

## **AHEAD Comments on Proposed ADA Title II Web and Mobile Accessibility Rule**

The Association on Higher Education and Disability (AHEAD) is pleased to submit these comments to the Disability Rights Section, Civil Rights Division of the US Department of Justice in response to the request for input regarding the potential addition a new subpart H to the Title II Americans with Disabilities Act (ADA) regulation, 28 CFR part 35.

### **Introduction**

AHEAD is a national nonprofit association representing over 5,000 members who are actively engaged in service provision, consultation and training, and policy development to create just and equitable higher education experiences for disabled people on college campuses throughout the country. AHEAD promotes disability accessibility across the field of higher education and beyond by developing and sharing relevant knowledge; strategically engaging in actions that enhance higher educational professionals' effectiveness; and advocating on behalf of its membership, their institutions, their work, and those they serve, ensuring full, effective participation by disabled people in every aspect of the postsecondary experience.

AHEAD's members are in a frontline position when it comes to the work of removing barriers to equal educational opportunity for disabled students. Comprehensive, unambiguous federal regulations are the most effective tool campus disability professionals have to provide reasoning and clarity to guide and persuade higher level administrators regarding their obligations to disabled students. AHEAD's constituents have appreciated the guidance and remedies provided by the Department of Justice and the Department of Education, Office of Civil Rights. AHEAD supports the addition of a subpart H to the extent that it moves digital accessibility and inclusion of disabled people forward, but have concerns that, in its current form, it will not achieve the goal of equitable access for disabled people in college and university settings.

In preparing its comments, AHEAD drew from the suggestions of its varied membership, who possess expertise in myriad aspects of higher education accessibility issues. Our responses are ordered in terms of concern and priority.

### **AHEAD Has Serious Concerns About Some of the Exemptions to the Proposed Rule**

#### **The Exemption for Password-Protected Web Content at Public Postsecondary Institutions Should Be Enacted Only for a Limited Time**

The proposed exemption of content in password-protected courses with a 5-day opportunity to make the course and its materials accessible once a disabled student enrolls, while theoretically supporting access, ignores important realities of postsecondary environments, which will inevitably result in a failure to provide timely materials to disabled students.

Some of the realities this approach ignores are:

**1. Many programs include very short academic terms of just a few weeks, so a 5-day delay in materials causes insurmountable harm.**

During a traditional fifteen-week semester, a disabled student *may* be able to handle a 5-day delay in acquisition of accessible materials without major repercussions. However, in the current postsecondary context, courses are offered in many formats: quarter systems are about ten weeks long and many programs, such as nursing, include required courses that are offered only in mini-terms that are as short as five weeks. For these shorter terms, a 5-day delay in receiving materials puts disabled students at a decided and potentially unrecoverable disadvantage. This will result in disabled students not having the same options of courses that other students have. In some cases, entire programs are delivered in this mini-term format, thus a 5-day delay in receiving materials would render those programs unavailable as an option for disabled students.

**2. Course content often includes complex materials that take much longer than 5 days to make accessible.**

The amount and type of course content varies widely between courses, and as a result the amount of time needed for conversion of materials varies widely. One public university found that the number of files contained in its courses ranged from 8 to 1000 files *per course*. The *type* of content also makes a significant difference. For example, a math course made up mostly of equations and formulas, a human anatomy course with dozens of detailed drawings, an art class with hundreds of images of works of art, or a course with multiple videos will take scores of staff hours to make accessible. If designed from the start to be accessible, the time required to create access will be substantially less than if retrofitted.

**3. Many courses use third-party materials and applications outside the institution's control, which cannot be made accessible in only 5 days.**

Some courses that are designed using homegrown materials *may* be within the control of a college or university to turn around within the prescribed 5-day period. However, an enormous number of courses are designed using materials and applications that are purchased from third-party vendors. These applications have become extremely common on college campuses, and include interactive textbooks, online lab programs, and other dynamic materials. When these applications are inherently inaccessible, the institution must create a completely different way for a student with disabilities to participate in the course or obtain accessible versions of the materials or applications, which often requires a lengthy process. Without a requirement to make courses accessible proactively, many postsecondary institutions will continue to purchase these inaccessible materials and products, and third-party vendors will not be incentivized to change their practices and become WCAG-compliant.

**4. Courses modified for an enrolled disabled student may not remain accessible or may not be accessible to other students.**

The method of “Probabilistically Calculating the Rate of Course Remediation” is based on a false premise that what is remediated remains remediated. Course instructors each create their own content, and as they change content is changed. For example, in many freshman and sophomore level courses instructors are current graduate students, who change with each term. Heavy use of adjunct and contract faculty nationwide also causes high turnover in teaching staff. New instructors frequently redevelop a course. Even returning instructors want to update their content and keep it relevant. In addition, if the requirement is that a course be made accessible for the student who enrolls, these changes may not render the course accessible to other disabled students. For example, if a deaf student enrolls and all of the videos in the course are captioned, this will not make the course accessible to a blind student who needs the materials to be screen reader compatible. Finally, a course often has multiple sections taught by different instructors and the content may vary from section to section.

**5. The workflow for remediating a course for accessibility can be very complex.**

When a student enrolls in a given course, how accessible that course is to them is typically unknown. Some postsecondary institutions employ automation to assess course materials for access. While this may help determine if there will likely be barriers for a particular student, these automated tools fall far short of identifying all significant barriers to access. A human check is the only way to accurately determine if the content will be accessible to the particular enrolled student. The items that need to be checked include (but are not limited to) content created within the learning management system (typically third party applications such as Blackboard, Canvas or others), documents and slide decks provided, videos that need captioning and audio description, the mode of interaction between students, additional applications being used, specialized equipment students are expected to use, and external content such as YouTube videos, podcasts, etc. Each of these items may require a different approach to remediate—some requiring the instructor’s involvement, some could be outsourced or managed by the assigned entity on campus, and some negotiated with a third-party vendor. In the case of third-party applications or inaccessible equipment, seeking an alternative method of engagement or a different and accessible approach may be required.

Further, the ability to retroactively check all of these items assumes they have already been created. It is not uncommon for courses to be assigned an instructor at the last minute, in which case the instructor is building the course as they go. In such cases, rather than checking materials, it is necessary to work with the instructor to ensure they know how to design accessibly. Even in the most well-intentioned environment, the chances of all materials, processes and applications being remediated before the student experiences a barrier are extremely low.

***The exemption causes delayed access for disabled students, which results in inequitable education***

Each of the above realities causes extensive delays in a student's receipt of accessible materials. For those students who, based on disability, require that course materials are provided in an accessible format, any delay results in an inequitable education. For some students, the use of assistive technology already makes engaging with materials more time consuming. Added delays in receiving course material in an accessible format place additional academic burdens on disabled students that are not placed on their non-disabled classmates. In the attempt to overcome those delays, students expend substantially more time, energy and effort than their non-disabled peers to receive the same benefits—resulting in circumstances that do not meet the basic standard of giving disabled students “an equal opportunity to benefit from...programs, services and activities,” a general requirement of Title II of the ADA.

Additionally, the exemption effectively bars disabled students from making last minute schedule changes and even worse, in some cases prevents disabled students from selecting the academic programs and majors that have shorter academic terms, foreclosing career opportunities to disabled students that are open to all other students.

***An alternate proposal: Sunset the password-protected web content exemption after 3 to 5 years***

In view of all of these complexities, AHEAD asserts that the only way to avoid further entrenching the pattern of discrimination against disabled students is to take an approach that embodies the philosophy of universal design. As defined in section 3 of the Assistive Technology Act of 1998, as amended, 29 U.S.C. 3002, “universal means a concept or philosophy for designing and delivering products and services that are usable by people with the widest possible range of functional capabilities, which include products and services that are directly accessible (without requiring assistive technologies) and products and services that are interoperable with assistive technologies.”

To achieve equal access, postsecondary institutions must take a proactive approach toward creating accessible materials and meeting accepted web accessibility standards. AHEAD supports an approach that is modeled upon the existing regulations' successfully implemented distinction between existing facilities and new construction. We support the alternative approach suggested in Question 35, “requiring that all newly posted course content be made accessible on an expedited time frame, while adopting a later compliance date for remediating existing content.” If the Department decides to retain the proposed exemption, AHEAD strongly recommends instituting it for a limited time—perhaps 3 years, or at most 5—at which time all materials would need to comply with the chosen standard of accessibility. We offer a suggested process and language that reflects this approach. (See Addendum).

## **Exempting Archived Web Content Limits the Ability of Those with Disabilities to Conduct Research or Access Important Online Records**

AHEAD agrees that public agencies should prioritize making current and future web content accessible, but this proposed exception, as it impacts research within academia in particular, is overly broad. We have two primary concerns with this exception:

1. Some content that meets the proposed definition is valuable to those who use public websites.
2. This exception may be interpreted to include entities whose primary purpose is archival in nature—such as libraries, research organizations, or historical archives.

Many documents, including legal decisions, academic articles or public records, are created and then archived in inaccessible formats. These materials are of value to many people, including disabled students and academics who are conducting research. Some of these materials may indeed meet the definition of “archived web content” and we worry that a public entity maintaining such materials on its website might argue that such content is only used for research, making these items difficult to obtain for disabled people who need access to them.

Given these concerns, AHEAD recommends that the proposed regulation be revised to limit the application of this exception to materials created and posted prior to a specified date and to establish specific requirements for how requested materials need to be made accessible. Suggested language for revisions to this exception are provided in the addendum.

## **Exempting Pre-Existing Conventional Electronic Documents Similarly Negatively Impacts Disabled People**

AHEAD has similar concerns about this exception to those stated in the archived web content and suggests a similar remedy: requiring entities to state how the public may request accessible versions of a given document, and requiring ongoing provision of accessible materials to that individual, once the institution is on notice that they need accessible formats.

## **The Exemption for Individualized, Password-Protected Documents Should Expire and Entities Should Not Require Users to Repeatedly Request Accessible Versions**

The practice of sending password-protected documents to employees and students on college campuses is a common one. The privacy of financial information, degree completion processing, and student health visits are often protected in this manner. The problem with exempting these documents from meeting accessibility standards is that most institutions create and deliver them using an automated process through a third-party vendor software and data storage product. Disabled employees and students are likely to receive the inaccessible version and then have to make a request for an accessible alternative. AHEAD also supports putting an expiration date on this exception, encouraging innovation from vendors who create such tools to create them in a way that generates accessible formats students and employees can select.

In the meantime, we strongly recommend an express requirement that entities must provide accessible versions of individualized password-protected documents on an ongoing basis to those who have requested them in the past. For example, if a financial statement is sent monthly to all students with outstanding financial obligations, the recipients should be provided a way to opt in to receive an accessible version once and then receive that accessible version each subsequent time it is sent, on an ongoing basis.

### **To Keep Pace with Changes in Technology, the Adopted Standard Should Be Tied to Most Recent Accessibility Standards**

AHEAD supports the adoption of WCAG, Level AA as the standard, but would, at the very least, encourage the adoption of WCAG 2.2 if it is released before the final rule is issued. In order to keep pace with the ever-changing standards and landscape of technology, AHEAD strongly encourages that the adopted standard require compliance with the most recent version of WCAG within a specified period—we suggest no more than two years—after the release of each update to the WCAG standard.

### **Conforming Alternate Versions Should be Limited in Order to Assure Quality and Avoid a Segregated Experience**

AHEAD supports limiting the use of conforming alternate versions and suggests an additional limitation. When interaction is a part of the experience of the web application, directing disabled users to an alternate version results in segregation from other users. It is suggested that the use of alternate versions not be permitted when doing so would have this effect.

### **The Department Should Make It Clear That This Rule Also Applies to Digital Textbooks and Related Courseware**

Question 26 asks if there are particular issues relating to the accessibility of digital books and textbooks that the Department should consider in finalizing this rule. The provision of accessible textbooks does deserve special attention. More and more textbooks are published in digital format. A common misconception is that if they are digital, they are accessible, but these digital books generally do not meet accessibility standards. When digital versions of books are utilized and are not accessible, the institution must work with the publisher to obtain a file which is not protected through digital rights management. The digital files provided by the publisher generally do not come with alternative text, proper headings, or ways to navigate from the content to footnotes or reference pages. This all has to be repaired manually by staff at the institution.

Another important issue is that textbooks are often not just “books” anymore. They often come with associated additional “courseware” that students use to complete assignments or engage with additional materials. This courseware is generally hosted on a publisher-hosted site which is external to the institutionally maintained and controlled LMS. Third-party publishers see this content and these platforms as proprietary and will not provide access for institutions to modify or remediate accessibility issues on the site itself. This

means that the institution will need to completely recreate the content activities and assignments in an alternative environment it controls and whose accessibility it can assure. When this is even possible, it can take weeks to achieve, due to the complexity of the materials.

As long as the approach is to wait until a student is enrolled to require accessibility, third-party publishers will have little incentive to ensure that their textbooks and courseware are accessible. Their position will likely remain that accessibility is only required when there is an enrolled student who needs the content to be accessible and therefore it is acceptable to provide institutions with inaccessible materials. The onus will continue to be placed on the institution to assess accessibility and remediate as necessary.

### **Institutions Should Be Required to Conduct a Self-Evaluation, Create a Transition Plan, and Monitor Compliance**

In our suggested approach of sunseting the exception for password protected content, AHEAD views a maturity model as sound tool to assist postsecondary institutions in self-evaluation and in creating a transition plan toward proactive accessibility. A transition plan seems a necessary component on the pathway toward compliance with this rule—whether or not the exception is set to expire.

In terms of measuring compliance, a balanced combination of assessing organizational maturity and adherence to the technical standard provides a fair approach. AHEAD agrees that an organization that reaches a higher level of maturity will likely be able to respond to and remove barriers to access quickly. Included in such a maturity model should be the principles set forth in sections 35.105, 35.106, and 35.107 of Title II: the ease of finding information about communicating barriers, the clear designation of responsible party, and on-going testing which includes disabled users who are most impacted by inaccessible web and mobile apps.

### **The Proposed Requirement Should Be Fully Integrated in Other Sections to Emphasize Its Importance**

AHEAD proposes this requirement be more fully integrated into other global nondiscrimination provisions, leaving no doubt as to its importance. While there are several opportunities for updating existing language to reflect this priority, we offer one example and recommend that section 35.102 (a) be amended to read (additions in brackets and italicized): “Except as provided in paragraph (b) of this section, this part applies to all services, programs, and activities provided or made available by public entities, *[including those services, programs, and activities provided through information technologies such as the web and mobile applications].*”

### **Conclusion**

AHEAD fully supports a strong position on the accessibility of web and mobile apps. The NPRM demonstrates the Department of Justice’s deep and nuanced understanding of many of the issues encountered by disabled people as well as by those committed to

creating accessible digital environments. However, the rule as is—with the current exceptions—perpetuates an inequitable, ad hoc approach, leaving disabled people waiting for the access that their nondisabled peers receive seamlessly. Just as in the built environment, retrofitting for digital access rarely can be achieved in a timely and truly inclusive manner. The only approach to the design of web and mobile apps that truly results in an equitable experience is a born accessible approach to design. AHEAD requests that the regulation be modified to lead our society in this direction.

## Addendum

### Public Postsecondary Institutions: Password-Protected Web Content

#### *Suggested Timeline and Process*

- Beginning with the effective date of the Rule, for any online password-protected courses in which a student with a disability enrolls at before the start of the academic term, the content of the course will be accessible by the beginning of the academic term. Thereafter the altered content of the course will remain accessible, without regard to who is enrolled in the future.
- Beginning with the effective date of the Rule, for courses in which a student with a disability enrolls after the start of the academic term, the course content will be accessible quickly enough so that the student with a disability has timely access to and an equal opportunity to benefit from content available on the course website, but not longer than 5 days after the first day of the class.
- Beginning in 2 or 3 years from the adoption of the Rule, depending on the size of the public entity, for admitted, enrolled students, all online content for newly created courses will be accessible, as defined by the then-current WCAG standard, without regard to who is enrolled. Thereafter, the course content will be required to remain accessible, without regard to who is enrolled in the future.
- Beginning in 2 or 3 years, for existing course shells, all **new content** for password-protected courses must be accessible, without regard to who is enrolled. The course content will be required to remain accessible, without regard to who is enrolled in the future.
- By year 3, the password-protected course content exemption will expire, and the content of all **active** password protected post-secondary courses will be accessible.
- The institution's course catalog will give clear notice of the right to accessible materials and how to request them.
- The fundamental alteration affirmative defense is available, but when it applies, there must be alternate steps taken to create effective access.

#### *Suggested Language*

Suggested additions are in brackets and italicized.

(e) Public postsecondary institutions: password-protected course content. Except as provided in paragraphs (e)(1) and (2) of this section, course content *[created or acquired before {date of enactment}, which is only]* available on a public entity's password-



*protected or otherwise secured website for admitted students enrolled in a specific course offered by a public postsecondary institution [may continue to be utilized until three years from the publication of this rule in final form. The exception provided by this paragraph, as limited by its subparagraphs, shall expire five years after the publication of this rule in final form and, thereafter, all course content offered by any public postsecondary institution must fully comply with the requirements of § 35.200, whether or not the course is password-protected.]*

(1) This exception does not apply if a public entity is on notice that an admitted student is pre-registered in a specific course offered by a public postsecondary institution and that the student, because of a disability, would be unable to access the content available on the public entity's password-protected or otherwise secured website for the specific course. In such circumstances, all content available on the public entity's password-protected or otherwise secured website for the specific course must comply with the requirements of § 35.200 by the date the academic term begins for that course offering. New content added throughout the term for the course must also comply with the requirements of § 35.200 at the time it is added to the website.

(2) This exception does not apply once a public entity is on notice that an admitted student is enrolled in a specific course offered by a public postsecondary institution after the start of the academic term and that the student, because of a disability, would be unable to access the content available on the public entity's password-protected or otherwise secured website for the specific course. In such circumstances, all content available on the public entity's password-protected or otherwise secured website for the specific course must comply with the requirements of § 35.200 within five business days of such notice. New content added throughout the term for the course must also comply with the requirements of § 35.200 at the time it is added to the website.

*[(3) A public postsecondary educational institution must, in a readily accessible manner, notify students through its registration process and in its course catalog, how a student with a disability may advise the institution that the student, because of a disability, would be unable to access any noncompliant content and request that any such materials be modified to conform with § 35.200 as required by paragraphs (e)(1) or (e)(2).*

*(4) If the institution determines, pursuant to § 35.204, that making certain pre-existing course materials accessible as required by paragraphs (e)(1) or (e)(2) would result in a fundamental alteration in the nature of the course or would impose an undue financial or administrative burden on the institution, it must do both of the following:*

*(A) take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that the student with a disability enrolled in the course is able to access the information contained in noncompliant course materials to the maximum extent possible; and*

*(B) ensure that all other course materials comply with § 35.200 within the time frame specified in paragraph (e)(1) or (e)(2), as applicable.]*

## Archived Web Content

### ***Suggested Language***

Suggested additions are in brackets and italicized.

Archived web content as defined in section 35.104 of this chapter, *[which is posted to the public entity's website before {date of enactment}, may continue to be provided in an inaccessible format, unless the primary mission of the public entity or the primary purpose of its digital platform is to provide information used for reference, research, or recordkeeping. The public entity's website must provide a written statement, which complies with section 35.200, describing information contained in archived web content and providing information about how a member of the public may request an accessible version of any such archived web content. If the public entity determines, pursuant to section 35.204, that making certain pre-existing archived web content accessible as required by this paragraph would result in a fundamental alteration in the nature of the programs or services provided by the public entity or would impose an undue financial or administrative burden on the public entity, it must nevertheless ensure that all other archived web content complies with section 35.200 within the time frame specified in this paragraph.]*