Digital Accessibility – Developments in 2018

by

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2018 brought a number of developments in the area of digital accessibility, including increasing litigation, demand letters, and the release of the Web Content Accessibility Guidelines 2.1 (WCAG 2.1), the World Wide Web Consortium’s (W3C) first revision of WCAG since its release of WCAG 2.0 in December 2008. This year also brought some – albeit limited – insight on the views of the U.S. Department of Justice (DOJ), which enforces both Titles II and III of the Americans with Disabilities Act (ADA), and the U.S. Department of Education’s Office for Civil Rights (OCR), which is a designated investigative agency under Title II of the ADA and enforces Section 504 of the Rehabilitation Act as applied to educational institutions. This article provides an overview of the more significant developments that have occurred in 2018, as well as recommendations for navigating this evolving area of the law.

The Agencies

U.S. Department of Justice, Civil Rights Division

2018 commenced with the DOJ formally withdrawing its long-awaited rulemakings to address website accessibility under the ADA. In July 2010, coincident with the 20th anniversary of the ADA, DOJ had announced its intent to issue regulations specifically addressing an entity’s obligations with respect to websites under Titles II and II of the ADA. See 75 Fed. Reg. 43,460 (July 26, 2010). On December 26, 2017, however, DOJ withdrew its previously issued Advance Notices and Supplemental Advance Notice of Proposed Rulemaking, after having designated them as “inactive” in July 2017. See 82 Fed. Reg. 60,932 (Dec. 26, 2017). In its Notice of Withdrawal, DOJ indicated that it was evaluating whether promulgating specific Web accessibility standards through regulations is necessary and appropriate to ensure compliance with the ADA. Id. DOJ’s most recent regulatory agenda issued on October 17, 2018, does not indicate any intent to promulgate regulations regarding website or digital accessibility.

The withdrawal of these rulemakings and the increasing incidence of litigation and demand letters from potential litigants prompted U.S. Representative Ted Budd (R-NC), joined by more than 100 members of Congress, to urge DOJ to address the situation. In its response letter dated September 25, 2018, DOJ set forth its current views on the issue of website accessibility. DOJ reiterated its position that the ADA applies to public accommodations’ websites, which it first articulated over 20 years ago, and that absence of regulations specifically addressing websites does not provide a basis for noncompliance with the ADA’s requirements. By letter dated September 9, 1996, in response to an inquiry by U.S. Senator Tom Harkin (an original sponsor of the ADA), DOJ had stated that “[c]overed 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.” At that time, DOJ noted that a covered entity could satisfy its obligations under the ADA either by providing full accessibility through the Internet directly, or alternatively by offering “other alternate accessible formats, such as
Braille, large print, and/or audio to people with visual impairments,” and noting the availability of such materials in text format on the web page, along with instructions for obtaining the materials in accessible format.

DOJ’s position that use of alternative methods is an acceptable method of providing access to websites subsequently evolved, especially after issuance of WCAG 2.0. WCAG 2.0 is a voluntary set of guidelines issued by W3C’s Web Accessibility Initiative. It sets forth a number of “Success Criteria,” categorized into three different levels – A, AA and AAA. In June 2003, DOJ had issued technical assistance guidance regarding the accessibility of state and local government websites under Title II of the ADA and Section 504. See Accessibility of State and Local Government Websites to People with Disabilities (June 2003), available at https://www.ada.gov/websites2.htm. In this guidance, DOJ identified the first version of WCAG (issued in May 1999) and the standards issued under Section 508 of the Rehabilitation Act (Section 508) for federal government websites as resources for making websites accessible. DOJ thereafter began incorporating website accessibility requirements into certain of its settlement agreements with entities subject to Title II of the ADA. See, e.g., Settlement Agreement with Green Bay, Wisconsin, DJ #204-85-110, ¶¶ 44-45 (Aug. 5, 2004), available at https://www.ada.gov/GreenBaySA.htm; Settlement Agreement with Frederick, Maryland, DJ #204-35-2345, ¶¶ 32-33 (Aug. 5, 2004), available at https://www.ada.gov/fredericksa.htm.


DOJ’s September 25, 2018, response suggests that strict adherence to WCAG 2.0 AA or any other voluntary standard may not be required. While DOJ reiterated that the lack of specific regulations or standards does not absolve an entity from complying with the ADA’s requirements, it further noted that
Absent the adoption of specific technical requirements for websites through rulemaking, public accommodations have flexibility in how to comply with the ADA’s general requirements of nondiscrimination and effective communication. Accordingly, noncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA. (Emphasis added.)

DOJ did not elaborate further on the “flexibility” a covered entity may have in complying with the ADA. DOJ’s response indicates that, at least in its current view, failure to fully conform a website or other digital software or technology to a voluntary technical standard, such as WCAG, does not automatically give rise to liability under the ADA. As discussed further below, however, courts and private litigants have used WCAG 2.0 AA in evaluating whether a website is accessible and in framing injunctive relief with respect to remediation of websites. Additionally, although under the current administration DOJ does not appear to be as actively pursuing settlements or participating in litigation in this area, private litigants are filing increasing amounts of litigation.

U.S. Department of Education, Office for Civil Rights (OCR)

2018 similarly brought changes to OCR’s approach to administrative complaints, including those regarding digital accessibility. On March 5, 2018, OCR updated its Case Processing Manual to address bulk or mass complaints, subjecting them to dismissal without investigation. Complaints subject to dismissal included those OCR determined to be “a continuation of a pattern of complaints previously filed with OCR by an individual or group against multiple recipients or complaint[s] filed for the first time against multiple recipients that, viewed as a whole, places an unreasonable burden on OCR’s resources.” OCR’s rationale was to prioritize its resources and better manage its caseload. The volume of complaints OCR received increased from 5,805 in FY 2006 to 12,837 in FY 2017, and complaints alleging disability discrimination accounted for 43% of those filed in FY 2017. See OCR Fiscal Year 2019 Budget Request, at Z-20, Z-21, available at https://www2.ed.gov/about/overview/budget/budget19/justifications/z-ocr.pdf. OCR also reported that as of September 30, 2017, 58% of the complaints received were pending over 180 days. Id. at Z-22. Pursuant to this “mass complaint” provision, OCR reportedly dismissed nearly 700 complaints filed by just five individuals.

On November 19, 2018, OCR reversed course, removed the provision from the Manual, and indicated that it would conduct investigations into the complaints that had been dismissed. The reversal came after several civil rights groups filed suit asserting that the March 2018 revisions to OCR’s Case Processing Manual violated the Administrative Procedure Act. See National Federation of the Blind et al. v. U.S. Department of Educ., No. 1:18-cv-01568-TDC (D. Md.) (filed May 31, 2018).

Prior to the March 2018 revision to its Case Processing Manual, OCR had entered into several resolution agreements addressing digital accessibility under Section 504 of the Rehabilitation Act and/or Title II of the ADA. In the higher education context, campus technology covered by such agreements includes not only public facing websites, but also
intranets, learning management systems, financial aid and admissions portals, library resources, and all student-facing technology. While certain of these agreements afford institutions flexibility to choose the particular technical standards they would use to determine accessibility (e.g., WCAG 2.0, the former Section 508 Standards), in 2015 OCR began to specify particular technology standards for assessing accessibility, including WCAG 2.0 and other recommended guidelines issued by W3C, such as the Web Accessibility Initiative Accessible Rich Internet Applications Suite (WAI-ARIA). See Resolution Agreement with University of Phoenix, OCR No. 08-15-2040 (June 12, 2015), available at https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/08152040-b.pdf; Resolution Agreement with Spokane School District No. 81, OCR Reference No. 10171197 (May 30, 2017), available at https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/10171197-b.pdf. As we proceed into 2019, it will be interesting to observe whether and/or the degree to which OCR provides institutions with “flexibility” in making their websites and digital content accessible.

The Courts

With the change in administration, more focus has shifted to the courts. To date, the majority of federal litigation (or demand letters threatening such litigation) regarding digital accessibility has been brought under Title III of the ADA. These cases involve a wide array of places of public accommodation. While they pertain primarily to websites, some also have involved mobile applications and point-of-sale devices. Cases filed against postsecondary institutions typically are brought under Section 504, as well as either Title II or Title III of the ADA. Similar to the administrative complaints noted above, such cases have covered a range of campus technology, including Massive Open Online Courses. Cases also are being pursued in state court under state law.

The vast majority of cases have resulted in settlements, typically prior to any decision by the presiding court. Case decisions rendered typically have focused on certain threshold issues: 1) whether a website is covered under the ADA (either as a public accommodation itself, or as benefit, service, or communication of a public accommodation); 2) whether advancement of claims absent promulgation of specific regulations and/or adoption of standards to address website or digital accessibility violates constitutional due process; and 3) whether such cases should be deferred under the primary jurisdiction doctrine, pending issuance of regulations by the enforcing agency.

The first issue – whether a website is covered under the ADA – has been addressed primarily in litigation under Title III of the ADA, which covers places of public accommodation. See 42 U.S.C. § 12182(a). Among the federal district courts that have addressed whether claims involving websites may be brought under Title III of the ADA, many have held either that such claims are covered where the website has a “nexus” to a physical place of public accommodation, or that Title III is not restricted to physical places, but also encompasses the websites of entities that operate solely online and whose operations fit within one of the twelve enumerated categories of places of public accommodation. See Gil v. Winn-Dixie Stores, Inc., 257 F. Supp. 3d 1340 (S.D. Fla. 2017) (website “is heavily integrated with [] physical store locations and operates as a gateway to physical store locations”); National Federation of the Blind v. Scribd Inc., 97 F. Supp. 3d 565 (D. Vt. 2015) (online reading library covered under Title
III). To date, the U.S. Courts of Appeals for the Ninth and Eleventh Circuits have each issued unpublished decisions holding that such claims are covered insofar as the website has a nexus to a physical place of public accommodation. See Earll v. eBay Inc., 599 Fed. Appx. 695 (9th Cir. 2015) (“place of public accommodation” requires “some connection between the good or service complained of and an actual physical place”); Haynes v. Dunkin’ Donuts LLC, 741 Fed. App’x 752 (2018) (alleged inaccessibility of the website denies access to services of the shops that are available on the website). The Seventh Circuit also has stated, in a case concerning the terms of an insurance policy, that Title III of the ADA extends to websites and facilities “in electronic space.” See Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999). There currently are cases pending before both the Ninth and Eleventh Circuits in which the courts are expected to issue published decisions addressing this issue. See Robles v. Domino’s Pizza, LLC, No. 17-55504 (9th Cir.); Gil v. Winn-Dixie Stores, Inc., No. 17-13467-CC (11th Cir).

By contrast, Section 504 of the Rehabilitation Act covers any “program or activity” (which is defined to include all operations of a postsecondary institution) receiving federal financial assistance. 29 U.S.C. § 794(a)-(b). Title II of the ADA covers “services, programs or activities” of any public entity. 42 U.S.C. § 12132. As the vast majority of postsecondary institutions receive some form of federal financial assistance and publicly owned institutions are covered under Title II, postsecondary institutions are vulnerable to potential claims irrespective of whether Title III of the ADA encompasses websites.

The issues of due process and the primary jurisdiction doctrine have yield mixed results in the district courts and are currently pending before the Ninth Circuit in Robles v. Domino’s Pizza, LLC, and before the Eleventh Circuit in Gil v. Winn-Dixie Stores, Inc. Oral arguments in both cases were held in October 2018, with decisions anticipated in 2019. The oral argument in Winn-Dixie Stores, Inc. involved extensive focus from the court on the absence of regulations, the fact that WCAG 2.0 is subject to change (as evidenced by the issuance of WCAG 2.1), and the fact that full compliance with WCAG 2.0 may not be possible. Oral argument in Domino’s Pizza, LLC, included comments from the presiding judges that that state of the law given DOJ’s failure to complete its rulemaking is “highly undesirable,” but also that despite the absence of regulations, the statute remains and that courts must “do their best” to apply the statute.

Other issues addressed by the courts in 2018 include mootness, whether based on prior resolution of claims and/or modification of the website, and standing. (“Mootness” occurs when there is no longer a “live” dispute for a court to resolve due to a change in the law or other change in circumstance that eliminates the dispute.) In Haynes v. Hooters of America, LLC, 893 F.3d 781 (11th Cir. 2018), the Eleventh Circuit rejected the argument that the defendant’s prior settlement agreement with a different claimant, in which defendant agreed to modify its website in accordance with WCAG 2.0 A, mooted the subsequent claim. The Eleventh Circuit noted that the record did not indicate whether the website had been successfully remediated, that the relief sought (that the website’s accessibility be “continually updated and maintained”) remained a live issue, and that the current plaintiff was not a party to the prior agreement. The fact that websites and their content may frequently change also has led to disputes as to whether actual remediation of a website moots a claim. In Carroll v. New People’s Bank, Inc., 2018 WL 1659482, No. 1:17-cv-00044 (W.D. Va. Apr. 5, 2018), the court concluded it did, reasoning that the defendant would not likely return to a less accessible website after having “substantially expanded” the accessibility of its website, which the court determined was “not a minor undertaking.”
contrast, the court in *National Federation of the Blind v. Target*, 582 F. Supp. 2d 1185 (N.D. Cal. 2007), noted that the ongoing addition of new web pages argued against finding the claim moot.

Courts have also closely scrutinized whether individual plaintiffs have standing to bring claims regarding the accessibility of a website. Cases have been dismissed for lack of standing where the plaintiff did not allege any specific intent to use the website or the defendant’s physical facilities in the future. In *Price v. Celebration Golf Co., LLC*, 2018 WL 3056077, No. 6:18-cv-429-Orl (M.D. Fla. June 20, 2018), the case was dismissed (without prejudice) where the plaintiff did not indicate any specific intent to use the defendant’s golf course and provided only a vague description of how the allegedly inaccessible website impeded use of the golf course. In *Carroll v. New People’s Bank, Inc.*, 2018 WL 1659482, No. 1:17-cv-00044 (W.D. Va. Apr. 5, 2018), the court held that a plaintiff who lived nearly 300 miles from the defendant’s closest bank branch lacked standing because he did not allege that he actually uses or plans to use the bank’s online banking or branch services. In *Thurston v. FCA US, LLC*, 2018 WL 700939, No. EDCV 17–2183–JFW (C.D. Cal. Jan 26, 2018), the court similarly held that the plaintiff, who failed to allege any intent to visit the defendant’s auto dealership, or to return to its website to locate any dealerships, lacked standing.

To date, there remain several additional issues that have not been addressed clearly by the courts. Among these are the following:

- How should accessibility be measured? If 100% accessibility 100% of the time is not a practical standard given the volume of content and its continuously changing nature, and some content by its nature cannot be made accessible, what degree of “noncompliance” establishes legal liability?

- What alternate methods of providing access are acceptable, and under what circumstances may they be used as opposed to making a website or other technology directly accessible? Is providing an alternate accessible version of a website or particular technology acceptable, and under what circumstances? Is it acceptable if the alternate version provides some but not all of the same functionality?

- Must all content be made accessible, or alternatively, can older “legacy” or “archived” content that may be used infrequently be provided in accessible format upon request? Both DOJ and OCR have used this approach in certain settlement agreements.

- How should specific success criteria in WCAG 2.0 AA be interpreted? While WCAG 2.0 AA contains success criteria that are intended to be objectively testable, there are subjective aspects to its application. Consultants working in this field may (and often do) differ in their interpretations. For example, WCAG 2.0 AA requires that substantive text descriptions be provided for non-text content such as images, but decorative or background images are excepted. While the provision of a text description can be objectively determined, whether a particular image conveys meaningful information or is merely decorative can...
be a subjective determination. Similarly, the issue of whether a text description itself conveys adequate information is inherently subjective.

- In addition to WCAG, what other technology standards or guidelines might a covered entity be required to consider? In the education context, other standards that have been incorporated into settlement agreements (including in some OCR agreements) are the Web Accessibility Initiative Accessible Rich Internet Applications Suite (WAI-ARIA) for web content; W3C’s Authoring Tool Accessibility Guidelines (ATAG) 2.0 for software used to create web content; W3C’s User Agent Accessibility Guidelines (UAAG) 1.0 for web browsers, media players, and assistive technologies; W3C’s Guidance on Applying WCAG 2.0 to Non-Web Information and Communications Technologies (WCAG2ICT) for non-web software and content; W3C’s MathML 3.0 for digital mathematical and scientific notation; and the DAISY Consortium’s Digital Accessible Information System (DAISY) Standard or the International Digital Publishing Forum’s (IDPF) EPUB 3 specification for digital publications and documents.

W3C’s working draft “Mobile Accessibility: How WCAG 2.0 and Other W3C/WAI Guidelines Apply to Mobile,” dated Feb. 26, 2015, also has been relied upon by plaintiffs with respect to mobile content and mobile apps.

WCAG 2.1

W3C’s issuance of WCAG 2.1 in June 2018 has covered entities questioning what technical guidelines or standards an entity should rely upon to define and provide accessibility in the digital realm. WCAG 2.1 retains WCAG 2.0 in its entirety, but adds 17 additional success criteria. The new success criteria are intended to address viewing of content on mobile devices as well as provide additional success criteria to improve the experience of individuals with “low vision” and cognitive impairments. Of the new success criteria, 5 are Level A, 7 are Level AA, and 5 are Level AAA. W3C’s overview of these additional success criteria can be accessed at https://www.w3.org/WAI/standards-guidelines/wcag/new-in-21/. The full WCAG 2.1, incorporating the WCAG 2.0 requirements and containing embedded links to additional technical guidance material, is available at https://www.w3.org/TR/WCAG21/. WCAG 2.0 as issued in December 2008 is available at https://www.w3.org/TR/WCAG20/.

In litigation, plaintiffs have relied upon requirements set forth in WCAG 2.0 AA in identifying alleged barriers on websites. Courts have similarly relied upon it in structuring injunctive relief. See Gil v. Winn-Dixie Stores, Inc., 257 F. Supp. 3d 1340 (S.D. Fla. 2017); Thurston v. Midvale Corp. et al., Case No. BC663214 (Cal. Super. Ct., Los Angeles May 21, 2018) (California Unruh Act). In addition to DOJ and OCR similarly relying on WCAG 2.0 AA in settlement agreements, WCAG 2.0 AA was adopted by the U.S. Access Board in January 2017 with respect to federal government websites under Section 508, and by the U.S. Department of Transportation in November 2013 with respect to airline websites under the Air Carrier Access Act. See 82 Fed. Reg. 5,790 (Jan. 18, 2017); 78 Fed. Reg. 67,882 (Nov. 12, 2013).

To date, neither the courts nor enforcing agencies have utilized the supplemental success criteria provided in WCAG 2.1. In November 2018, however, the National Federation of the
Blind announced a settlement agreement with Alameda County, California, in which the county agreed to utilize WCAG 2.1 AA in making its election website accessible. This is believed to be the first settlement agreement utilizing WCAG 2.1 AA, and it may presage further efforts to apply WCAG 2.1 AA in defining accessibility for websites and other electronic and information technology. Such efforts also may be enhanced as the technology industry itself shifts to WCAG 2.1 as a “best practice.” At present, however, WCAG 2.0 AA is the only version of WCAG to be adopted by any federal agency or utilized by the courts. Institutions should be cognizant, however, that state agencies may embrace WCAG 2.1 under state law, even if the federal courts have not yet done so.

What You Should Do

As the state of the law continues to evolve, higher education institutions must consider several factors in attempting to navigate and ensure compliance in the digital realm. Proactively doing so affords an institution better ability to control its process and timetable, in addition to mitigating legal risk. Below are several recommendations institutions should consider:

- Educate senior leadership with respect to not only the legal issues, but also the ongoing process that will be required to achieve and ensure compliance. The digital realm, including assistive technologies, is not static. As it changes, accessibility solutions, industry guidelines, and legal requirements also will change. Understanding that the process must be ongoing is a necessary foundation for both obtaining and sustaining leadership commitment and a successful process.

- Appoint an accessibility coordinator or alternatively designate a responsible individual (or individuals) to oversee compliance in the digital realm. Identification of a coordinator or responsible individual is a common component of agency settlements. Although many individuals may have a role in your compliance efforts, officially designating responsibility to a coordinator or a limited, core number of individuals and granting them the necessary authority to follow-through with oversight better enables your compliance efforts to stay on track.

- Adopt a written policy regarding the accessibility of your electronic and information technology. The lack of such a policy factors into both agency investigations and litigation. Having such a policy helps demonstrate commitment to providing accessibility, and it also is viewed as helpful in ensuring ongoing compliance. Policies regarding procurement of technology or related services should similarly address the accessibility of your procurements.

- Develop a compliance plan. This involves evaluating your electronic and information technology; formulating a prioritized timetable for remediating inaccessible technology or content, or alternatively providing an alternate solution for accessibility; and establishing a process for maintaining accessibility, such as periodic testing and reviews. Identifying interim solutions until the plan is fully implemented is also important. Obtaining input from campus constituencies with respect to accessibility and establishing priorities for remediation also has been a requirement in several agency settlement agreements.
• **Communicate to campus constituencies** your available accessibility resources, the manner in which they may obtain further assistance, and a mechanism for providing feedback. Providing a mechanism for individuals to obtain further assistance and response to any concerns in a timely manner mitigates the risk of concerns escalating to formal litigation.

• **Provide job-appropriate training.** Training should be provided not only for IT staff, but also for content producers, including faculty. Some agency settlement agreements have also included training for students, so that they are aware of available accessible technology, the process for requesting accommodations, and the manner in which they can report any concerns.

Given the current state of case law and the absence of specific regulations or other guidance from the enforcing agencies, a covered entity’s obligations in providing access in the digital realm remain vaguely defined. This vagueness will persist until the case law further develops or the enforcing agencies further address these issues in regulations or other guidance. In the interim, prior settlements and judgements are useful in identifying steps an entity can take to satisfy its obligations in the digital realm and key standards institutions might use to guide their approach to website and digital accessibility. Institutions should utilize those standards in following the recommended steps for pursuing continuous improvement in relation to website and digital accessibility. Doing so is the best course presently available for avoiding potential legal liability.

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