Sponsored by
Hogan Lovells

NACUA
Webinar

The DOJ's Final Rule on Digital Accessibility: Practical Considerations for Public Institutions and Changes on the Horizon for Private Institutions

Phil Catanzano, Co-Founder, Education & Sports Law Group
Trevor Finneman, Principal Counsel, University of California System
Olabisi Okubadejo, Associate VP for Equal Opportunity, Affirmative Action, and Compliance, Georgetown University

Agenda

- Introduction to Digital Accessibility (review for most)
  - What Are We Talking About?
  - Statutory Framework
  - Litigation and Federal Compliance Efforts
- Title II Updates and Examples
- Tips to Bring Back to Campus
- Procurement Practices
- Audience Q&A and Closing Remarks

What Are We Talking About?

- Navigation
- **Readability**
- Headings & Lists
- **Use of Color**
- **Images**
- **Alt Text for Images**
- Hyperlinks
- Tables
- **Forms**
- **Captions for Video & Audio**

Good Example	Contrast Ratio	Bad Example	Contrast Ratio
Good Example	21:1	Bad Example	2.77:1
Good Example	5.1:1	Bad Example	2.6:1
Good Example	8.4:1	Bad Example	1.3:1
Good Example	5.7:1	Bad Example	1.3:1
Good Example	9.5:1	Bad Example	1.2:1

NACUA

Accessing Digital Environments

Visual Impairments

- Screen Readers, ZoomText, Control colors

Deaf or Hard of Hearing

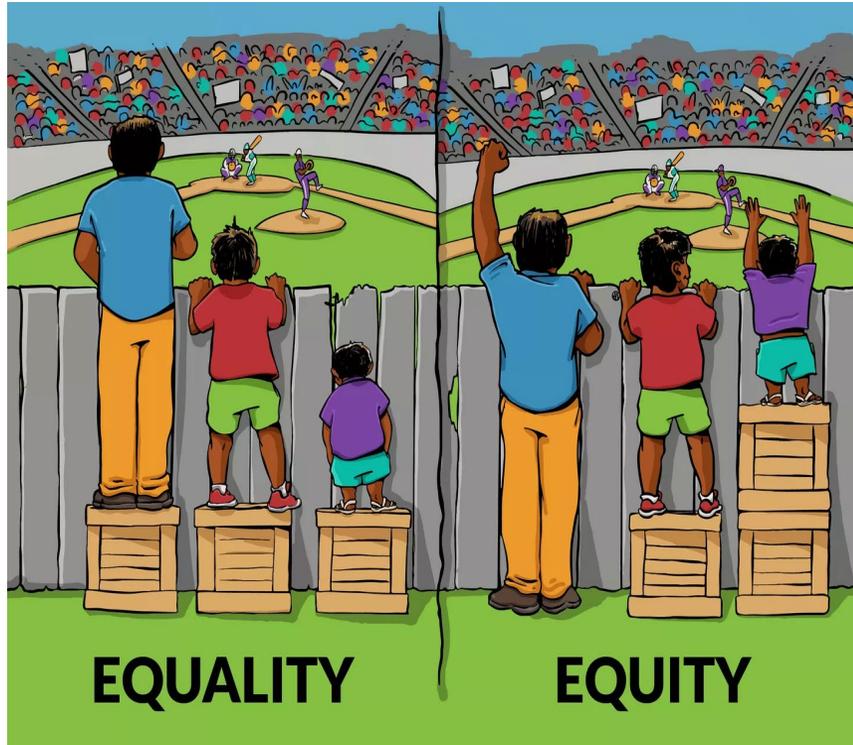- Captions and/or transcripts

Motor Impairments

- Mouth stick/head wand, trackball mouse

Cognitive and Other Impairments

- Literacy/Text-to-Speech software

- Time management, mindfulness apps

- Voice recognition software

What Does "Accessibility" Even Mean?

EQUALITY   EQUITY

"Accessible" means that individuals with disabilities are able to independently acquire the same **information**, engage in the same **interactions**, and enjoy the same **services** within the same timeframe as individuals without disabilities, with substantially equivalent ease of use.

(Definition from federal resolution agreements.)

NACUA

Statutory Framework

- Americans with Disabilities Act
  - Title II = public institutions
  - Title III = private institutions considered "public accommodation[s]"

- Section 504 of the Rehabilitation Act of 1973

- Not a statute but technical standard: World Wide Web Consortium (W3C) and the Web Content Accessibility Guidelines (WCAG) are critical

Litigation Lessons?

- "Drive-by litigation" v. litigation for change, *e.g.*, **MIT/Harvard**

- Federal compliance efforts: UC Berkeley / DOJ consent decree; many OCR resolution agreements

- **Payan v. LACCD**: Board of Trustees of the LACCD unanimously voted to instruct its attorneys **NOT** to appeal the case to the U.S. Supreme Court

- Not just academic: Web accessibility is important for private businesses:
  - "In a society in which business is increasingly conducted online, excluding businesses that sell services through the Internet from the ADA would[:] 'run afoul of the purposes of the ADA and would severely frustrate Congress' intent that individuals with disabilities fully enjoy the goods, services, privileges, and advantages available indiscriminately to other members of the general public.'" **Nat'l Ass'n of the Deaf v. Netflix, Inc.**

Updates to Title II of the ADA

Overview

- Published April 24, 2024; applicable to public institutions.

- Institutional requirement that institutions make accessible services, programs, and activities through websites and mobile apps.

  - Services, programs, and activities considered broadly.

- Institutions must make sure that their web content and mobile apps meet **WCAG 2.1, Level AA** within **two or three years** of when the rule was published on April 24, 2024, depending on their "**total population**."

- Consistent with OCR and DOJ settlements.

Exceptions

- In certain limited situations, outlined in the regulation, some web content and some mobile app content does not have to meet the WCAG 2.1, Level AA standard.

- Exceptions focus on rarely used content and content that could be particularly difficult to make accessible.

- Even where exceptions apply, institutions must continue to provide individuals with disabilities with effective communication, reasonable modifications, and an equal opportunity to participate in or benefit from the institution's services, programs, and activities.

First Exception: Archived Web Content

- Content that is not currently used. Information may be outdated, not needed, or repeated somewhere else. May be archived on the website.

- Web content that meets all four of the following points would not need to meet WCAG 2.1, Level AA:

  - The content was created before the date the state or local government must comply with this rule, or reproduces paper documents or the contents of other physical media (audiotapes, film negatives, and CD-ROMs for example) that were created before the government must comply with this rule, **AND**

  - The content is kept only for reference, research, or recordkeeping, **AND**

  - The content is kept in a special area for archived content, **AND**

  - The content has not been changed since it was archived.

Covered by the Exception?

- Governing board meeting minutes and video of meeting from 1998 that are stored in an "archive" section of a website and are not updated.

- Scanned handwritten notes or reports that go with the 1998 meeting minutes and are stored in the "archive" section of a website.

- Person with hearing loss requests access to the 1998 archived video of the meeting. Must the video comply with WCAG 2.1 AA? What should the public entity do?

- Governing board meeting minutes from 2026 that are stored in an "archive" section of a website and are not updated.

- Spreadsheet regarding monthly temperature averages in Bitterroot mountains located in archived section of website and is regularly updated.

Second Exception: Pre-Existing Conventional Electronic Documents

- Old documents, like PDFs, on website. It can sometimes be hard to make these documents meet WCAG 2.1, Level AA.

- Documents that meet both of the following points usually do not need to meet WCAG 2.1, Level AA:

  - The documents are word processing, presentation, PDF, or spreadsheet files; AND

  - They were available on the state or local government's website or mobile app before the date the state or local government must comply with this rule—and are not now used to access / participate in service, programs, activities.

Covered by the Exception?

- PDF flyer for an artificial intelligence symposium taking place in early 2022 and posted on college website in 2021.

- In 2019, a college posted a PDF housing application form that current students still use to apply for on-campus housing.

- PowerPoint file from January 2026 presentation by chemistry department chair.
  - o Chemistry department chair updates and re-posts same PowerPoint file in May 2027.

Third Exception: Third Party Content

- Content posted by a third party where the third party is not posting due to contractual, licensing, or other arrangements with a public entity.

- Third parties are members of the public or others who are not controlled by or acting for state or local governments. The state or local government may not be able to change the content third parties post.

- Content that is posted by third parties on a state or local government's website or mobile app would not need to meet WCAG 2.1, Level AA.

- Be careful about "significant assistance" – is it truly a third party, or are they providing a service or in an agreement with institution?

Covered by the Exception?

- A message that a member of the public posts on a message board for admitted students.

  o What if the message board is housed on the university's website and the message board itself is inaccessible?

- A Mapquest map used by the university's transportation office to help visitors navigate to campus parking lots.

- A college uses a vendor to design and manage its website. The vendor assured the college that its template is accessible to individuals who use screen readers but a JAWS user reports barriers on the college's main webpage.

Fourth Exception: Password Protected Individualized Documents

- Password-protected websites need not be accessible right away for everyone, and there might not be a person with a disability who needs access to these documents. (If there is, individualized accommodations or targeted remediation may be required under the ADA and Section 504.)

- Documents that meet all three of the following points do not need to meet WCAG 2.1, Level AA:

  - The documents are word processing, presentation, PDF, or spreadsheet files, AND

  - The documents are about a specific person, property, or account, AND

  - The documents are password-protected or otherwise secured.

Covered by the Exception?

- Student's transcript as HTML content on university's password-protected website.

- PDF version of student's transcript behind secure authentication on university's website.

  o Does exception extend to website hosting PDF of student's transcript?

- College posts Microsoft Word document regarding upcoming rent rate increase for all students in a dormitory on a password-protected website.

- University provides admission decisions to applicants via individualized PDFs hosted on a password-protected website. The password-protected individualized document applies to the PDF, so it does not comply with WCAG 2.1 AA. A blind applicant requests access. What should the university do?

Fifth Exception: Pre-Existing Social Media Posts

- Making all past social media posts accessible may be impossible.

- Social media is also time-focused: usually intended to provide updates about things happening at the time they were posted in the past.

- Social media posts made by an institution before the date the institution must comply with this rule do not need to meet WCAG 2.1, Level AA.

- Consider the purpose for which the social media is retained:

  - What about specific internet archives? E.g., repository for social media made by former presidents or institutional leadership?

Covered by the Exception?

- In 2020, a university posted to its social media feed an inaccessible announcement telling graduating seniors the deadline for requesting graduation regalia and the location for picking up caps and gowns.

- An alumnus who is deaf requests that a college's History department caption a video series that it posted on social media in 2023. The video series received only 25 views and will cost $500 to caption. The department recently underwent budget cuts.

Removed Exception: Password-Protected Course Content

Table 3: Initial Familiarization, Testing, and Remediation Costs (Millions)

Cost	State	County	Municipal	Township	Special District	School District	U.S. Terri-tories	Higher Ed.	Total
Regulatory familiarization	$0.02	$1.00	$6.42	$5.35	$12.7	$4.03	$0.00	$0.62	$30.1
Websites	$253.0	$819.9	$2,606.6	$1,480.7	$408.5	$2,014.0	$7.1	$1,417.4	$9,007.3
Mobile apps	$14.7	$56.8	$100.0	$1.4	$0.0	$406.3	$1.3	$68.9	$649.2
Postsecondary course remediation	N/A	N/A	N/A	N/A	N/A	N/A	N/A	$5,508.5	$5,508.5
Primary and secondary course remediation	N/A	$50.8	$19.8	$42.8	N/A	$1,134.1	N/A	N/A	$1,247.5
Third-party website remediation	$7.2	$39.4	$147.2	$85.5	$19.6	$113.8	$0.0	$93.6	$506.4
Total	$275.0	$967.8	$2,880.1	$1,615.8	$440.8	$3,672.2	$8.4	$7,089.1	$16,949.1

Conforming Alternate Versions

- Institutions sometimes have two versions of the same digital content:

  1. Main version that is not accessible and another version that is accessible and provides all the same information and features.

  2. Second version is called a "conforming alternate version."

- Conforming alternate versions – permitted only where there is a **technical or legal limitation** that prevents inaccessible web content or mobile apps from being made accessible.

BE CAREFUL! It is very challenging to maintain conforming alternate versions.

Tips to Bring Back to Campus

Plan Your Approach

1. Identify key stakeholders and strategic partnerships

2. Determine the scope of the task

3. Create a strategy (concrete <u>and</u> idealistic)

4. Prioritize efforts – you cannot fix the issue overnight

5. Include the community through training and other involvement

<u>Approaches Not One Size Fits All</u>: Campuses may have different goals, approaches, resources to apply to large or small populations and web environments

Key Stakeholders and Partnerships

- Administrators
- Academic Affairs
- Procurement
- Shared Governance
- General Counsel
- Business Office
- Information Technology
- Distance Education

- Diversity, Equity & Inclusion
- Accessibility/Disability Services
- Marketing & Communications
- Libraries
- Centers for Learning & Teaching
- Auxiliary Services
- Athletics

Digital Accessibility Strategy

- Enact Policies & Procedures to support digital accessibility program

- Identify technical standards, definitions, scope, exceptions

- Deep dive on tech side: same or different CMS' by school?

- Establish Committees, Working Groups, Liaison System

- Determine Roles & Responsibilities

- Provide/Obtain Professional Development Opportunities

- Acquire or develop tools and services to monitor and sustain compliance, including mechanism to report/remediate barriers
  - Faculty - (1) skills to make accessible content + (2) remediation support

- Offer access to assistive technologies

Prioritization

- Registered individuals with disabilities facing digital accessibility barriers

- Low hanging fruit (*e.g.*, Accessibility Statement on website, easy template fixes)

- Public facing, high traffic websites

- Essential intranet functions (*e.g.*, registration and payment systems)

- Plan for new, modified, and legacy content

NACUA

Common Challenge Areas

- Large Websites: "I had no idea it was that expansive!"

- Conflicts with Other Departments: "Marketing says they need this!" or "We're all on different templates/CMS'!"

- Procurement: "Wait, they have purchasing power?"

- Libraries: Digital databases; decades worth of content.

- Athletics: Real time stats, live video, vendors, etc.

- Video, Interactive, or even non-dynamic documents like PDFs.

- Consolidation of vendors, so limited options on market.

Procurement Process - Overview

- **Procurement = key component of digital access compliance**.
  - Title II Technical standard – no threshold for value or number of users; covers all digital content unless exception applies; and
  - College/University responsible for inaccessible vendor products. Cannot contract / license away that responsibility. 28 C.F.R. § 35.130(b)(1); 28 C.F.R. § 36.202.
- **Procurement of accessible digital content = team / committee effort.**
  - Team members: procurement, IT, counsel, and department procuring product.
  - Some functions require basic training, others detailed subject matter expertise (IT).

Procurement Process - Documentation

- **Gather Accessibility Conformance Documentation -**
    - Documentation needed for purchases + renewals.
    - Common example of documentation: VPAT – Voluntary Product Accessibility Template.
        - Train procurement staff to review VPATs (consider creating a checklist).
    - Pros & Cons of VPATS (and other vendor documentation)
        - **VPAT Pros**: insight into vendor's view of product accessibility and sophistication around accessibility; see how vendor tested product; info on accessibly roadmap if needed.
        - **VPAT Cons**: misleading, incomplete information re: accessibility.
    - Best Practice: Request testing access during procurement process.

Procurement Process - Testing

- Evaluate Accessibility Independently – Best Practice
  - Cannot rely solely on vendor documentation -
  - Testing: **automated** + **manual**.
    - Automated testing examples: SiteImprove or WebAIM WAVE Accessibility toolbar plugin.
      - General sense of accessibility, but signficant limitations.
    - Manual testing = gold standard, but resource intensive. Requires additional staffing and/or third-party testers.

Procurement Process - Contract

- Require accessibility assurances in procurement contracts.
    - Consider as a **standalone clause**, SOW, exhibit.

- Suggested language to include:
    - **Technical standard** for *life of agreement* – WCAG 2.1 AA or above.
        - Software updates sometimes reduce accessibility, especially with SAAS products.
    - Require vendor to allow **testing access** throughout agreement.
    - Require vendor to **fix identified issues within a set timeframe**.
        - *Expect to work with vendor to create <u>accessibility roadmaps</u> and <u>alternate conforming versions</u>.*
    - **Indemnification**.

Questions?

NACUA