The Newly Proposed Updates to the Title II Regulations About Web and Mobile App Accessibility: What Are They, and How Can You Contribute?

AHEAD
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The DOJ Notice of Proposed Rulemaking (NPRM) on the Accessibility of Web Information and Services of State and Local Government Entities

Viewed from the 10,000 foot Level
What Is an NPRM?\textsuperscript{(1)}

• A law without a regulation is of very limited value
  • When Congress passes laws, many details are often left to federal agencies to detail in implementing regulations
  • A regulation (also called a “rule”) is a set of requirements issued by a federal agency, in this case, the United States Department of Justice (DoJ) to implement Title II of the ADA, which applies to “public entities”
  • The importance of clear, feasible, and enforceable regulations has long been understood by the disability community
  • This is the reason behind the 504 Sit-In
What Is an NPRM? (2)

• “Rulemaking” is the process that federal agencies use to write such regulations
  • A Notice of Proposed Rule Making, an NPRM, is a draft of a set of proposed regulations
  • This NPRM gives everyone notice of what DOJ thinks is the best way to implement a law, Title II of the ADA with regard to a specific issue:
    • Public entities, distributing and sharing information that is conveyed through technology
    • Soon after the final version is adopted, it will likely be incorporated into the regulations implementing Section 504; thus, covering nearly every postsecondary institution in America
  • An NPRM is not a final regulation-- not an enforceable rule until the NPRM/regulation writing process is complete and the final regulation is posted in the Federal Register
What Is an NPRM? (3)

• Most important, the NPRM process is our opportunity for the public to comment on the wisdom, feasibility, enforceability, and cost of the agency’s (DoJ) proposal

• Under the Administrative Procedures Act, DoJ must read and take into consideration every comment that is timely filed

• When it issues the final version of the regulations, it must provide a “section by section analysis,” including its response to those concerns that were raised by a significant number of persons

• If DoJ rejects the suggested alternative language or comments, it must state why

• Links for your comments are provided in this presentation
This is about democracy!

For your voice to count, like an informed voter, you must be an informed “commenter”

That’s the purpose of this AHEAD webinar
But Let’s Not Be Naive

• It is reasonable to speculate that this proposal has been to both the Office of Management and Budget and the White House for reviews and revision several times.

• It is already estimated to cost nearly $2.75 billion over the next ten years.

• This NPRM has been in development for approximately 6 years.
  • It represents a lot of compromises and consequently comes with a lot of “administrative inertia”.
  • To change it, amend it, or “blow it up” and send DoJ back to the drawing board will take a lot of articulate, factual, persuasive, insightful comments.
“Blow It Up”?

• A lot of good work, 1000s of settlements and more than a few good court decisions and consent decrees, concerning web access in higher education, have been achieved by ED OCR and DOJ by relying up and enforcing the existing 504/Title II regulations that pertain to “auxiliary aids and services”
  • Leave well enough alone, goes the argument

• Or, as the judicial branch grows ever more conservative, we need strong, clear, digital-specific regs. to protect against adverse decisions
  • For all the good settlements etc., more clear compliance standards are needed
  • Adopting new regs, along the lines of the NPRM represents “a bird in the hand, etc.”
  • It’s now or never

• And, if we use the NPRM process effectively, we can get more and better than is now on the table without “blowing it up”
Our Shared Assignment: Find the “Sweet Spot”

- Considerations to be triangulated:
  1) Establish as the compliance standard: equality for persons with sensory, manual, or speaking impairments with regard to:
     - Independence
     - Completeness of the information
     - Timeliness
     - Ease of use
  2) Feasibility as to administrative implementation and cost
  3) Political acceptability – $2.75 billion so far

- The more we can satisfy all these concerns the better
Studying the NPRM In Order to Develop Your Best Comments
Structure of this NPRM (1)

• This regulation would be an addition (amendment) to the more general existing regulations that have been widely applied to the issue of digital equality
  • Those provisions in the Section 504 regulations and more importantly in Title II of the ADA that pertain to “auxiliary aids and services”
    • 34 CFR section 104.44(d)
    • 28 CFR section 35.160
Structure of this NPRM

• A general requirement (e.g., compliance with WCAG 2.1 level AA)
  • Exceptions to that general principle or requirement (e.g., class materials accessible only by a password)
  • Limitations to the exceptions (e.g. course materials that will be used by a blind student)
Key Distinctions to Watch For

• General provision v. those that pertain specifically to colleges and universities
• Public-facing v. class-facing website requirements
• Direct material v. linked or third-party material posted on websites
• Materials a college places on its websites v. materials others place on the college’s website
• Platforms v. content access
• Variation in deadlines
  • Size of service area determines when compliance standards must be met
  • Students who enroll before the academic terms starts v. students who enroll after the academic term starts
General Affirmative Defenses

• Fundamental alteration and undue burden but that does not relieve the school from still providing the information

• Equivalent facilitation:
  • “Nothing in this subpart prevents the use of designs, methods, or techniques as alternatives to those prescribed, provided that the alternative designs, methods or techniques result in substantially equivalent or greater accessibility and usability of the web content or mobile app.
My Initial Question for You to Consider

• Does the NPRM need an opening general compliance standard so as to cover what is not anticipated in the more granular regulations?
  • Such a general standard is found in nearly every other civil rights regulation; though the Title II regulation being amended already contains such a standard
  • As a regulation ages, it becomes ever more critical to enforcement and litigation to have such a comprehensive standard
    • That standard could be that all program applicants and participants with sensory, speech, and manual dexterity disabilities must be provided the “same independence, information (at the same time), with the same degree of completeness and ease of use.”
Important Links: NPRM

- [DOJ summary of the NPRM](#)
- [The NPRM with explanation and questions by DOJ](#)
  - Roughly 215 pages
  - Postsecondary specific exception and limitations are roughly on pages 71-83
  - Questions 27 to 35 are the most direct ones; question 35 the most global
    - You might want to structure your comments around the questions
  - The regulations themselves are 8 pages in length and will be posted with this presentation
Important Links: Comments on the NPRM

- AHEAD
  - AHEAD: Webinar Announcement with Links
  - AHEAD Survey Form for Comments [deadline is September 6]
- CAPED
  - CAPED Survey Form for Comments
- DOJ
  - Site for Submitting Comments Directly to DOJ [best to submit by October 3]
Exceptions to the Proposed Rulemaking

Sources

1. Fact Sheet: Notice of Proposed Rulemaking on Accessibility of Web Information and Services of State and Local Government Entities

2. NPRM: Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities
Proposed Technical Standard

Web Content Accessibility Guidelines 2.1

WCAG 2.1 is an update from WCAG 2.0, emphasizing accessibility guidance for:

- Mobile accessibility
- People with low-vision
- People with cognitive and learning disabilities

Composed of testable Success Criteria

- The Success Criteria are what determine “conformance” with WCAG
- WCAG 2.1 adds 12 Level A and Level AA success criteria
DOJ has proposed exceptions

General Framework for Exceptions

1. When an exception applies, specific kinds of web and mobile app content *do not have to comply* with the technical standard.

2. There are proposed limits to some exceptions. When a limit applies, content *would have to comply* with the technical standard.
   a. Limits mean that the exception would not apply in some situations, if certain facts or circumstances are present.

3. A total a six proposed exceptions
Exception: Section §35.201(a): Archived web content

“Archived web content” is defined as web content that:

1. is maintained exclusively for reference, research, or recordkeeping;
2. is not altered or updated after the date of archiving;
3. is organized and stored in a dedicated area or areas clearly identified as being archived.

Limitations to Exception

- **All three factors** must be met for this exception.
- The content would generally still need to be provided in an accessible format if a person with a disability requests it (under current ADA rules).
Section §35.201(a): Archived web content - Questions

Feedback requested by DOJ

Question 15: How do public entities currently manage content that is maintained for reference, research, or recordkeeping?

Question 16: What would the impact of this exception be on people with disabilities?

Question 17: Are there alternatives to this exception that the Department should consider, or additional limitations that should be placed on this exception? How would foreseeable advances in technology affect the need for this exception?
Exception: Section §35.201(b): Pre Existing conventional electronic documents

1. The documents are in certain file formats specified in the proposed rule, like word processing, presentation, PDF, or spreadsheet files (The list is not intended to be exhaustive);

2. They are available on the state or local government’s website or mobile app before the date the state or local government will have to comply with this rule (after the rule is finalized).
Limitations to Exception

1. **Both factors must be present** for the exception to apply unless.

2. This exception would not apply if the pre-existing documents are currently being used by members of the public to access or participate in public services, programs, or activities.
Feedback requested by DOJ

Question 18: Where do public entities make conventional electronic documents available to the public? Do public entities post conventional electronic documents anywhere else on the web besides their own websites?

Question 19: Would this “preexisting conventional electronic documents” exception reach content that is not already excepted under the proposed archived web content exception? If so, what kinds of additional content would it reach?
Feedback requested by DOJ

Question 20: What would the impact of this exception be on people with disabilities? Are there alternatives to this exception that the Department should consider, or additional limitations that should be placed on this exception? How would foreseeable advances in technology affect the need for this exception?
Exception: §35.201(c) Web content posted by a third party

1. “Web content that is posted by third parties on a state or local government’s website would not need to comply with the technical standard.”

Third parties are members of the public or others who are not controlled by state or local governments.

The state or local government also may not have control over the content third parties post, and this content may be outdated or not relevant.

Limitations to Exception

- Third-party content posted by the state or local government.
- Content posted by a state or local government’s contractor or vendor.
- Tools and platforms that allow third parties to post content.
Feedback requested by DOJ

Question 21: What types of third-party web content can be found on websites of public entities and, how would foreseeable advances in technology affect the need for creating an exception for this content? To what extent is this content posted by the public entities themselves, as opposed to third parties? To what extent do public entities delegate to third parties to post on their behalf? What degree of control do public entities have over content posted by third parties, and what steps can public entities take to make sure this content is accessible?

Question 22: What would the impact of this exception be on people with disabilities?
Exception: §35.201(d) Linked third-party content

1. Content that a state or local government links to from its website generally would not need to comply with the technical standard.

Limitations to Exception

1. This exception would not apply if the state or local government is using the linked web content to offer its service, program, or activity.
Section §35.201(d): Linked Third Party Content - Questions

Feedback requested by DOJ

Question 23: Do public entities link to third-party web content to allow members of the public to participate in or benefit from the entities’ services, programs, or activities? If so, to what extent does the third-party web content that public entities use for that purpose comply with WCAG 2.1 Level AA?

Question 24: What would the impact of this exception be on people with disabilities and how would foreseeable advances in technology affect the need for this exception?
Exception: §35.201(e) Public schools’ password-protected course content

1. “Course content 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” would **not need to comply**.

**Limitations to Exception**

- A student with a disability who needs accessible content is enrolled in the class or course; **OR**
- A student is enrolled in an elementary, middle, or high school class or course whose parent needs accessible content because of the parent’s disability.
Exception: §35.201(e) Public schools’ password-protected course content

**Proposed Timelines**

Timeline for public schools to make password-protected course content accessible when a student or their parent needs accessible content

<table>
<thead>
<tr>
<th>When did the student enroll in the class or course?</th>
<th>When would the content need to be made accessible?</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Before</strong> the academic term begins</td>
<td>By the date the academic term begins</td>
</tr>
<tr>
<td><strong>After</strong> the academic term begins</td>
<td>Within <strong>five</strong> business days</td>
</tr>
</tbody>
</table>
Exception: § 35.201(e) Public schools’ password-protected course content - Questions

Feedback requested by DOJ

Question 27: How difficult would it be for public postsecondary institutions to comply with this rule in the absence of this exception?

Question 28: What would the impact of this exception be on people with disabilities?

Question 29: How do public postsecondary institutions communicate general information and course-specific information to their students?

Question 30: Do public postsecondary institutions commonly provide parents access to password-protected course content?
Exception: §35.201(e) Public schools’ password-protected course content - Questions

Feedback requested by DOJ

Question 31: The proposed exception and its limitations are confined to content on a password-protected or otherwise secured website for students enrolled in a specific course. Do public postsecondary institutions combine and make available content for particular groups of students (e.g., newly admitted students or graduating seniors) using a single password-protected website and, if so, should such content be included in the exception?

Question 32: On average, how much content and what type of content do password-protected course websites of postsecondary institutions contain? Is there content posted by students or parents? Should content posted by students or parents be required to be accessible and, if so, how long would it take a public postsecondary institution to make it accessible?
Exception: § 35.201(e) Public schools’ password-protected course content - Questions (3)

Feedback requested by DOJ

Question 33: How long would it take to make course content available on a public entity's password-protected or otherwise secured website for a particular course accessible, and does this vary based on the type of course? Do students need access to course content before the first day of class? How much delay in accessing online course content can a student reasonably overcome in order to have an equal opportunity to succeed in a course, and does the answer change depending on the point in the academic term that the delay occurs?
Exception: § 35.201(e) Public schools’ password-protected course content - Questions

Feedback requested by DOJ

Question 34: To what extent do public postsecondary institutions use or offer students mobile apps to enable access to password-protected course content? Should the Department apply the same exceptions and limitations to the exceptions under proposed § 35.201(e) and (e)(1)–(2), respectively, to mobile apps?

Question 35: Should the Department consider an alternative approach, such as 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?
Exception: § 35.201(g): Individualized documents that are password protected

1. Web content that meets all three of the following factors:
   a. the content is in certain file formats, like word processing, presentation, PDF, or spreadsheet files; AND
   b. the files are about a specific person, property, or account; AND
   c. the files are password protected.

**Limitations to Exception**

1. The exception would not apply unless all three factors are present. The content would generally need to comply with the technical standard.
§ 35.201(g) Individualized documents that are password protected- Questions

Feedback requested by DOJ

Question 45: What kinds of individualized, conventional electronic documents do public entities make available and how are they made available (e.g., on websites or mobile apps)? How difficult would it be to make such documents accessible? How do people with disabilities currently access such documents?

Question 46: Do public entities have adequate systems for receiving notification that an individual with a disability requires access to an individualized, password-protected conventional electronic document? What kinds of burdens do these notification systems place on individuals with disabilities and how easy are these systems to access? Should the Department consider requiring a particular system for notification or a particular process or timeline that entities must follow when they are on notice that an individual with a disability requires access to such a document?
Feedback requested by DOJ

Question 47: What would the impact of this exception be on people with disabilities?

Question 48: Which provisions of this rule, including any exceptions (e.g., the exceptions for individualized, password-protected conventional electronic documents and content posted by a third party), should apply to mobile apps?
Practitioner’s View - Thoughts on the Exceptions
Keep this in mind!

Under the current ADA rules, covered entities have to provide effective communication and make reasonable modifications.

So, even though [...] is excepted from complying with the technical standard, the content would generally still need to be provided in an accessible format if a person with a disability requests it.
Section §35.201(c): Web Content Posted by a Third Party on a Public Entity’s Website

**DOJ concern** - a public entity may have little or no control over the content posted. In some cases, a public entity’s website may include posts from third parties dating back many years, which are likely of limited, if any, relevance today. Because public entities often lack control over this third-party content, it may be challenging (or impossible) for them to make it accessible

However, it does not apply to the tools or platforms used to post third-party content on a public entity’s website such as message boards—these tools and platforms are subject to the rule’s technical standard.

- a public entity **may not delegate away its obligations** under the ADA.
- Accordingly, if a public entity relies on a contractor or another third party to post content on the entity’s behalf, the public entity **retains responsibility for ensuring the accessibility** of that content.
Section 35.201(c): Web Content Posted by a Third Party on a Public Entity’s Website

**Possible simple fixes for inaccessible third party options:**

1. Remove it completely
2. Replace it with accessible option
3. Fix it if you have access to do so
4. Push on the third party vendor for best educational outcome in support of student
What are the problems of third-party systems

- Privacy concerns
- Security
- Intellectual property
- Lack of updates and version control can create issues
- Developers may suspend third party tool
- Interruptions and delays in learning
- Accommodations or universal design approach to the instructional materials
- Training for faculty to use third party tools seamlessly during instruction
Possible Solutions

- Review your procurement policies and process for third party content.
- Tell providers of non-compliant third party content that they must make their content accessible before it can be published, and provide guidelines for what is required.
- Establish systems or controls that prevent the publication of non-compliant third party content.
- Remediate non-compliant third party content before it’s published. Set up a system where all third party content is checked before publication and accessibility issues are addressed, automatically or manually.
- Provide accessible alternatives for third party content that can’t be remediated directly.
- Create a notification process where website users are alerted that third party content may be inaccessible, and to notify the website owner immediately for remediation.
Is this regulation good, bad, ugly...or indifferent?

In retrospect, based on my experience in an institution, what do I need to consider in support or rejection of these proposed recommendations

- Development of a clear campus plan to integrate stop gap measures in cooperation with:
  - I.T.
  - Faculty Training Center
  - Committees that recommend software for instruction through program review
  - Additional training on third party roadblocks to retrain faculty in software choices
  - Training students on accessing instructional systems not just in time training during a testing situation
  - Committees that create policies and campus procedures
Next Steps for You - Why Your Voice is Important

- It’s important because of implementation challenges
- Requires campus collaboration for student access
- Requires engagement and decision-making with campus IT services, faculty-training/support centers
- Institutions require a digital accessibility policy to proactively set institutional direction
- Identify the work and position you are doing on campus

For the Public comment
Provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples.
Proposed §35.201(e) - Online Course Content Exception

Alternate UDL approach

Proposed section 35.201(e) creates an exception for online course content in password-protected courses in higher education.

The exception is based on the idea that there is a defined population of students who have enrolled for such courses and that accessibility can be dealt with as an individual accommodation.
Discussions and Q & A