



National Association of College and University Attorneys
Presents:

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

Webinar

June 6, 2024

12:00 PM – 2:00 PM Eastern
11:00 AM – 1:00 PM Central
10:00 AM – 12:00 PM Mountain
9:00 AM – 11:00 AM Pacific

Presenters:

Phil Catanzano

Co-Founder

Education & Sports Law Group

Trevor Finneman

Principal Counsel

University of California Office of the President

Olabisi Okubadejo

Senior Associate

Jackson Lewis P.C.

Contents

1. Speaker Bios, Pages 1-2
2. Materials, Page 3
3. NACUA Webinar CLE Forms, Pages 4-6
4. PowerPoint Slides, Pages 7-40

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



Phil Catanzano is currently a co-founder of Education & Sports Law Group. Prior to starting Education & Sports Law Group, Phil was Senior Counsel at Holland & Knight for seven years and, prior to that, an attorney at the U.S. Department of Education's Office for Civil Rights for almost a decade where he investigated institutions accused of discrimination on the basis of disability, gender, or race/ethnicity, among others. Phil has also served in Title IX coordinating roles and supportive roles for accessibility services offices on an interim basis. In the accessibility context, this includes advising and conducting programmatic reviews around accommodation processes, physical

accessibility, and digital accessibility. A primary aspect of Phil's practice is representing institutions involved in investigations or compliance reviews with federal regulators from the U.S. Department of Education and the U.S. Department of Justice. Phil also teaches higher education law and disability law at Harvard University's Graduate School of Education, as well as at Boston College. Using this classroom experience, Phil often shares with audiences the practical benefits and challenges of creating an accessible classroom environment.



Trevor Finneman, Esq., has proudly served on the DCRC board since 2016. Trevor is Principal Counsel for the University of California Office of the President, where he advises on a range of disability issues—including student accommodations, online accessibility, and the physical accessibility of University of California campuses and facilities. As an attorney with a profound bilateral hearing loss, he has dedicated his career to disability issues.



Olabisi "Bisi" Okubadejo currently serves as Associate Vice President of Equal Opportunity, Affirmative Action, and Compliance at Georgetown University. Prior to transitioning to Georgetown, Bisi was Of Counsel at Ballard Spahr LLP, where her practice focused on civil rights and employment issues in higher education, particularly on matters arising from alleged discrimination on the basis of race, disability, religion, age, and sex, including sexual harassment and sexual violence. She has experience both as an attorney in private practice and as a supervisory attorney with the U.S. Department of Education's Office for Civil Rights

(OCR). Ms. Okubadejo has advised colleges and universities on their compliance with federal laws, including Title IX, the ADA, Section 504, the Clery Act, Title VI of the Civil Rights Act, the Age Discrimination Act, FERPA, and Title VII. She has experience working with educational institutions and business entities on digital accessibility issues, including compliance with government settlement agreements and ensuring the accessibility of websites and course materials. Ms. Okubadejo's experience includes providing interactive training on civil rights issues to coordinators, administrators, hearing panels/judicial boards, campus safety departments, and students. She also has significant experience conducting and overseeing internal investigations and program reviews of higher education institutions and other employers, and auditing policies and procedures.

Materials List

1. [Accessibility of Web Content and Mobile Apps Provided by State and Local Government Entities: A Small Entity Compliance Guide](#), U.S. Dep't of Justice, Civil Rights Div. (May 22, 2024).
2. [DOJ's Proposed Web and Mobile App Accessibility Regulations: An Overview](#), Educause, Katie Branson (Nov. 23, 2023).
3. [Department of Justice Seeks Public Comment on Proposed Rule to Strengthen Web and Mobile App Access for People with Disabilities](#), U.S. Access Bd. (Aug. 15, 2023).
4. [Nondiscrimination on the Basis of Disability: Accessibility of Web Information and Services of State and Local Government Entities](#), U.S. Dep't of Justice (Aug. 4, 2023).
5. [Fact Sheet: Notice of Proposed Rulemaking on Accessibility of Web Information and Services of State and Local Government Entities](#), U.S. Dep't of Justice, Civil Rights Div.
6. [Digital Accessibility](#), U.S. Dep't of Education, Office for Civil Rights (May 19, 2023).
7. [Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance From the Department of Education](#), U.S. Dep't of Justice (Spring 2023).
8. [The Problem did not Fix Itself: The Continuing Challenge of Digital Accessibility on Campus](#), NACUA, Phil Catanzono, p. 2-11 (June 23-26, 2019).



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

June 6, 2024

If you are an attorney applying for Continuing Legal Education credits (CLEs), you must sign this attendance record to verify your attendance. Please complete and return this form no later than Wednesday, June 12 to the CLE Credit Submission Portal (www.nacua.org/submitCLE).

***Total CLE Credits = 120 minutes**

Organization

PRINTED Name

SIGNATURE

State & Bar Number (If Applying for CLE)



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

June 6, 2024

- Attorneys from MD, MA, MI, SD, or DC: These jurisdictions do not have CLE requirements and therefore require no report of attendance or filing.
Attorneys from AK, AZ, CA, CO, CT, DE, HI, IN, IA, KY, MN, MO, MT, NH, NJ, NY, VT, WI, or WY: Do not return this form to NACUA. Please keep this form for your records to submit directly to your state CLE commission or in case your state bar audits you for CLE compliance. Please also remember to sign the attendance record.
Attorneys from all other states: Please complete and return this form no later than Wednesday, June 12 to the CLE Credit Submission Portal (www.nacua.org/submitCLE). Please also remember to sign the attendance record.

NACUA certifies that this program has been presumptively approved and conforms to the standards prescribed by the rules and regulations of the State Bars of AK, AZ, AR, CA, CT, DE, HI, NV, NH, NJ, NM, PA, RI, VT, WV and WY. NACUA will apply for CLE credits from the following states: AL, CO, FL, GA, ID, IL, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NE, NC, ND, OH, OK, OR, SC, TN, TX, UT, VA, WA and WI.

The New York Approved Jurisdiction policy may apply to this program. New York attorneys may apply CLE credit from one of the approved jurisdiction states towards their NY CLE requirement. For more information and to review the policy, please visit www.nycourts.gov/attorneys/cle/approvedjurisdictions.shtml.

Note: Restrictions vary state by state and not all states will accredit this webinar.

Upon receipt of this certificate of attendance and your attendance record, NACUA will process the credits through the applicable state if approved.

Certification

NACUA will apply for a total of 120 minutes. By signing below, I certify that I attended the above activity and request minutes of CLE credits.

Name

State & Bar Number

Address

Email

Signature

Authorized By:

Amanda McLean

Amanda McLean
Meetings and Events Coordinator



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

June 6, 2024

FOR KANSAS, NEW YORK, OHIO AND PENNSYLVANIA ATTORNEYS ONLY

*This is a supplementary document to keep track of the verification codes for each program. Please complete and return this form no later than Wednesday, June 12 to the CLE Credit Submission Portal (www.nacua.org/submitCLE).

Date / Time	Session Title	Verification Code 1	Verification Code 2
06/06/2024 12:00 PM ET	The DOJ’s Final Rule on Digital Accessibility: Practical Considerations for Public Institutions and Changes on the Horizon for Private Institutions		

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

The screenshot shows the WAVE tool interface. On the left, a 'Summary' panel lists various accessibility metrics. The main content area shows a website with a navigation menu, a search bar, and a main content area with a video player. A 'WAVE' panel on the left provides a detailed summary of the page's accessibility status.

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

Accessing Digital Environments

Visual Impairments

- Screen Readers, ZoomText, Control colors

Deaf or Hard of Hearing

- Captions and/or transcripts

Motor Impairments

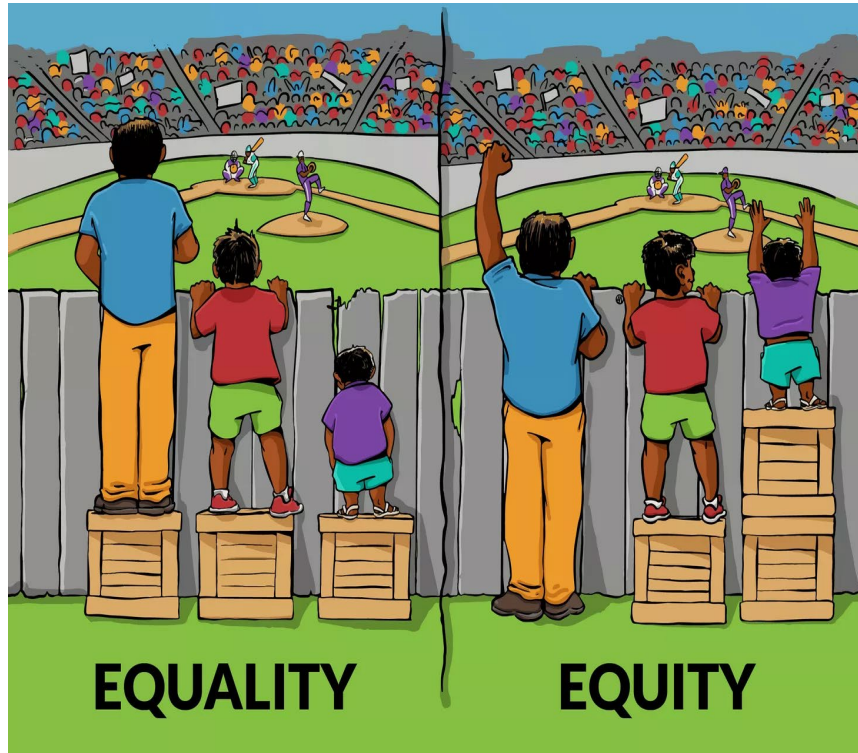
- Mouth stick/head wand, trackball mouse

Cognitive and Other Impairments

- Literacy/Text-to-Speech software
- Time management, mindfulness apps
- Voice recognition software



What Does “Accessibility” Even Mean?



“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.)

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.
 - 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.
 - 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.
 - 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 alumna 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. Territories	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 and idealistic)
4. Prioritize efforts – you cannot fix the issue overnight
5. Include the community through training and other involvement

Approaches Not One Size Fits All: 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



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 accessibility 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 significant 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 accessibility roadmaps and alternate conforming versions.*
 - **Indemnification.**



Questions?

NACUA materials, PowerPoint slides and recordings available as part of this program are offered as educational materials for higher education lawyers and administrators. They are prepared by presenters and are not reviewed for legal content by NACUA. They express the legal opinions and interpretations of the authors.

Answers to legal questions often depend on specific facts, and state and local laws, as well as institutional policies and practices. The materials, PowerPoint slides and comments of the presenters should not be used as legal advice. Any hypothetical scenarios presented are based on fictional facts and persons. Legal questions should be directed to institutional legal counsel.

Those wishing to re-use the materials, PowerPoint slides or recordings should contact NACUA (nacua@nacua.org) prior to any re-use.