately withdrawn by the Trump administration in 2017 before they are completed. The Title III rules applying to private industry are removed.

Current State

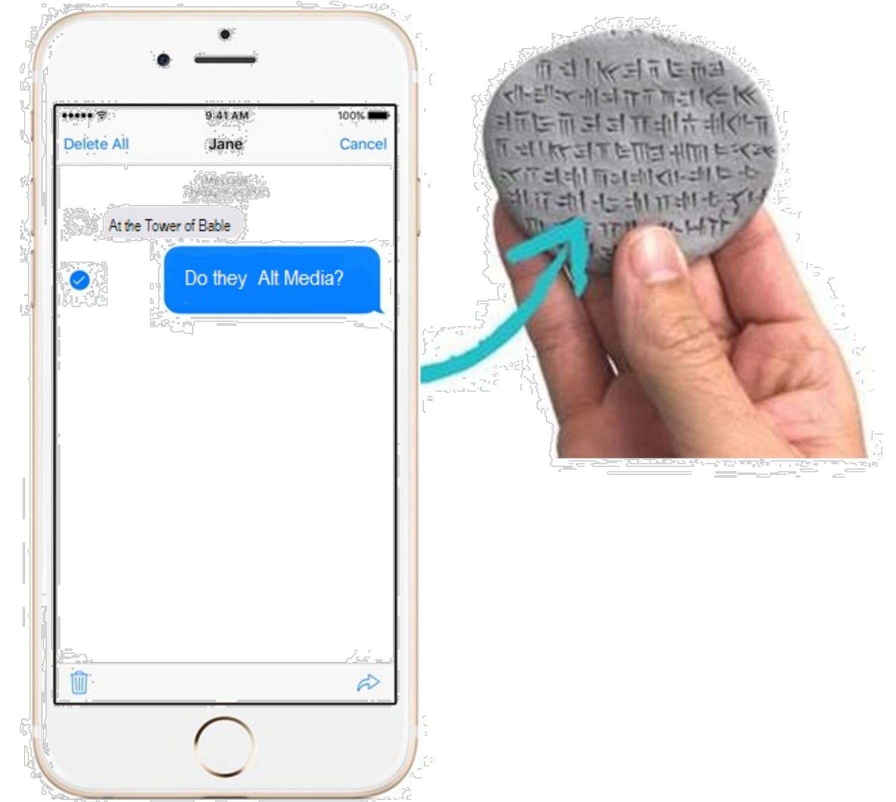
- The Biden administration picked this rule back up, putting the proposed update to the ADA implementing regulations through the full process. The final rule was released in April 2024.
- Most entities covered under Title II of the ADA have until April 24, 2026 to comply with this regulation. (Special District Governments and entities having a population of 50,000 or less have an additional year.)

Important Things to Keep in Mind

- Covered entities must meet their existing obligations to provide equally effective communication to people with disabilities even if they qualify for an exception.
- Public entities are not required to meet this regulation when doing so would constitute a fundamental alteration in the nature of a program, service, or activity; or determine that it would be an undue financial or administrative burden, however, the regulation makes clear that they still must take any action that would provide access for people with disabilities.

What is Effective Communication?

- Anchored to the message
- Consequences of miscommunication
- Likelihood of miscommunication
- Timeliness
- Substantially equivalent ease of use
- Deference



Technical Standards

- The Department of Justice has incorporated by reference the Web Content Accessibility Guidelines (WCAG) 2.1 from 05 June 2018 at level AA as the standard for compliance with this regulation. Unless otherwise covered by an exception, web-based content or mobile apps must meet this standard as of the compliance date for the entity.

Exceptions

1. Archived web content.
2. Preexisting conventional electronic documents, unless such documents are currently used to apply for, gain access to, or participate in the public entity's services, programs, or activities.
3. Content posted by a third party, unless the third party is posting due to contractual, licensing, or other arrangements with the public entity.
4. Conventional electronic documents that are about a specific individual, their property, or their account and that are password-protected or otherwise secured.
5. Preexisting social media posts.

Archived web content

- Created prior to the compliance date.
- Reproduces paper documents or other media created prior to the compliance date.
- Retained exclusively for reference, research, or recordkeeping.
- Not updated after the compliance date.
- Clearly identified as being archived.

Implications for library and educational institutions

- While this would seemingly apply to large journal and other research databases prior to the compliance date, most are not easily divided into current and “archived” content areas.
- Since entities still have effective communications obligations under existing regulations, and the nature of many of these entities services and programs are explicitly to provide access to these archived materials, they would likely need to be made accessible on request.

Preexisting conventional electronic documents

- Content in Portable Document Format (PDF), word processor file formats, presentation file formats, and spreadsheet file formats.
- Important: these documents must have been created prior to the compliance date for the entity and they may not be currently used for applying for, or participating in the programs, services, or activities of the entity.

Content posted by a third party

- Content posted by a third party, unless the third party is posting due to contractual, licensing, or other arrangements.
- The intention of this exception is clearly to exempt content that is permitted to be posted by non-contracted individuals interacting with public entities such as commenters on message boards, other citizens, lawyers, etc.
- The regulation makes clear that if the entity is contracting with a third party to design, build, or run their online presence, the entity is nevertheless required to comply with the regulation.

Individualized and secured conventional electronic documents

- Conventional electronic documents (PDF, word processer, spreadsheet, or presentation files) that are about a specific individual, their property, or their account, where access is restricted, presumably to that individual.
- The classic example is a utility bill by a municipal run utility.
- Note: if access were requested by this individual the entity would likely need to provide an accessible version under their existing equally effective communications obligations.

Pre-existing social media posts

- Social media content posted prior to the compliance date.
  - Note: The same issues of existing effective communications obligations likely apply when a specific request is made for access.

Fundamental alteration, undue financial or administrative burden

- An entity carries the burden of proving that compliance with the regulation is a fundamental alteration or undue burden.
- Decision must be made by the head of that entity or their designee after consideration of the full resources available for the funding and operation of that entity, and a written report must be included with that determination.
- Entities still must ensure that people with disabilities receive the benefits or services provided by the public entity to the maximum extent possible.

How to move forward together

- Publishers and other vendors providing technology services to state and local government entities should immediately start planning to provide accessible platforms and move toward accessible content delivery mechanisms.
- Entities should immediately begin engaging with their suppliers to convey their requirements for accessibility, targeting their applicable compliance date.

The Future

- My opinion based on the trajectory of the legal and regulatory landscape, we are likely to see some form of regulations in the Title III segment in the next 3-4 years that would make accessibility a direct legal requirement for private businesses.

Resources

- Web Content Accessibility Guidelines 2.1 (05 September 2018 version.)
  - Note: this is not the newest version, but is what DOJ adopted in the final regulation.
- U.S. Department of Justice fact sheet on these regulations
- Final rule in PDF format
- The final regulation as posted in the Federal Register

Questions and contact info

- Questions
- I hope this was helpful
- You can find me on LinkedIn at https://www.linkedin.com/in/pbossley