



# **TOPIC:**

BUILDING AN ACCESSIBLE DIGITAL WORLD: THE OBLIGATION TO MAKE ELECTRONIC RESOURCES ACCESSIBLE

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# INTRODUCTION:

Colleges and universities need to plan for an accessible digital world, not only for their students but also for employees and members of the public. Just as curb cuts and elevators have helped many able-bodied people wheeling luggage or pushing a stroller, accessible technology will help all members of our wider communities to participate in the mission of creating, transmitting, and preserving knowledge.

This Note will examine the legal basis for requiring colleges and universities to create an accessible digital environment. It will then explore the specific requirements that colleges and universities should be considering throughout the work of building that environment.

# DISCUSSION:

I. Legal Framework

Colleges and universities are regulated by two federal anti-discrimination laws, the Rehabilitation Act of 1973[2] and the Americans with Disabilities Act ("ADA")[3], as well as analogous state laws. The federal statutes are similar and in most cases interpreted as being interchangeable. The U.S. Department of Education Office for Civil Rights ("OCR"), in conjunction with the U.S. Department of Justice ("DOJ"), enforces the ADA and the Rehabilitation Act, both of which prohibit colleges and universities from discriminating on the basis of disability in their programs or activities.

#### A. Rehabilitation Act

Dating from the 1970s, the Rehabilitation Act regulates both public and private colleges and universities that receive federal financial assistance. Specifically, Section 504 provides: "No qualified person with a disability . . . shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." [4] Section 508 of the Rehabilitation Act expressly applies to federal agencies' electronic and information technologies ("EIT") [5], and its regulations require federal agencies to "develop, procure, maintain, or use" only accessible EIT[6]. In addition to other requirements, federal agency websites must allow interpretation by screen readers and related technology. [7] Although Section 508 does not apply to colleges or universities (except as contractors for federal agencies), the U.S. Department of Justice, Civil Rights Division, points to Section 508 web accessibility standards in providing guidance for ADA compliance with regard to state and local government websites. [8] In addition, OCR resolution agreements generally authorize recipients to employ Section 508 accessibility standards. [9]

#### B. Americans with Disabilities Act

The ADA, adopted in 1990 and amended in 2008, regulates public colleges and universities (Title II)[10], as well as private postsecondary institutions that qualify as a place of public accommodation (Title III)[11]. Titles II and III prohibit discrimination in "services, programs and activities" and "goods, services, facilities, privileges, advantages and accommodations," respectively.[12]

## C. Federal Regulatory Activity

As early as 1996, the Assistant Attorney General of the DOJ Civil Rights Division recognized the need for accessibility on the Internet stating,

Covered entities under the ADA are required to provide effective communication, regardless of whether they generally communicate through print media, audio media, or computerized media such as the Internet. Covered entities that use the Internet for communications regarding their programs, goods, or services must be prepared to offer those communications through accessible means as well.[13]

In 2010, the DOJ issued regulations concerning the need to provide effective communication for individuals with disabilities. Although the DOJ acknowledges that the regulations do not

expressly address website accessibility, the agency notes in the Appendix to the regulations that its position is that the ADA covers "Internet Web site access." [14] What the regulations do add is "accessible electronic and information technology" to the list of auxiliary aids and services that may be required. [15] In addition to expanding the list of auxiliary aids and services, the 2010 amended regulations also added language imposing obligations on public and private colleges and universities to ensure that such aids and services are offered in "accessible formats, in a timely manner, and in such a way as to protect" the individual's privacy and independence. [16] The obligation of timely delivery of communication accommodations and independence in use are provisions that would appear to fall squarely upon website accessibility and the content therein.

Recognizing that in the past six years, the Internet, accessibility tools, and assistive technologies have become more available, less expensive, and more widely used, the DOJ recently withdrew its 2010 Advance Notice of Proposed Rulemaking, and issued a Supplemental Advance Notice of Proposed Rulemaking (SANPRM), to consider establishing specific technical requirements to make accessible the services, programs, or activities State and local governments offer the public via the web.[17]

The DOJ and OCR have sent clear messages to the higher education community that the requirements to provide accessible EIT are broad and comprehensive. In June 2010, the agencies issued a joint "Dear Colleague Letter," stating that federal law prohibits colleges and universities from using any electronic book reader, or similar technology, or in fact any emerging technology without insisting that such technology be accessible to all students.[18] In May 2011, OCR issued a guidance document clarifying that the parameters of the 2010 "Dear Colleague Letter" apply to all "disabilities that affect the ability to use printed materials," including cognitive and learning disabilities, and to "all school operations," including programs "where no students with visual impairments are currently enrolled." A university must identify a "means to provide immediate delivery of accessible devices or other technology necessary to ensure accessibility from the outset."[19]

# D. Federal Enforcement Actions

Over the last six years, the DOJ and OCR have investigated and reached resolutions with multiple institutions of higher education, which have received significant attention within NACUA and in the news media. Both the Department of Education and the DOJ have expressed concerns over technology that may be inaccessible to individuals with disabilities, with specific attention to individuals who are blind, through enforcement actions against a variety of entities, even when the technology is being used on a temporary or trial basis.[20] In recent years, advocacy groups supporting persons with disabilities, such as the National Federation of the Blind ("NFB") and the National Association of the Deaf ("NAD"), have drawn the agencies' attention to universities and their use of EIT to communicate with students, prospective students, employees, and visitors as well as utilization of EIT and related devices in classroom learning or other academic venues.[21]

Not surprisingly, the focus of litigation and enforcement actions is on advocacy for students who are precluded from receiving the same educational opportunities as other students because of

inaccessible technologies. Nonetheless, although institutions of higher education may wish to prioritize their accessibility initiative efforts, recent class action lawsuits brought by the NAD against Harvard and MIT seek access to all publicly facing websites (transcription of audio material; captioning of audiovisual material), including access for individuals who have no affiliation with the universities.[22] Through analysis of the legal challenges, enforcement actions, and resulting settlement agreements, we can discern guidance for what our respective institutions need to do to be considered "in compliance" with respect to EIT accessibility, as discussed below in Section II.

The question asked by OCR and DOJ in enforcement actions is not whether the institution failed to provide reasonable accommodations after receiving notice from a student or community member that accommodations were needed. Instead, the recent accessibility enforcement actions have examined whether institutions are using inaccessible technology that prevents a person with a disability from having immediate access to information. The absence of immediate access, with substantially equivalent ease of use, is the alleged discriminatory act.[23] Under the ADA and the Rehabilitation Act, public entities and private entities that are public accommodations engage in discrimination if individuals or a class of individuals are denied participation, given unequal benefits, or given separate benefits that are not as effective as the benefits afforded to others.[24] As a result, the reasonable accommodations framework, with the interactive process, and the expectation that the user will self-identify and provide information about his or her limitations, does not apply. We think it is exceptionally important for institutions to be aware of this important departure from "traditional' concepts of how disability laws (and the interactive protocols we are accustomed to engage in) operate in the context of EIT accessibility.

The legal analysis begins with the elements of a claim under either Title II or III of the ADA or Section 504 of the Rehabilitation Act which are that an individual: (1) has a disability; (2) is otherwise qualified to receive the benefits of a public service, program, or activity; [25] and (3) was excluded from participation in or denied the benefits of such service, program, or activity, or otherwise discriminated against, on the basis of such disability.[26] The issue in EIT accessibility litigation usually focuses on the third element. College and university settlement agreements often require that the school define "accessible" as meaning:

[A] person with a disability is afforded the opportunity to acquire the same information, engage in the same interactions, and enjoy the same services as a person without a disability in an equally effective and equally integrated manner, with substantially equivalent ease of use. The person with a disability must be able to obtain the information as fully, equally, and independently as a person without a disability.[27]

The authors are not aware of any higher education cases that have been litigated through trial to a final resolution, rather than settled. Therefore, how colleges and universities should go about making electronic and digital educational materials readily accessible to individuals with

disabilities is best determined by analyzing federal guidance documents and resolution agreements.

# II. Practical Advice: Lessons Learned from Lawsuits, Enforcement Actions, Resolution Agreements, and Settlements

OCR resolution agreements and DOJ agreements or consent decrees with colleges and universities consistently require the institutions to establish structural components to ensure a foundation for building, acquiring, and maintaining only accessible EIT. To that end, compliance reviews routinely include reviews of policies, examination of procurement practices, sampling of webpages maintained by the university, and evaluation of third-party services used by the university. A review of the guidance provided by the enforcement actions on these key structural components follows.

#### A. EIT Policies and Procedures

Institutions are well advised to establish EIT accessibility policies and accompanying procedures. Institutions may conclude that their issues are best addressed by a general, high-level policy articulating the need for accessibility, or they may determine that their community would benefit from a more detailed policy that specifies what accessibility means in varying circumstances, such as website accessibility, accessibility for purchasing software, accessibility of campus-based equipment, etc.

A key component of resolution agreements is the requirement that the college or university adopt a policy and procedures to ensure that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of the University, or be subjected to discrimination by the University."[28] Many resolution agreements also dictate the definition of "accessibility" that should be included in such a policy.[29] Whether it makes sense for an institution to specifically adopt the definition of "accessibility" provided in Section I.D., above, will vary from school to school.[30] Regardless, a high-level policy statement is likely a minimal requirement to demonstrate the institution's intent to maintain non-discriminatory systems and platforms. More specific requirements may be articulated in additional policies or in accompanying procedures.

There may be value in having policies (or work plans) that specifically reference timelines for deploying accessible technology, instructional materials, procurement, web pages, learning management systems, library systems, and other electronic information technology. As with any policy, an EIT policy should be established in accordance with existing institutional mechanisms. Also, an EIT policy should contain a clear grievance procedure. Although there is not a universally accepted "model policy," there are some good examples that can be used as a starting point for drafting.[31]

Following are some helpful tips to consider when developing an EIT policy.[32]

 Obtain buy-in from the institutional senior leadership team because the policy affects the entire institutional community.

- Collaborate with key institutional stakeholders (IT, Procurement, Marketing, etc.) to determine the impact of an EIT policy and additional fiscal/human resources needed to satisfy/comply with the policy requirements.
- Rollout institutional training/education about the policy prior to policy implementation.
- Detail the responsibilities of each functional area in the policy.

# **B. EIT Accessibility Coordinator**

Public colleges and universities with over 50 employees are required to identify an ADA Coordinator.[33] All colleges and universities receiving federal financial assistance and employing more than fifteen employees are required to identify a Section 504 Coordinator.[34] In addition, it is advisable to have either the same individual or another individual who is particularly qualified not only in disability compliance, but also in understanding electronic and information technology, designated as the EIT Accessibility Coordinator.[35]

#### C. Assessment

Resolution agreements regularly require assessments or audits of the institution's EIT and corrective action strategies to address deficiencies. The assessment should include university websites, documents posted to webpages and websites, access to classroom podiums and display devices, course registration software, videos, personal response systems ("clickers"), and banking arrangements offered to students, faculty and staff, including website and ATM access.[36]

An emerging best practice in designing an audit of EIT is to ensure that the audit includes not only high-traffic sites or systems, but also captures "critical path" applications or functions such as admissions, curriculum requirements, student conduct, student services, and employee benefit systems. Designing an audit appropriately will require input from knowledgeable members of your campus community to identify these "critical path" functions or applications.

## D. Training/Education

Nearly all resolution agreements require institutions to provide education to faculty and staff who develop or post content on any university website or through other EITs; who select, create, or post EIT for students; or who otherwise incorporate students' use of EIT in their classes. The agreements often require that the college or university create and maintain a website focused on EIT accessibility, including tools and resources.[37] A number of resources have been developed, by other institutions and also by the National Center on Disability and Access to Education (NCDAE)[38] that your institution may be able to adapt and utilize.

#### E. Procurement Protocols

Recognizing that providing an accessible information technology environment is dependent in large part on the EIT purchased by the college or university, several schools have agreed to implement internal procedures to address accessibility at the point of purchase.[39]

To develop effective procurement protocols or guidelines, consider the following suggestions:

- Create a mechanism within the purchasing process to inform employees of the requirement to purchase only accessible EIT.
- Centralize the function of evaluating whether EIT is accessible before purchase.
- Include text in the RFP or other procurement process that requires the vendor to provide information about the accessibility of the product or service.[40]
- Require the vendor to demonstrate the accessibility of the product. One preliminary
  method is to require the vendor to submit a VPAT (Voluntary Product Accessibility
  Template). Many large vendors have VPATs available upon request so purchasers can
  assess whether EIT meets various Section 508 standards.
- Require an "EIT Accessibility" provision within the terms and conditions of technology software/hardware contracts wherein the vendor acknowledges EIT accessibility requirements and expectations. The provision should provide the college or university the right to terminate the contract without penalty in the event that such requirements or expectations are not met by the vendor.
- Have an IT accessibility expert review IT accessibility requirements and expectations with the selected vendor/supplier before the product is purchased.
- Create a mechanism to receive feedback from the campus community about how accessibility is being addressed through the procurement process.
- For public institutions, consult state procurement laws to make sure any procurement practices adopted in accordance with the institution's EIT plan align with state statutory requirements.

## F. Critical EIT for Students

Even after developing the structural components of a compliant EIT program, determining where to begin to focus on actually identifying and fixing inaccessible EIT can be a daunting task. Recent OCR enforcement actions indicate areas of high visibility and/or key functionality that colleges and universities should address promptly. These areas include[41]:

- Learning Management Systems ("LMS")[42];
- Class assignments and course content within LMS[43];
- Instructional materials such as syllabi, textbooks, presentations, handouts, and others that are delivered in electronic format[44];
- Live chat functions in key applications[45];
- EIT used in the classroom, such as classroom clickers, emails, blogs, web conferencing, and other forms of communicating and interacting[46]; and
- Making videos accessible, including captioning and labeling.[47]

Institutions should obviously devise their own list of high-priority items based on their own assessment and sources of information. Keep in mind that Help Desk inquiries and website-administrator feedback emails may identify issues that users have with particular websites and/or systems, which may help in targeting where to start. Typically, resolution agreements

anticipate that a corrective work plan will be implemented over approximately three years. Therefore, schools should – over time—expand the focus of compliance efforts and incorporate additional areas of EIT, such as documenting accessibility for content on websites maintained by the institution, including inclusion of Alt-text, proper formatting of PDFs, etc; addressing accessibility with respect to library databases and other resources; and assessing and making accessible third-party resources available to students on campuses such as ATMs.[48]

#### G. Websites

A particular focus of resolution agreements and litigation is website accessibility. In addition to the provisions about critical information for students discussed above, resolution agreements often contain provisions requiring colleges and universities to make their websites accessible.[49]

Obviously, one key question for website accessibility is how to ascertain whether your website is accessible.[50] Deficiencies identified by the OCR in its resolution agreements have included:[51]

- a lack of alternative text on all images;
- documents, such as PDFs or other image-based documents, not posted in an accessible format;
- a lack of captions on all videos and the inability to operate video controls using assistive technology;
- improperly structured data tables;
- frames not titled with text that facilitates frame identification and navigation;
- improperly formatted and labeled form fields;
- improper contrast between background and foreground colors;
- areas in which a keyboard-only user could not access information or use drop down menus;
- inaccessible course registration information;
- calendars not being accessible to a screen reader.

Standards for website accessibility are somewhat fluid and uncertain. OCR states in its 2014 letters to Youngstown State University[52] and the University of Cincinnati[53] that reliance on Section 508, Web Content Accessibility Guidelines (WCAG), and/or other standards "does not imply that conformity with such standards is either required or sufficient to comply with the requirements of either Section 504 or Title II." OCR may be trying to lay the groundwork for evolving (and increasing) technology requirements in a world where technological change is omnipresent, by essentially saying, "Adherence to the WCAG standards today may not be enough tomorrow."

Although case law and enforcement actions in this area continue to develop, recent resolution agreements and settlements suggest that the appropriate standard for websites and web-based software that is published, hosted or used by colleges and universities are the standards and guidelines outlined in the WCAG 2.0, Level AA guidelines (<a href="http://www.w3.org/TR/wcag2ict/">http://www.w3.org/TR/wcag2ict/</a>) published by Web Accessibility Initiative of the World Wide Web Consortium (W3C).[54] These

obligations extend to third-party websites for student services such as outsourced campus bookstores, student health insurance portals, etc. Both OCR and the DOJ have recently agreed to use the WCAG 2.0, Level AA standard as a minimum requirement to establish accessibility of websites. In the edX settlement agreement, DOJ followed its recent practice of relying on WCAG 2.0 AA, published by W3C.[55] However, it went on to require that edX ensure that its website, mobile applications and platform do not "block or interfere with any accessibility feature" of course content made available in accessible formats such as MathML, WCAG2ICT, WAI-ARIA, DAISY, and EPUB3.[56] Section 508 standards are an alternative, but the more recent settlement agreements have used the WCAG standards.[57] Some observers have also predicted that one likely option for the government's regulations would be to adopt the WCAG standards, and rely on the W3C community to maintain and update these standards. At this point, the WCAG 2.0 AA standards seem likely to be at least minimally acceptable to the federal agencies for the next several years – which, as our IT colleagues would tell us, is about as long as anyone can predict things for technology, given how rapidly it develops and becomes obsolete.

# **CONCLUSION:**

As campuses around the country have learned from their students, parents, employees and visitors, visual impairments and other disability limitations that impact the usability of technology affect many members of our communities. Although it is not possible to wave a wand today and make all existing resources and tools instantly accessible, now is the time to plan for the future, and to build the policies and infrastructure necessary to ensure that the increasingly digital world we live in welcomes and facilitates the participation of all members of our community and our society.

# **RESOURCES:**

**Access Text Network**: Membership exchange network that facilitates and supports delivery of alternative files for students with diagnosed print-related disabilities. <a href="http://www.accesstext.org/">http://www.accesstext.org/</a>.

Architectural and Transportation Barriers Compliance Board (Access Board): Access Board is an independent Federal Agency devoted to accessibility for people with disabilities. The Board develops and maintains criteria for electronic and information technology. It also provides technical assistance for those requirements. http://www.access-board.gov/.

**Association on Higher Education and Disability (AHEAD):** AHEAD is a professional membership organization for individuals involved in the development of policy and in the provision of quality services to meet the needs of persons with disabilities in all areas of higher education. <a href="http://www.ahead.org/">http://www.ahead.org/</a>.

**DAISY Consortium:** The DAISY Consortium is an international association that develops, maintains and promotes international DAISY (Digital Accessible Information System) standards. http://www.daisy.org/

**LOUIS Database:** LOUIS contains information on accessible print materials produced by approximately 160 organizations throughout the United States. These materials include books in braille, large print, audio, and electronic file format. http://louis.aph.org/catalog/CategoryInfo.aspx?cid=152

**MathML:** MathML is an XML application for describing mathematical notation and capturing both its structure and content. The goal of MathML is to enable mathematics to be served, received, and processed on the World Wide Web, just as HTML has enabled this functionality for text. http://www.w3.org/TR/MathML3/.

National Center on Disability and Access to Education makes available a program called GOALS: "Gaining Online Accessible Learning through Self-Study," [58]

National Federation of the Blind Higher Education Accessibility Toolkit: <a href="https://nfb.org/higher-education-accessibility-toolkit">https://nfb.org/higher-education-accessibility-toolkit</a>.

**Web Accessibility Initiative (WAI):** WAI develops guidelines for web accessibility; support materials to help understand and implement web accessibility; resources through international collaboration. http://www.w3.org/WAI/.

**World Wide Web Consortium (W3C):** The W3C is an international community where member organizations, staff, and the public work together to develop web standards. <a href="http://www.w3.org/Consortium">http://www.w3.org/Consortium</a>.

Following are some helpful University Websites.

http://www.calstate.edu/accessibility/

http://oregonstate.edu/accessibility/

http://accessibility.psu.edu/

http://www.wisconsin.edu/acss/disability/universal.htm

http://www.umt.edu/accessibility/

# **ENDNOTES:**

[1] Lucy France is Legal Counsel at the University of Montana. Hannah Ross is University Counsel at Princeton University. The authors gratefully acknowledge the significant contributions of Jeff Silvyn, General Counsel, Pima Community College, to early drafts of this Note.

[2] 29 U.S.C. § 794 (1973). Its implementing regulations are at 34 C.F.R. Part 104.

[3] Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, and its implementing regulations at 28 C.F.R. Part 35; Title III at 42 U.S.C. §12181-89, and its implementing regulations at 28 C.F.R. Part 36.

- [4] 29 U.S.C. § 794 (a). Its implementing regulations are at 34 C.F.R. Part 104.
- [5] 29 U.S.C. § 794(d).
- [6] 36 C.F.R. § 1194.1.
- [7] Id. § 1194.22.
- [8] The DOJ also notes that a more comprehensive resource is the Web Content Accessibility Guidelines developed by the Web Accessibility Initiative. Civil Rights Div., U.S. Dept. of Justice, *Accessibility of State and Local Government Websites to People with Disabilities*, <a href="www.ada.gov/websites2.htm">www.ada.gov/websites2.htm</a> (last visited May 17, 2016).
- [9] See e.g., South Carolina Technical College System Resolution Letter, Office for Civil Rights, Dep.'t of Education, No. 11-11-6002 (Mar. 8, 2013) [hereinafter South Carolina Resolution Agreement], http://www2.ed.gov/about/offices/list/ocr/docs/investigations/11116002-a.html.
- [10] Title II of the Americans with Disabilities Act of 1990, at 42 U.S.C. § 12132, and its implementing regulation at 28 C.F.R. Part 35.
- [11] Title III at 42 U.S.C. §12181-121189, and its implementing regulations at 28 C.F.R. Part 36.
- [12] 42 U.S.C. § 12132; id. § 12182.
- [13] Letter from Deval L. Patrick, Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to the Honorable Tom Harkin, U.S. Senator (Sept. 9, 1996),
- http://www.justice.gov/crt/foia/readingroom/frequent\_requests/ada\_coreletter/cltr204.txt.
- [14] Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56,164, 56,235-56,236 (Sep. 15, 2010) (Title II); 75 Fed. Reg. 56,236, 56,316 (Sep. 15, 2010) (codified at 28 C.F.R. pt. 35) (Title II); Nondiscrimination on the Basis of Disability by Public Accommodations in Commercial Facilities, 75 Fed. Reg. 56,236, 56,253 (Sept. 15, 2010) (codified at 28 C.F.R. pt. 36) (Title III). Its technical assistance publication entitled "ADA Requirements: Effective Communication," emphasizes the overarching obligation of ADA-regulated entities (including colleges) to "take appropriate steps to ensure that communications with applicants, participants, members of the public and companions with disabilities are as effective as communications with others." 28 C.F.R. § 35.160 (a)(1); see also Civil Rights Div., Dep't of Justice, ADA Requirements: Effective Communication, (Jan. 31, 2014), <a href="http://www.ada.gov/effective-comm.htm">http://www.ada.gov/effective-comm.htm</a> (last visited May 17, 2016). However, the publication draws an important distinction between state and local government operations and places of public accommodation. Title II entities are obligated to give primary consideration to the communication preferences of the individual with a disability, 28 C.F.R. § 35.160(b)(2), whereas, Title III entities do not face the same obligation but must provide "effective communication." Id. § 36.303(c).
- [15] See 28 C.F.R. § 35.104 (Title II); id. § 36.303(b)(2) (Title III).
- [16] See id. § 35.160(b)(2) (Title II); id. § 36.303(c)(1)(ii) (Title III).
- [17] Civil Rights Div., U.S. Dep't of Justice, Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities. (Apr. 29, 2016),
- http://www.ada.gov/regs2016/sanprm.html (last visited May 15, 2016). On May 9, 2016, the DOJ issued a proposed rule under Title II seeking comment. Nondiscrimination on the Basis of Disability;

  Accessibility of Web Information and Services of State and Local Government Entities, 81 Fed. Reg.
- Accessibility of Web Information and Services of State and Local Government Entities, 81 Fed. Reg. 28,658 (May 9, 2016).
- [18] Office for Civil Rights, Dep't of Educ. Civ. Rights Div. & Dep't of Justice, Joint "Dear Colleague" Letter: Electronic Book Readers (June 29, 2010).
- [19] Office for Civil Rights, Dep't of Educ., "Frequently Asked Questions About the June 29, 2010 Dear Colleague Letter," at 2 (May 29, 2011), <a href="http://www2.ed.gov/about/offices/list/ocr/docs/dcl-ebook-faq-201105.html">http://www2.ed.gov/about/offices/list/ocr/docs/dcl-ebook-faq-201105.html</a> (last visited May 17, 2016) (emphasis added).
- [20] Civil Rights Div., Dep't of Justice, *ADA Requirements: Effective Communication* (Jan. 31, 2014), <a href="http://www.ada.gov/effective-comm.htm">http://www.ada.gov/effective-comm.htm</a> (last visited July 20, 2016).
- [21] See, e.g., Pennsylvania State University Resolution Agreement, Office for Civil Rights, U.S. Dep't of Educ., No. 03-11-2020 (Sept. 27, 2011) [hereinafter Penn State Resolution Agreement], http://accessibility.psu.edu/nfbpsusettlement/.
- [22] Nat'l Ass'n of the Deaf v. Harvard University, No. 3:15-cv-30023-MGM (D. Mass. Feb 12, 2015); Nat'l Ass'n of the Deaf v. Massachusetts Institute of Technology, No. 3:15-cv-30024-MGM (D. Mass. Feb. 12, 2015). Both Complaints were filed on February 12, 2015.
- [23] See., e.g., University of Cincinnati Resolution Letter, Office for Civil Rights, U.S. Dep't of Educ., No. 15-13-6001, at 3 (Dec. 18, 2014), <a href="http://www2.ed.gov/documents/press-releases/university-cincinnati-">http://www2.ed.gov/documents/press-releases/university-cincinnati-</a>

<u>letter.pdf</u>; University of Montana Resolution Agreement, Office for Civil Rights, U.S. Dep't of Educ., No. 10122118, at 1 (Mar. 10, 2014) [hereinafter Montana Resolution Agreement], <a href="http://www.umt.edu/accessibility/docs/FinalResolutionAgreement.pdf">http://www.umt.edu/accessibility/docs/FinalResolutionAgreement.pdf</a>,; South Carolina Resolution Agreement, *supra* note 9, at 4.

[24] 42 U.S.C. § 12182(b)(1)(A)(i)-(iii); 29 U.S.C. § 794 (a).

[25] One of the threshold legal issues has been whether the internet is a place of public accommodation. Circuit courts disagree as to whether Title III only prohibits discrimination in physical places or whether it prohibits discrimination with respect to any services offered to the public, even in the absence of some connection to a physical place. It is the authors' view that the analysis articulated by the First, Second and Seventh Circuits is the better legal reasoning, consistent with the remedial purposes of the Rehabilitation Act and the ADA, and almost certain to prevail in the long term. But even if legal uncertainty continues, inaction exposes institutions to risks of agency compliance actions. Compare Weyer v. Twentieth Centruy Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000) (holding that Title III only prohibits discrimination in physical spaces), with Carparts Distribution Ctr., Inc. v. Auto Wholesaler's Ass'n of New England, Inc., 37 F.3d 12, 19 (1st Cir. 1994) (holding that accommodations are required even in the absence of some physical space). See also Cullen v. Netflix, Inc., D.C. No. 5:11-cv-01199-EJD, at 2 (9th Cir. Apr. 1, 2015) (physical space required); Earll v. eBay, Inc. D.C. No. 5:11-cv-00262-EJD, at 2 (9th Cir. Apr. 1, 2015) (physical space required); Morgan v. Joint Admin Bd., Ret. Plan of the Pillsbury Co. and Am. Fed'n of Grain Millers, AFL-CIO-CLC, 268 F.3d 456, 459 (7th Cir. 2001) (no physical space required); Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28, 32-33 (2d Cir. 1999) (no physical space required) Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1011 (6th Cir. 1997) (en banc) (physical space required). Cf. Nat'l Ass'n of the Deaf v. Harvard University, No. 3:15-cv-30023-MGM (D. Mass. Feb. 9, 2016 (rejecting the argument that a website is not a place of public accommodation).

[26] Innes v. Board of Regents of the University System of Maryland, et. al. No. DKC 13-2800, at 7 (D. Md. Mar. 16, 2015); 28 C.F.R. §§ 36.201(a), 36.202(a), 36.202(c); 35.130(a).

[27] South Carolina Resolution Agreement, *supra*, note 9, at 1; University of Cincinnati Resolution Agreement, Office for Civil Rights, U.S. Dep't of Educ., No. 15-13-6001, at 2 (Dec. 8, 2014) [hereinafter Cincinnati Resolution Agreement]; <a href="http://www2.ed.gov/documents/press-releases/university-cincinnati-agreement.pdf">http://www2.ed.gov/documents/press-releases/university-cincinnati-agreement.pdf</a>; Youngstown State University Resolution Agreement, Office for Civil Rights, U.S. Dep't of Educ., No. 15-13-6002 (Nov. 25, 2014) [hereinafter Youngstown Resolution Agreement], <a href="http://www2.ed.gov/documents/press-releases/youngstown-state-university-agreement.pdf">http://www2.ed.gov/documents/press-releases/youngstown-state-university-agreement.pdf</a> . See also Settlement Agreement and Release, Nat'l Fed'n of the Blind v. Scribd, Inc., 997 F. Supp. 3d 565 (D. Vt. 2015) ("The intent of this Settlement Agreement is to ensure that blind persons who use screen access software shall have effective and equal access to all of the various benefits sighted persons have in regards to the Website and related native mobile applications for iOS and Android.").

[28] Louisiana Tech University, Board of Supervisors for the University of Louisiana System Settlement Agreement, Civil Rights Div., U.S. Dep't of Justice, No. 204-33-116 (July 23, 2013) [hereinafter Louisiana Tech Settlement Agreement], ; <a href="http://www.ada.gov/louisiana-tech.htm">http://www.ada.gov/louisiana-tech.htm</a>.

[29] South Carolina Settlement Agreement, *supra* note 9; Cincinnati Resolution Agreement, *supra* note 27; Youngstown Resolution Agreement, *supra* note 29.

[30] While adopting the language favored by one or both agencies may seem wisest to many institutions, this critical policy choice requires buy-in from a wide variety of campus stakeholders. Some institutions might prefer definitions that hew more closely to statutory language, or speak at a higher level. In such a case, the agencies' recommended language might be provided as one resource for interpretation.

[31] See, e.g., Charles B. Reed, California State University Board of Trustees Policy on Disability Support and Accommodations – Executive Order No. 926, CALIFORNIA STATE UNIVERSITY (Dec. 20, 2004) <a href="http://www.calstate.edu/eo/EO-926.html">http://www.calstate.edu/eo/EO-926.html</a> (last visited May 17, 2016); Guidelines, PENNSYLVANIA STATE UNIVERSITY, <a href="http://accessibility.psu.edu/guidelines/">http://accessibility.psu.edu/guidelines/</a> (last visited May 17, 2016); EITA Implementation Plan: EITA Policy and Procedures, UNIVERSITY OF MONTANA,

http://www.umt.edu/accessibility/implementation/policy/default.php (last visited May 17, 2016); OSU Policy on Information Technology Accessibility, OREGON STATE UNIVERSITY,

http://oregonstate.edu/accessibility/ITpolicy (last visited May 17, 2016); Electronic and Information Technology Policy, GEORGE MASON UNIVERSITY, <a href="http://universitypolicy.gmu.edu/policies/university-information-technology-accessibility/">http://universitypolicy.gmu.edu/policies/university-information-technology-accessibility/</a> (last visited May 17, 2016); University of Washington IT Accessibility Guidelines, UNIVERSITY OF WASHINGTON, <a href="http://www.washington.edu/accessibility/guidelines/">http://www.washington.edu/accessibility/guidelines/</a> (last visited May 17, 2016).

- [32] See also Robert Carr, *The Web Accessibility in Higher Education Project,* EDUCAUSE REVIEW, Feb. 22, 2015, <a href="http://er.educause.edu/articles/2015/2/the-web-accessibility-in-higher-education-project">http://er.educause.edu/articles/2015/2/the-web-accessibility-in-higher-education-project</a> (last visited June 17, 2016). This *EDUCAUSE Review* article provides examples of how institutions might approach the establishment of EIT accessibility policies.
- [33] 28 C.F.R. § 35.107(a) (2005).
- [34] 34 C.F.R. § 104.7.
- [35] See, e.g., Electronic Information Technology ("EIT") Accessibility Compliance, YOUNGSTOWN STATE UNIVERSITY, http://cms.ysu.edu/accessibility/electronic-information-technology-
- <u>%E2%80%9Ceit%E2%80%9D-accessibility-compliance</u> (last visited May 17, 2016); *About Accessibility UM*, UNIVERSITY OF MONTANA, <a href="http://www.umt.edu/accessibility/about.php">http://www.umt.edu/accessibility/about.php</a> (last visited May 17, 2016); *Cal State University Accessible Technology Initiative (ATI) Staff*, California State University, <a href="http://teachingcommons.cdl.edu/access/ATI/index.html">http://teachingcommons.cdl.edu/access/ATI/index.html</a> (last visited May 17, 2016).
- [36] Examples of EIT Accessibility Audits are the 2014 Annual Report, PENNSYLVANIA STATE UNIVERSITY, <a href="http://accessibility.psu.edu/ati/annualreport/2014report/#Toc272663647">http://accessibility.psu.edu/ati/annualreport/2014report/#Toc272663647</a> (last visited May 17, 2016), and EIT Accessibility Audit, UNIVERSITY OF MONTANA,
- http://www.umt.edu/accessibility/implementation/audit.php (last visited May 17, 2016).
- [37] Montana Resolution Agreement, *supra* note 23, at 6; Louisiana Tech University Settlement Agreement, *supra* note 28; Youngstown Resolution Agreement, *supra* note 27, at 3; Consent Decree, *Lanzilotti & Cossaboon & National Federation of the Blind v. Atlantic Cape Community College, Consent Decree*, No. 1:15-cv-03656-JEI-JS ( June 1, 2015) , at 15.
- [38] See NCDAE's one-page accessibility resources, or "cheatsheets," at *Cheatsheets* <a href="http://ncdae.org/resources/cheatsheets/">http://ncdae.org/resources/cheatsheets/</a> (last visited May 17, 2016).
- [39] Pennsylvania State Resolution Agreement, *supra* note 31; Youngstown Resolution Agreement, *supra* note 27; Montana Resolution Agreement, *supra* note 23; Louisiana Tech Settlement Agreement, *supra* note 28.
- [40] THE UNIVERSITY OF CALIFORNIA GUIDELINES FOR PURCHASING ACCESSIBLE IT PRODUCTS OR SERVICES (June 1, 2015), <a href="http://www.ucop.edu/electronic-accessibility/files/uc-guidelines-accessibility-procurement.pdf">http://www.ucop.edu/electronic-accessibility/files/uc-guidelines-accessibility-procurement.pdf</a>, offers sample text for both web-based products/services and other IT Products. (last visited May 17, 2016).
- [41] In May 2015, the DOJ moved to intervene in a disability discrimination lawsuit, alleging that Miami University uses technologies that are inaccessible to current and former students who have vision, hearing or learning disabilities. Pl.-Intervenor United States' Mot. to Intervene, Dudley v. Miami University, et al., No. 14-cv-038, at 2 (S.D. Ohio, May 12, 2015). Plaintiffs allege Miami University has failed to ensure that individuals with disabilities can interact with its websites and learning management systems and access course assignments, textbooks and graphical materials on an equal basis with students without disabilities. Id. at 3. The DOJ is concerned that "Miami's failures have deprived persons with disabilities of a full and equal opportunity to benefit from Miami University's educational opportunities." Press Release, U.S. Dep't of Justice, Justice Department Moves to Intervene in Disability Discrimination Lawsuit Alleging that Miami University Uses Inaccessible Educational Technologies and Course Materials (May 12, 2015), http://www/justice.gov./opa/pr/justice-department-moves-intervenedisability-discrimination-lawsuit-alleging-miami (last visited July 20, 2016). It further stated that "Miami University's use of such technologies has denied individuals with disabilities the opportunity to equally participate in and benefit from Miami University's curricular and co-curricular services, programs, and activities. See 42 U.S.C. § 12132; 28 C.F.R. § 35.130." Pl.-Intervenor United States' Mot. to Intervene, Dudley v. Miami University, et al., No. 14-cv-038, at 5 (S.D. Ohio, May 12, 2015) (citing 42 U.S.C. § 12132; 28 C.F.R. § 35.130).
- [42] University of Phoenix Resolution Agreement, Office for Civil Rights, U.S. Dep't of Educ., No. 08-15-2040, at 1 (June 12, 2015), <a href="https://www.phoenix.edu/content/dam/altcloud/doc/ocr-resolution-agreement.pdf">https://www.phoenix.edu/content/dam/altcloud/doc/ocr-resolution-agreement.pdf</a>; University of Montana Resolution Agreement, <a href="mailto:supra">supra</a>, note 28.
- [43] Penn State Resolution Agreement, supra, note 31.
- [44] Louisiana Tech University Settlement Agreement, supra, note 28.
- [45] University of Montana Resolution Agreement, *supra*, note 28, at 1.
- [46] *Id.* at 4-5.
- [47] See Youngstown State University Resolution Agreement, *supra*, note 27, at 4. Institutions may want to focus first on videos intended as course content for students, or those videos that have a very wide audience, such as welcome videos to a new class, or videos where the president addresses the campus

community. Audio description of verbal content falls within the WCAG standards. Notably it is not specified as an auxiliary aid or service in existing ADA regulations. However, college and university settlement agreements include compliance in this area which may be difficult and quite expensive. Audio description may require course expertise. Prioritizing videos and other visual media for audio description may be advisable.

[48] See Maricopa County Community College District Resolution Agreement, Office for Civil Rights, U.S. Dep't of Educ., No. 2:12-CV-00907-NVW, at 3 (Oct. 2014),

https://nfb.org/images/nfb/documents/pdf/higher-ed-toolkit/mcccd\_nfb\_settlement\_agreement.pdf;
Montana Resolution Agreement, *supra* note 28, at 1, 5-6; Penn State University Resolution Agreement, *supra* note 31.

[49] Montana Resolution Agreement, *supra* note 28, at 3, 6 (finding that webpages hosted or published by the University and webpages that provide essential student functions must be accessible according to WCAG 2.0 Level AA, have a clear statement or link to statement on all University websites, describing the University's commitment to web accessibility and a method to report barriers); South Carolina Resolution Agreement, *supra* note 9, at 1 (finding that each college must conduct an annual website review and identify steps to correct problems); *see also* Penn State Resolution Agreement, *supra* note 31; Louisiana Tech Settlement Agreement, *supra* note 28.

[50] While there is still no standard federal regulation to determine website accessibility, there are some helpful checklists to assist with assessing website accessibility. See, e.g., Section 508 Checklist, WebAIM.org, <a href="http://webaim.org/standards/508/checklist">http://webaim.org/standards/508/checklist</a> (last visited June 17, 2016).

[51] Youngstown Resolution Agreement, *supra* note 27, at 11-12; Cincinnati Resolution Agreement, *supra* note 27, at 8-9; South Carolina Resolution Agreement, *supra* note 9, at 4; Montana Resolution Agreement, *supra* note 28, at 1.

- [52] Youngstown Resolution Agreement, supra note 27, at 2, n.1.
- [53] Cincinnati Resolution Agreement, supra note 27, at 2, n.1.

[54] Web Accessibility Initiative of the World Wide Web Consortium, *Guidance on Applying WCAG 2.0 to Non-Web Information and Communications Technologies (WCAG2ICT)*, W3C WORKING GROUP NOTE, <a href="http://www.w3.org/WAI/about-links.html">http://www.w3.org/WAI/about-links.html</a> (last visited July 15, 2016). The Web Accessibility Initiative of W3C provides an array of resources relating to web accessibility and invites interested members of the higher education community to become involved in the development of tools and strategies.

[55] EdX Inc. Settlement Agreement, Civil Rights Div., U.S. Dep't of Justice, DJ No. 202-36-255 (Apr. 2, 2015) <a href="https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/02/edx">https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/02/edx</a> settlement agreement.pdf.

- [56] *Id.* at 18.d.
- [57] Montana Resolution Agreement, supra note 28, at 6.
- [58] For more information, see http://ncdae.org/goals/ (last visited Apr. 23, 2015).

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