ACCESSIBILITY & TECHNOLOGY: NAVIGATING THE EVOLVING LANDSCAPE

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I. INTRODUCTION[1]

Academic institutions often face an even more rigorous analysis than other places of public accommodation when navigating the already-complicated laws and regulations governing the provision of accessibility to individuals with disabilities. Depending on what sources provide an academic institution with its funding, if it has both public and private elements, it could conceivably face overlapping and/or competing accessibility obligations as set forth in the Rehabilitation Act of 1973, Titles II and III of the Americans with Disabilities Act (supported by voluminous underlying regulations, guidance memorandums and settlement agreements), as well as equivalent state and local laws.

Over the past several decades, most academic institutions have developed an understanding about how these various wide-reaching accessibility obligations impact their brick and mortar facilities across campus (*e.g.*, stadiums, dining halls, dormitories, and classroom buildings) and create a need to modify policies, practices, and procedures (*e.g.*, test taking, dormitory selection). However, in the past several years, as academic institutions – like society-at-large – continue to embrace and incorporate emergent technologies into their operations, an entirely new series of related accessibility concerns have arisen. Suddenly, issues including website accessibility and the use of e-readers (and other new technology) in the classroom have captured the attention of numerous governmental entities and advocacy groups and moved to the forefront of the accessibility landscape.

Complicating efforts to balance the use of new technologies with accessibility obligations is the current lack of clearly-developed sources of legal obligations supported by well-defined regulations or standards. The evolving landscape is currently based on overarching civil rights concepts (*e.g.*, "full and equal enjoyment" and "effective communication") and antiquated technical requirements that are in the process of being significantly revised. Therefore, for now, unlike when addressing the more traditional design/construction matters, academic institutions looking to utilize technology in an accessible fashion cannot simply refer to specific guidelines or codes adopted by the government. Instead, operating under primarily general civil rights obligations combined with a variety of more current non-binding guidelines offered by private entities, each academic institution is left to make its own determinations concerning what level of accessibility is necessary when adopting new technology and how best to achieve that level.

After an initial discussion of the various sources of accessibility laws and regulations, this outline examines the primary issues related to website accessibility, e-readers, and technological

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issues including auxiliary aids and services. The outline concludes by suggesting some best practices academic institutions should consider adopting as they continue to confront the ever-evolving issue of utilizing accessible technology.

II. SOURCES OF ACCESSIBILITY OBLIGATIONS

The hallmark civil rights law for individuals with disabilities is the Americans with Disabilities Act of 1990 ("ADA"), a comprehensive federal civil rights statute designed to eradicate discrimination on the basis of disability. The ADA is essentially an amalgam of two major civil rights laws – the Civil Rights Act of 1964 and the Rehabilitation Act of 1973 ("Rehab Act") – together which provide the ADA's basis for coverage and enforcement, defining disability, and determining what constitutes discrimination. With these two laws forming the foundation, Congress has continually identified and passed legislation to protect individuals with disabilities in a variety of areas (*e.g.*, Architectural Barriers Act of 1968, the Air Carriers Access Act of 1986, and the Fair Housing Act of 1988).

Depending on the situation, the duties of an academic institution may be bound by federal laws pertaining to the public and private spheres, as well as related state and local laws. Academic institutions receiving federal financial assistance are obligated under the anti-discrimination laws regulating the conduct of public entities. For example, the Rehab Act prohibits discrimination in federal programs and facilities by all recipients of federal financial assistance. The ADA prohibits discrimination against individuals with disabilities in employment, Title I; and with accessing goods and services, both in the public sphere, Title II (state and local), and the private sphere, Title III. These two laws are closely related as the experiences of the Rehab Act set the stage for the ADA provisions. Their distinctive focus does not merely prohibit discrimination but also imposes additional affirmative obligations upon the required industries (*e.g.*, education, telecommunications, housing, transportation).

A. The Rehabilitation Act of 1973

1. Overview The Rehabilitation Act of 1973 makes it illegal for the federal government, federal contractors and any entity receiving federal financial assistance to discriminate on the basis of disability. Rehabilitation Act of 1973 § 104, 29 U.S.C. § 794 (2006). Covered entities also are required to ensure that their employment practices do not discriminate on the basis of disability.

2. Section 502: created an executive agency named the Architectural and Transportation Barriers Compliance Board, which is now known as the Access Board ("Access Board").

   (a) The Access Board's membership is comprised of 13 Presidential appointees, a majority of who must be individuals with disabilities, and 12 executive-level members of federal departments representing the Department of Health and Human Services; Department of Transportation; Department of Housing and Urban Development; Department of Labor; Department of the Interior; Department of Defense; Department of Justice; General Services Administration;

Department of Veterans Affairs; United States Postal Service; Department of Education; and Department of Commerce.

(b) Among its many obligations, the Access Board develops advisory information for, and provides appropriate technical assistant to individuals or entities with rights or duties under, among other statutes, Titles II and III of the ADA; guidelines for accessibility of telecommunications equipment and customer premises equipment under Section 255 of the Telecommunications Act of 1996; and the standards for accessible electronic and information technology under Section 508 of the Rehabilitation Act. 29 U.S.C. § 792(b).

3. Section 504: prohibits discrimination on the basis of disability: "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794(a) (2006). Thus, Section 504 also obligates state and local governments to ensure that persons with disabilities have equal access to any program services or activities receiving federal financial assistance.

(a) "[T]he term 'program or activity' means all of the operations of . . . a college, university, or other postsecondary institution, or a public system of higher education; or a local educational agency . . ., system of vocational education, or other school system . . ." 29 U.S.C. § 794(b).

(b) The applicability of Section 504 is determined by the source of money an entity receives. If an academic institution receives federal financial assistance from the U.S. Department of Education, then it is obligated under Section 504 not to discriminate against any student on the basis of disability. Thus, Section 504 applies to many areas of post-secondary education, including admissions and recruitment, academics, housing, and athletics.

(c) The U.S. Department of Education, Office for Civil Rights ("OCR") enforces Section 504 as it applies to educational institutions.

(d) Section 504 requires post-secondary academic institutions to provide auxiliary aids and services so that students with impaired sensory, manual, or speaking skills can participate fully in the school's programs. Nondiscrimination on the Basis of Handicap in Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 104.44 (2007).

(i) Auxiliary aids may include, among other things, sign language interpreters, Braille readers, and classroom equipment designed to assist students. 34 C.F.R. § 104.44(d)(2).

(e) However, "[r]ecipients [of federal financial assistance] need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices of services of a personal nature." 34 C.F.R. § 104.44(d)(2).

B. The Americans with Disabilities Act

1. Title I of the ADA ("Title I"): prohibits private employers from discriminating against qualified individuals with a disability in regard to employment. "Disability" means "a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment." Americans with Disabilities Act of 1990 § 1, 42 U.S.C. § 12102(1) (codified as amended by The ADA Amendments Act of 2008).[2] Employers are required to provide reasonable accommodations to qualified individuals with a disability who can perform the essential functions of the job with or without accommodation, but not if such an accommodation would constitute an undue hardship. 42 U.S.C. §§ 12111-12117. The ADA charges the Equal Employment Opportunity Commission ("EEOC") with creating regulations to implement Title I. 42 U.S.C. § 12116. The EEOC investigates all charges of Title I violations. 42 U.S.C. § 12117.

   (a) The ADA Amendments Act of 2008 ("ADAAA") adopted a series of definitional alterations, modified previous standards, and nullified several Supreme Court decisions. The total effect of these revisions was to shift the focus in disability cases from disputing whether the employee has a disability to addressing whether there is a reasonable accommodation suitable for the employee. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

   (b) ADAAA expanded the calculus for interpreting "disability", in part by clarifying and expanding the scope of: (i) "major life activities;" and (ii) to what extent an impairment must limit a major life activity to be considered "substantially limiting." ADAAA also extended the boundaries of "major life activities" to encompass "major bodily functions."

   (c) In March 2011, pursuant to ADAAA, the EEOC announced its revised Title I regulations.

      (i) Under the revised regulations, a limitation need not "significantly" nor "severely" restrict a major life activity in order to be considered "substantially limiting." Rather, it is sufficient that an individual's ability to perform a single major life activity is limited when compared to that of "most people in the general population." 29 C.F.R. § 1630.2

   (d) Thus ADAAA and the revised regulations direct employers to focus their efforts on reasonably accommodating employees with disabilities, so long as the worker can perform the essential functions of the job. *Id*.

2. Neither ADAAA nor the Title I revised regulations changed the definitions of "undue hardship" or "reasonable accommodation," but rather, they clarified that the purpose of ADAAA was "to convey that the question of whether an individual's impairment

[2] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008)

is a disability under the ADA should not demand extensive analysis." 29 C.F.R. § 1630.2(j)(1)(iii).

3. Title II of the ADA ("Title II"): prohibits discrimination on the basis of disability: "[N]o 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 a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

   (a) Title II covers public entities, which are state or local governments and any department, agency or other instrumentalities of a state or local government. 42 U.S.C. § 12131.

   (b) A public entity's programs, activities, and services, when viewed in their entirety, must be readily accessible to, and usable by, individuals with disabilities.

   (c) Title II coverage depends on which entity is operating the organization. Title II applies to all the activities of State and local governments whether or not they receive federal funding (*e.g.,* a state university would be obligated under Title II because it is operated by a state agency).

   (d) Title II regulations require that existing facilities of public entities "[s]hall operate each service, program or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This obligation does not:

   - necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities;
   - require a public entity to take any action that would threaten or destroy the historic significance of an historic property; or
   - require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program or activity or in undue financial and administrative burdens. . . ." 28 C.F.R. § 35.150.

     In other words, a public entity need not make structural modifications just because they could be readily achievable if other effective methods for accessibility exist (*e.g.*, equipment, aids, alternative locations, policy modification).

   (i) A public entity must reasonably modify its policies, practices, or procedures to avoid discrimination, unless doing so would cause a fundamental alteration or constitute an undue burden.

   (ii) By focusing on "program accessibility," Title II entities often have more flexibility in addressing accessibility for existing facilities than those operating under Title III.

(e) In September 2010, the U.S. Department of Justice ("DOJ") promulgated the Revised ADA Regulations implementing Titles II and III, which include revised ADA Accessibility Guidelines for Buildings and Facilities ("ADAAG") (collectively, the "2010 Standards"). Similar to the 1991 Standards, the 2010 Standards affect all industries, including academic institutions.

(i) With regard to barrier removal obligations, the 2010 Standards permit existing facilities to avail themselves of an element-by-element safe harbor (*i.e.* specific elements in covered facilities that were built or altered in compliance with the 1991 Standards are *not* required to comply with the 2010 Standards until those elements are next altered). If the element does not comply with the 1991 Standards or was not initially addressed in the 1991 Standards, it is not eligible for the safe harbor protection; consequently, currently non-compliant design elements must comply with the entities' choice of either the 1991 or the 2010 Standards (with no "cherry-picking" allowed) by March 15, 2012, the effective date of the design/construction changes in the 2010 Standards. After March 15, 2012, all covered entities must comply with the 2010 Standards.

4. Title III of the ADA ("Title III"): prohibits places of public accommodation from discriminating "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182; 28 C.F.R. § 36. 201.

(a) The statute provides 12 categories of private entities that are considered a "place of public accommodations" (42 U.S.C. § 12181) which "means a facility, operated by a private entity, whose operations affect commerce and fall within at least one of [twelve] categories." 28 C.F.R. § 36.104.

(i) Among the categories are many facilities that exist on college and university campuses: for example, theaters, lecture halls, stadiums, restaurants, establishments serving food, motion picture houses, day care centers, gymnasiums, and retail stores. 42 U.S.C. § 12181; 28 C.F.R. § 36.104.

(b) The broad prohibited activities include: denying participation or opportunity to participate in programs or activities; providing unequal benefits to those offered to individuals without disabilities; providing separate benefits (*i.e.* not having an integrated experience); and discriminating because of a relationship or association with persons with disabilities.

(c) Specifically, places of public accommodation must: (1) not establish or impose eligibility criteria that screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, and accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered; (2) make reasonable

modifications in policies, practices, and procedures when such modifications may be necessary to afford any goods, services, facilities, privileges, advantages, or accommodations, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations; (3) "take those steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, *i.e.*, significant difficulty or expense." 28 C.F.R. § 301; 28 C.F.R. § 36.302; 28 C.F.R. § 36.303; and (4) remove architectural and communication barriers that are structural in nature to the extent that they are "readily achievable" (without much difficulty or expense). 28 C.F.R. § 36.304; and 29 U.S.C. § 794b (a).

(d) New Construction and Alterations:

(i) Facilities that are modified or altered after January 26, 1992, must comply with ADAAG so as to ensure compliance "to the maximum extent feasible" (excluding changes that are only cosmetic in nature and do not affect the usability of the facility). 28 C.F.R. § 36.402;

(ii) Facilities newly constructed for first occupancy after January 26, 1993 must be built in accordance with ADAAG unless doing so would meet the very narrow exception for structural impracticability. 28 C.F.R. § 36.401.

(e) Furthermore, Title III establishes that, "Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals." 42 U.S C. § 12189.

(i) Testing entities must offer examinations and courses relating to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes, in a place and a manner accessible to persons with disabilities or offer alternative accessible arrangements.

C. State and Local Laws

1. Academic institutions must also be aware that most states and localities have adopted human rights/anti-discrimination laws which prohibit discrimination on the basis of disability – many of which specifically address accessibility obligations. Moreover, most building codes also contain specific requirements regarding accessible design and construction.

III. WEBSITE ACCESSIBILITY

The Internet is a regular presence in the lives of most individuals. Internet users access websites to retrieve and provide information and participate in various online activities, including purchasing items from retailers, making reservations for travel and entertainment, and applying for admission to academic institutions and jobs. Depending on how websites providing such online services are developed, they may not be accessible to individuals with disabilities. For example, individuals who are have low vision may not be able to see small text on a screen if the website does not provide for screen magnification, and individuals who are deaf cannot understand aural-only content in online media if no text alternative exists. The legal obligations facing those websites currently depends on whether they are regarded as a public entity — thus likely covered by both Sections 504 and 508 of the Rehab Act, as well as Title II of the ADA — or, if they are a private entity, thus arguably covered by Title III of the ADA.

Section 508 of the Rehabilitation Act requires federal agencies and contractors of federal agencies to make their electronic and technology information accessible to individuals with disabilities. The current Section 508 regulations require that Web-based intranet and internet information conform to the same generally accepted standards of accessible design. With the proposed revisions to the Section 508 standards, the Access Board is looking to expand the definition of "electronic and technology information" to include email and other types of official communication including website content. As stated in the ANPRM, published in the *Federal Register* on March 22, 2010, "The draft provisions apply to a wide range of content formats [to be] harmonized with WCAG 2.0"[3] (*See* section G of this part below for discussion of The Web Content Accessibility Guidelines 2.0 ("WCAG 2.0").

For private entities, there is currently no clear and definite statutory or regulatory guidance as to whether websites are covered by Title III of the ADA, and thus required to be accessible to individuals with disabilities. In the small number of cases on this topic, there is a split among the courts, with some utilizing a close textual reading of the statutes and regulations to find that Title III is limited to physical structures while others are applying Title III's overarching civil rights requirements to include less traditional entities.

Despite the lack of specific language in the ADA or its current regulations on website accessibility and the circuit split on the issue, DOJ contends it "has been clear that the ADA applies to Web sites of private entities that meet the definition of 'public accommodations' . . ."[4] DOJ maintains that it has held its position that Title III applies to such websites over the past decade in various forms including: informal letters, amicus briefs, settlement agreements, publications, testimony before Congress, and speeches by Department officials.

Notwithstanding DOJ's insistence that Title III has always obligated private places of public accommodation to provide accessible websites, it has recognized that "inconsistent court

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[3] *See* Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; Telecommunications Act Accessibility Guidelines; Electronic and Information Technology Accessibility Standards, 75 Fed. Reg. 13458 (proposed Mar. 22, 2010) (to be codified at 36 C.F.R. pts. 1191, 1193, and 1194).

[4] Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43464 (proposed July 26, 2010) (to be codified at 36 C.F.R. pts. 35 and 36).

decisions, differing standards for determining [w]eb accessibility, and repeated calls for Department [of Justice] action indicate remaining uncertainty regarding the applicability of the ADA to websites of entities covered by Title III."[5] To that end, DOJ published an Advanced Notice of Proposed Rulemaking titled Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations. The ANPRM's purpose is to "revis[e] the ADA's title II regulation to establish requirements for making the services, programs, or activities offered by State and local governments to the public via the Web accessible" and "revis[e] the regulations implementing title III of the Americans with Disabilities Act (ADA or Act) in order to establish requirements for making the goods, services, facilities, privileges, accommodations, or advantages offered by public accommodations via the Internet, specifically at sites on the World Wide Web (Web), accessible to individuals with disabilities."[6]

Based on the current Section 508 requirements, DOJ's steadfast insistence on Title III's applicability to websites, and the recently published ANPRM on website accessibility – coupled with increased litigation brought by disability rights advocacy groups against a variety of entities including academic institutions – academic institutions should become well-versed on the issue of website accessibility.

A. Federal Law Accessibility Obligations For Websites of Public Entities

1. Section 504. (*See* Section II(A)(3) *supra*).

2. Section 508. Section 508 was adopted for federal agencies and contractors of federal agencies, to eliminate barriers in information technology, to make available new opportunities for people with disabilities, and to encourage development of technologies to help achieve these goals. Workforce Investment Act of 1998, Pub. L. No. 105-220, 112 Stat. 936 (1998).

   (a) Section 508 requires federal agencies and contractors of federal agencies to make information and data, including information and data on federal pages available on the Internet or the World Wide Web, available for access and use by individuals with disabilities. 29 U.S.C. § 794d(a)(1)(A).

   (b) Assistive Technology Act of 1998 ("AT Act"), as amended, (Pub.L.108-364, 29 U.S.C. §3001) requires States to provide an assurance of compliance with Section 508 as a condition to receiving Federal funds for the State Grants for Assistive Technology.

   (c) Section 508 Standards

      (i) The Access Board is charged with developing minimum guidelines and requirements for accessible electronic and information technology. 29 U.S.C.

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5 *Id.*

6 Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460 (proposed July 26, 2010) (to be codified at 36 C.F.R. pts. 35 and 36).

§ 794d(a)(2)(A). Individuals with disabilities may file a complaint with "the Federal department or agency alleged to be in noncompliance" or bring civil action in federal court against the non-compliant agency. 29 U.S.C. § 794d(f)(1998).

(ii) The current Section 508 standards were published in December 2000, soon after the enactment date of the Section 508.

(iii) The standards define the term "electronic and information technology" as including, but not limited to, World Wide Websites. Electronic and Information Technology Accessibility Standards, 65 Fed. Reg. 80504 (Dec. 21, 2000) (codified at 36 C.F.R. pt. 1194), 36 C.F.R. § 1194.4.

(iv) Technical standards focus on functional capabilities of, for example, software applications and operating systems, web-based information or applications, and video and multimedia products among other items. 36 C.F.R. § 1194.21-1194.26.

- *See* 36 C.F.R. § 1194.22 for a full listing of the technical standards for Web-based intranet and internet information and applications. The Section 508 Standards are located at 36 C.F.R. §§ 1194.1-1194.41.

3. Section 508 Update

(a) The Access Board is currently in the process of amending the Section 508 standards. On March 22, 2010, it published an Advanced Notice of Proposed Rulemaking ("ANPRM") and solicited comments regarding updates to the standards for electronic and information technology.

(b) One of the Access Board's goals is to harmonize the Section 508 standards with the World Wide Web Consortium's ("W3C") Website Content Accessibility Guidelines ("WCAG 2.0"), guidelines published in 2008 intended to help web developers create websites that are accessible to individuals with disabilities. (*See* Section G *infra* for a full discussion of WCAG 2.0).

(c) Other goals include:

- Abandoning the Access Board's prior regulatory approach of structuring the technical provisions based on discreet product types in favor of a more elastic organizational approach in which provisions are grouped by the features or capabilities of a product.
- Limiting "comparable access" to electronic information and data regardless of transmission or storage method to "official communications" by Federal agencies or agency representatives. "Official communications" refer to: (a) communications to Federal employees that contain information necessary for those employees to perform their job functions and information relevant to enjoyment of the benefits and privileges of employment; or (b)

communications by a Federal agency to members of the general public that contain information necessary for the conduct of official business with the agency.

- Requiring Federal agencies to provide alternative methods of communication through help desks and technical support services and to provide end-user support and materials in alternate formats.
- Providing for enhanced auditory features for individuals with limited hearing, including at least one mode of operation that improves clarity, reduces background noise, and allows for volume control.
- Requiring Information and Communication Technology ("ICT") with closed functionality to be accessible by individuals with disabilities without requiring assistive technology other than personal headsets.
- Requiring that when text, images of text, and symbols are provided on hardware for product use, it must also be provided in at least one other mode of operation that conveys the same information in electronic format, unless an exception applies.

(d) In a September 1, 2011 webinar, a Senior Accessibility Specialist at the Access Board stated that he anticipated that a draft NPRM will be released in fall 2011, with a comment period of 90 days, followed by review by the White House Office of Management and Budget for at least 90 days. The tentative effective date of the Section 508 revised standards is expected some time in 2013.

B. Federal Law Accessibility Obligations For Websites of Private Entities

1. Title III

(a) The threshold issue when considering website accessibility under Title III is whether the obligations set forth in Title III of the ADA for "places of public accommodation" are limited to actual physical structures, or whether the definition extends to websites.

(b) The ADA does not explicitly define whether a "place of public accommodation" must be a physical place or facility, nor does it directly address whether Title III could be read or interpreted to apply to a non-physical place or facility.

(c) Neither the 1991 Title III regulations nor the 2010 Standards expressly address website accessibility. In the supplementary information accompanying the 2010 Standards, DOJ expressed a deliberate decision to pass on the issue because, although many comments were submitted regarding the topic during the NPRM comment period, DOJ was not prepared to include website accessibility standards at the time the 2010 Standards were published.

(d) Despite DOJ's decision not to include language on website accessibility in the 2010 Standards, it expressed an intent to pursue the subject at a later time stating,

"Although the language of the ADA does not explicitly mention the Internet, the Department has taken the position that Title III covers access to Web sites of public accommodations [and] expects to engage in rulemaking related to Web site accessibility under the ADA in the near future."[7]

(e) On July 26, 2010, DOJ published its ANPRM regarding website accessibility standards. (*See* Section E *infra* for a full discussion of the Title III website accessibility ANPRM).

2. Case law

In the absence of specific legislation, it is not surprising that the threshold issue, whether Title III's applicability to "places of public accommodation" is limited to physical structures, has resulted in a circuit split.

Decisions Holding That Accessibility Obligations Do Not Extend Beyond Traditional Places Of Public Accommodation

(a) Sixth Circuit. In 1995, an individual with a hearing impairment alleged that the "blacking out" of a live broadcast of a football game unlawfully discriminated against individuals with hearing impairments in a disproportional way because of a lack of alternative telecommunications technology to otherwise access the game. The Sixth Circuit affirmed the District Court's dismissal of Plaintiff's Title III claim because the challenged service – the live telecast of a football game – was not offered by, or sufficiently linked to, a place of public accommodation – the stadium – stating, Although a [football] game is played in a 'place of public accommodation' and may be viewed on television in another 'place of public accommodation,' that does not suffice. Moreover, the plaintiffs' argument that the prohibitions of Title III are not solely limited to 'places' of public accommodation contravenes the plain language of the statute." The court relied on the Title III regulations that defined a "place" as "a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the twelve 'public accommodation' categories. 'Facility,' in turn is defined as 'all or any portion of buildings, structures, sites, complexes . . . or other real or personal property, including the site where the building, property, structure or equipment is located." *Stoutenborough v. Nat'l Football League, Inc.*, 59 F.3d 580, 583 (6th Cir. 1995) (citing 28 C.F.R. § 36.104).

(b) Third Circuit. In a 1998 case, *Ford v. Schering-Plough Corp.*, Plaintiff, who had a mental disability, argued that her employer's welfare benefits plan discriminated against her because the plan covered mental disabilities for a shorter period of time than for physical disabilities until the age of sixty-five. She alleged violations of both Title I and Title III. Plaintiff's Title III claim relied on the theory that the discriminatory insurance benefits plan was offered at an insurance office building.

[7] Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed Reg. 56236 (Sept. 15, 2010) (codified at 28 C.F.R. pt. 36).

The Third Circuit held that no Title III violation existed because the benefits did not qualify as a public accommodation: "The plain meaning of Title III is that a public accommodation is a place . . . This is in keeping with the host of examples of public accommodations provided by the ADA, all of which refer to places . . ." *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612 (3d Cir. 1998).

(c) Ninth Circuit. In a 2000 case, *Weyer v. Twentieth Century Fox Film Corp*, the issue was whether an employer and its insurance administrator could offer a disability insurance policy that gave more protections to individuals with physical disabilities than to those with mental disabilities, or whether such a plan violated the ADA. The court addressed whether an insurance company that administers an employer-provided insurance plan is a place of public accommodation. The Ninth Circuit held that "[t]he principle of *noscitur a sociis* requires that the term, 'place of public accommodation,' be interpreted within the context of the accompanying words, and this context suggests that some connection between the good or service complained of and an actual physical place is required." *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000); *cf. Nat'l Fed'n. of the Blind v. Target Corp.*, 452 F.Supp.2d 946, 953 (N.D. Cal. 2006).

(d) Eleventh Circuit. In a 2002 case, *Access Now, Inc. v. Southwest Airlines Co.*, Plaintiffs, Access Now (a disability advocacy group) and an individual who is blind, asserted that Southwest Airline's website – separate and apart from any of its physical facilities – was inaccessible to persons who are blind and thus in violation of Title III. The District Court for the Southern District of Florida dismissed Plaintiffs' complaint, holding that it was the role of Congress, and not the court, to expand the ADA's definition of "public accommodation" beyond physical, concrete structures, to include "virtual" places of public accommodation such as the website. *Id.* at n.13.

(i) "In interpreting the plain and unambiguous language of the ADA, and its applicable federal regulations, the Eleventh Circuit has recognized Congress' clear intent that Title III of the ADA solely governs access to physical, concrete places of public accommodation. . . . [T]o fall within the scope of the ADA as presently drafted, a public accommodation must be a physical, concrete structure. To expand the ADA to cover 'virtual' spaces would be to create new rights without well-defined standards. . . . "[T]he Supreme Court and the Eleventh Circuit have both recognized that the Internet is 'a unique medium— known to its users as 'cyberspace' — *located in no particular geographical location* but available to anyone, anywhere in the world, with access to the Internet.' Thus, because the Internet website, southwest.com, does not exist in any particular geographical location, Plaintiffs are unable to demonstrate that Southwest's website impedes their access to a specific, physical, concrete space such as a particular airline ticket counter or travel agency." *Access Now, Inc. v. Southwest Airlines Co.*, 227 F.Supp.2d 1312, 1318-21 (S.D. Fla. 2002).

(ii) Subsequently, the Eleventh Circuit dismissed Plaintiffs' appeal of this decision, finding that Plaintiffs had not appropriately appealed from the court's determination that the airline's website was not a "place of public accommodation" under Title III, but rather, their appellate brief, for the first time, argued that the airline as a whole was a place of public accommodation because it operated a "travel service," and that it had violated Title III because of the website's connection to the airline's "travel service." *Access No, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324 (11th Cir. 2004).

(e) E.D. Virginia. The issue in *Noah v. AOL Time Warner, Inc.* did not involve the ADA, but rather Title II of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, religion, or national origin by a place of public accommodation. The district court of the Eastern District of Virginia looked to the case law interpreting the applicability of Title III of the ADA to non-physical places as persuasive authority. The court cited *Carparts*, *Schering-Plough*, *Weyer*, and *Access Now*, among others. Ultimately it concluded that a place of public accommodation, "even under the ADA's broader definition, must be actual physical facilities." *Noah v. AOL Time Warner, Inc.*, 261 F.Supp.2d 532, 544 (E.D. Va. 2003).

Decisions Holding That Accessibility Obligations May Extend Beyond Traditional Places of Accommodation

(f) First Circuit. *Carparts Distribution Center v. Automotive Wholesaler's Ass'n.* involved claims of discrimination by a health insurance plan in the form of a lifetime cap on health benefits for individuals with AIDS. The First Circuit was asked whether such a cap violated Titles II and III of the ADA. In examining whether a "public accommodation" was limited to actual physical structures, the First Circuit relied upon the statutory language and held that the plain meaning of the 12 categories of public accommodation did not require that public accommodations have physical structures in which persons must enter. It reasoned that its holding was consistent with the legislative history of the ADA and the ADA's broad mandate to bring individuals with disabilities into the economic and social mainstream of American life. *Carparts Distrib. Ctr. v. Automotive Wholesaler's Ass'n*, 37 F.3d 12, 19 (1st Cir. 1994).

(g) Seventh Circuit. *Doe v. Mutual of Omaha Insurance Company* involved similar claims of discrimination by insurance companies capping health benefits for individuals with AIDS. The court explored the nondiscrimination requirements of Title III; noting, Title III "plainly enough" encompasses "the owner or operator of a store, hotel, . . . website, or other facility (whether in physical space or in electronic space) . . . that is open to the public cannot exclude disabled persons from entering the facility. . . .", *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999). Ultimately, however, the court found no violation of Title III because the ADA "does not require a seller to alter his product to make it equally valuable to the disabled and nondisabled." *Id.* at 563.

(h) Second Circuit. In *Pallozzi v. Allstate Life Insurance*, the Second Circuit examined whether Title III applied to insurance underwriting practices. Plaintiffs, who were diagnosed with major depression, agoraphobia, and borderline personality disorder, alleged that Allstate, their life insurance carrier, cancelled their temporary policy based on a medical report from their treating psychiatrist and in doing so violated Title III because the goods and services of an insurance office (which is expressly covered under Title III) are the insurance policies sold on the premises. The Second Circuit found that Title III applied, in part, because goods or services *of* a place of public accommodation does not generally mean *in* a place of public accommodation. *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28 (2d Cir. 1999).

(i) *Nat'l Fed'n. of the Blind v. Target Corp.* (N.D. Cal. 2006)

(i) Arguably the most important – and certainly the best known – decision regarding this issue occurred in *National Federation of the Blind v. Target* (N.D. Cal. 2006), a case in which the U.S. District Court in the Northern District of California sought to determine whether Title III of the ADA only required that Target maintain an accessible brick-and-mortar physical

structure, or if it also required Target to maintain its website, target.com, in a manner accessible to individuals with disabilities.

(ii) Background. In *Target*, the District Court for the Northern District of California denied, in part, retailer Target's motion to dismiss the allegations that it violated Title III of the ADA and California state law because the website that it operated, Target.com, was inaccessible to the blind and that this "unequal access to Target.com denie[d] [them] the full enjoyment of the goods and services offered at Target Stores." *Nat'l Fed'n. of the Blind v. Target Corp.*, 452 F.Supp.2d 946, 952 (N.D. Cal. 2006).

(iii) Plaintiff's argument. The National Federation of the Blind ("NFB"), an advocacy group for individuals who are blind or have visual impairments filed this suit alleging that the Target.com website allowed customers to "purchase many of the items available in Target stores" and perform store-related functions such as, "access information on store locations and hours, refill a prescription or order photo prints for pick-up at a store, and print coupons to redeem at a store." *Id.* at 949. Because individuals who are blind cannot access these services through the Target.com website, Plaintiff's alleged that the blind, "are denied full and equal access to Target stores." *Id.* at 950.

(iv) Defendant's argument. Target asserted that the ADA and California state law cover access to only physical spaces, such as Target's brick-and-mortar stores, and that because Target.com is not a physical space and thus not a "place of public accommodation," Plaintiffs' complaint failed to state a claim under these laws. Target also argued that even if Target.com provides some services associated with Target's stores, there was not a sufficient "nexus" between the services on the website and the brick-and-mortar stores to state a claim. Furthermore, Target contended that Plaintiffs were not denied physical access to the Target stores where they were provided equal services to those on the website and that Target need not modify its website so long as it provided the information contained therein in some other format, such as by telephone or at the stores.

(v) Holding. The court held that Target.com is, indeed, covered by the ADA and California state law because a sufficient "*nexus*" exists between the website and Target's related brick and mortar stores – or, in other words, between the online virtual space and Target's physical places of public accommodation. The court based its decision on the fact that many of the benefits and privileges of Target's website – such as online information about store locations and hours and printable coupons that are redeemed in the stores – were "heavily integrated with the brick-and-mortar stores."

(vi) The court underscored the fact that, "[t]he statute applies to the services *of* a place of public accommodation, not services *in* a place of public accommodation." *Id.* at 953.

(vii) The court did not rule on whether alternative measures provided by Target (*e.g.*, telephone line, in-store assistance) were effective alternatives under the auxiliary aid provision of Title III stating, "Indeed, whether or not a blind-accessible Target.com is a form of communication similar to the provisions of Braille menus is not at all clear from the face of the complaint. Nor is it clear whether or not the addition of "alt-tags" and other accessibility programming features would alter the nature of the service. Defendant's challenge is premature and the court declines to dismiss the action on this basis." *Id.* at 956.

(viii) Resolution. Following this decision, on August 27, 2008, Target settled with NFB. As a part of the settlement agreement, Target was required to: (i) establish a $6 million fund from which members of a California settlement class could make claims; (ii) make its website accessible to the blind; (iii) allow NFB to certify (the accessibility of) the Target website; (iv) pay NFB to train all its employees who work on the company's website; and (v) pay NFB attorneys' fees and costs.

(ix) Thus, *Target* can be viewed as a compromised reading of Title III as it applies to website accessibility. While the court did find that some obligations existed, it did so by focusing on the "nexus" required between the services on the target.com website and Target's brick-and-mortar stores. According to this court, without the nexus – for example, any information or services that are "unconnected to Target stores" and 'which do not affect the enjoyment of goods and services offered in Target stores" – there was no violation of Title III and California state law.

(j) N.D. California. In *Young v. Facebook, Inc.*, the U.S. District Court for the Northern District of California recently revisited the applicability of Title III to private websites and in doing so suggested that it was not prepared to expand its holding in *Target*. Instead, the court reaffirmed the Ninth Circuit's existing precedent that websites on their own do not constitute places of public accommodation under Title III of the ADA and, therefore a "nexus" must exist between a website's services and a physical place of public accommodation for Title III obligations to apply to the website.

(i) In *Young*, plaintiff, a woman with bipolar disorder, alleged that Facebook violated the ADA, California anti-discrimination laws, and state contract and tort common law by failing to provide reasonable customer services to assist her after it terminated her account for various purported abuses of Facebook's Statement of Rights and Responsibilities.

(ii) In granting Facebook's motion to dismiss on all counts, the court found that plaintiff failed to state a claim under Title III of the ADA for two reasons.

- First, citing the Ninth Circuit's decision in *Weyer* (*See supra* at Section III(B)(2)(c)), the court held that plaintiff failed to demonstrate that

Facebook was a place of public accommodation. "Facebook operates only in cyberspace, and is thus is [sic] not a 'place of public accommodation; as construed by the Ninth Circuit. While Facebook's physical headquarters obviously is a physical space, it is not a place where the online services to which Young claims she was denied access are offered to the public." *Young v. Facebook, Inc.*, No. 5:10-cv-03579-JF/PVT, 20ll WL 1878001, at *2 (N.D. Cal. May 17, 2011).

- Second, the court found that even applying the theory set forth in *Target*, plaintiff failed to allege a sufficient "nexus" between Facebook and any physical place of public accommodation. Plaintiff alleged that Facebook sold gift cards in physical stores, however, the court concluded that "[w]hile the retail stores that sell Facebook gift cards may be places of accommodation, Young does not allege that Facebook, Inc. 'owns, leases (or leases to) or operates' those stores. Facebook's internet services thus do not have a nexus to a physical place of public accommodation for which Facebook may be liable under the statute." *Id.* at *3.

C. Notable Agreements Reached Between Advocacy Groups and/or States and Private Companies/Entities Regarding Website Accessibility

1. In 2004, the New York State Attorney General brought an action against Ramada Inn and Priceline.com, based upon the position that the ADA applies to private websites. Both Ramada and Priceline agreed to implement accessibility improvements in line with WCAG 1.0 guidelines (*See* Section III(G) *infra* for more information regarding WCAG) that would allow for the use of assistive technology. Ramada and Priceline paid $40,000 and $37,500 respectively to cover the costs of the investigation.[8]

2. In 2008, Apple/iTunes settled a lawsuit filed by the National Federation of the Blind and agreed to make iTunes accessible by June 30, 2009. It also agreed to continue to work with NFB over the next 3 years to make sure that iTunes remains accessible. Additionally, Apple agreed to educate its iTunes programming staff regarding accessibility issues. Finally, Apple donated $250,000 to the Massachusetts Commission for the Blind.

3. In 2010, Major League Baseball entered into an agreement with the American Council of the Blind, the Bay State Council of the Blind, and the California Council of the Blind. Per the agreement, MLB agreed to improve accessibility not just of mlb.com, but of the websites of all 30 major league ball clubs. According to MLB.com, "MLB.com has utilized guidelines issued by the Web Accessibility Initiative (WAI) of the World Wide Web Consortium (W3C) to implement functional improvements to MLB.com. We are working to ensure that all content on www.mlb.com and all content on the club sites satisfy Level A and AA Success Criteria set forth in WCAG 2.0."[9]

D. The Development of DOJ's Stance on Website Accessibility Obligations for Title III Entities

As noted above, DOJ takes the position that Title III as written applies to the websites of private places of public accommodation. DOJ has made its position clear in various forms, including: settlements agreements, amicus briefs, guidance publications, letters and testimony before Congress, and its ANPRM. What follows is a chronological discussion of the development of DOJ's position on the website accessibility obligations of Title III entities.

1. In 1996, in response to an inquiry regarding the accessibility of websites, then-Assistant Attorney General Deval Patrick responded that "[c]overed entities under the ADA are required to provide effective communication, regardless of whether they generally communicate through print media, audio media, or computerized media

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[8] Press Release, New York State Office of the Attorney General, Spitzer Agreement To Make Websites Accessible To The Blind And Visually Impaired (Aug. 19, 2004), *available at* http://www.ag.ny.gov/media_center/2004/aug/aug19a_04.html (last visited Oct. 5, 2011).

[9] *See* MLB.com Accessibility Information, *available at* http://mlb.mlb.com/mlb/help/accessibility.jsp (last visited Oct. 5, 2011).

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."[10]

2. DOJ also made its position known in a 2000 case, *Hooks v. OKbridge, Inc.*, No. 99-50891 (W.D. Tex. 1999). Plaintiff, an individual with bi-polar disorder and other disabilities, alleged that an online gaming site terminated his membership because of his disability. Defendant asserted that it terminated Plaintiff's membership because he posted inappropriate messages on the website and also cheated during an online game. The threshold issue was whether Title III applies to a company that operates solely on the Internet.

   (a) DOJ stated in an *amicus* brief before the Fifth Circuit that, "The [ADA] covers the services 'of' of a place of public accommodation, not 'at' the place of public accommodation. The definition of a 'public accommodation' is intentionally broad and is not limited to those entities providing on-site services."

   (b) Moreover, DOJ argued that limiting Title III to physical places would have the impractical and nonsensical result of permitting discriminatory treatment by any public accommodation that provided its services at an off-site location. *See* Brief of the United States as Amicus Curiae in Support of Appellant, *Hooks v. Okbridge, Inc.*, No. 99-50891 (5th Cir. 2000), *available at* http://www.justice.gov/crt/about/app/briefs/hooks.htm.

      (i) Ultimately, the Fifth Circuit avoided the need to directly address DOJ's argument by holding that Plaintiff failed to meet his initial burden of proof that he requested a reasonable modification based on his alleged disability because he failed to notify the online gaming company of his alleged disability before his membership was terminated. *Hooks v. Okbridge, Inc.*, 232 F.3d 208 (5th Cir. 2000).

3. DOJ reiterated its position regarding the applicability of Title III beyond traditional brick and mortar entities in a 2002 case, *Rendon v. Valleycrest Productions, Ltd.*, where the issue was whether Title III applied to a television production company that established eligibility requirements for game show contestants to participate in a screening procedure over the telephone before they could participate in the game show. In order to be selected as a contestant on the trivia game show "Who Wants To Be A Millionaire?", potential contestants had to call a telephone number and respond as quickly as possible by pressing the telephone touch-keys.

   (a) Plaintiffs alleged that this system discriminated against individuals with disabilities because there were no alternative methods for them to participate (*e.g.*, live operators who could record their answers).

[10] Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, Department of Justice, to Tom Harkin, U.S. Senator (Sept. 9, 1996), *available at* http://www.justice.gov/crt/foia/readingroom/frequent_requests/ada_tal/tal712.txt (last visited Oct. 5, 2011).

(b) Defendants claimed that because the eligibility process had no connection to the physical studio where the game show was recorded, they were not obligated to make the eligibility process accessible.

(c) DOJ – appearing as an amicus – supported Plaintiffs' position and argued against any requirement that there must be a nexus between an alleged discriminatory act (here, requiring the use of a telephone touchpad in order to participate in a game show) and the location of a "brick-and-mortar" public accommodation, in order for the facility to comply with the obligations of Title III. *See* Brief for the United States as Amicus Curiae in Support of Appellant, *Rendon v. Valleycrest Prod., Ltd.*, No. 01-11197 (11th Cir. 2002), *available at* http://www.justice.gov/crt/about/app/briefs/rendon.htm.

(d) The 11th Circuit agreed with the Plaintiffs and DOJ, and analogized the telephone eligibility process to off-site discriminatory practices. It held that "[t]o contend that Title III allows discriminatory screening as long as it is off site requires not only misreading the relevant statutory language, but also contradicting numerous judicial opinions that have considered comparable suits dealing with discrimination perpetrated 'at a distance.'" *Rendon v. Valleycrest Productions*, 294 F.3d 1279, 1285 (11th Cir. 2002) (collecting cases).

(e) *Rendon* underscores DOJ's belief that Title III applies to any activity or service offered by a place of public accommodation, regardless of the location where the activity takes place or service is offered.

4. In 2003, DOJ published guidelines for state and local governments in which it stated that "for most websites, implementing accessibility features is not difficult and will seldom change the layout or appearance of web pages."[11]

   (a) At the time of this publication, DOJ directed web developers designing accessible web pages to the Section 508 Standards, as well as WCAG developed by WAI (*See* Section III(E) of this part for more information).

5. On April 15, 2010, at the 2010 Jacobus tenBroek Disability Law Symposium, Thomas E. Perez, Assistant Attorney General, Civil Rights Division of the U.S. Department of Justice, delivered prepared remarks about current and future obligations for removing both the "long-standing barriers and the new ones emerging" faced by individuals with disabilities.

   (a) Speaking about accessible technology Mr. Perez stated, "And though we have seen some voluntary efforts by companies once the matter is brought to their attention,

[11] U.S. Department of Justice, Civil Rights Division, Disability Rights Section, "Accessibility of State and Local Government Websites to People with Disabilities", published in June 2003, Section 5, page 14, *available at* http://www.ada.gov/publicat.htm#anchor-website (last visited Oct. 5, 2011).

far too many companies choose to forgo what I believe must be a profitable investment in making their products and services accessible to all consumers."[12]

(b) On the topic of website accessibility, Mr. Perez left no question as to where DOJ stands stating, "Let me be clear. It is and has been the position of the Department of Justice since the late 1990's that Title III of the ADA applies to Web sites. We intend to issue regulations under our Title III authority in this regard to help companies comply with their obligations to provide equal access."[13]

(c) Mr. Perez concluded his discussion of website accessibility with a warning to private entities stating, "Companies that do not consider accessibility in their Web site or product development will come to regret that decision, because we intend to use every tool at our disposal to ensure that people with disabilities have equal access to technology and the worlds that technology opens up."[14]

6. On April 22, 2010, just over 3 months before the 20th Anniversary of the ADA, Samuel Bagenstos, then-Principal Deputy Assistant Attorney General for Civil Rights, Department of Justice, testified before the U.S. House of Representatives Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Liberties, in a public hearing on Achieving the Promise of Americans with Disabilities Act in the Digital Age.[15]

(a) During his testimony, Mr. Bagenstos stressed that access to information and technologies is an issue of civil rights for individuals with disabilities because, with many companies using internet technologies for both hiring and recruiting, the gateways to employment and education opportunities are becoming increasingly web-based. In addition, institutions of higher education frequently rely on the Internet, in some cases for degree programs, and in others, for course assignments and discussions groups.

(b) Mr. Bagenstos explained that DOJ contends, "The broad mandate of the ADA to provide an equal opportunity for individuals with disabilities to participate in and benefit from all aspects of American civic and economic life will be served in today's technologically advanced society only if it is clear to businesses, employers, and educators, among others, that their website must be accessible."[16]

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[12] Thomas E. Perez, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice (Apr. 15, 2010) (remarks *available at* http://www.justice.gov/crt/speeches/perez_tenbroek_speech.pdf) (last visited Oct. 5, 2011).

[13] *Id.*

[14] *Id.*

[15] Samuel R. Bagenstos, Principal Deputy Assistant Attorney General for Civil Rights, U.S. Department of Justice (Apr. 22, 2010) (statement *available* at http://judiciary.house.gov/hearings/pdf/Bagenstos100422.pdf) (last visited Oct. 5, 2011)

[16] *Id.*

7. On July 19, 2010, DOJ entered into a Consent Decree with QuikTrip Corp., which owns and operates more than 550 convenient stores and gas stations, truck stops, and travel center facilities in nine states.

   (a) As part of a comprehensive settlement that requires QuikTrip to remove barriers at its existing facilities, QuikTrip was required to evaluate its website according to "generally accepted standards for website accessibility, such as the Standards promulgated pursuant to Section 508 of the Rehabilitation Act of 1973, as amended."

   (b) DOJ listed several requirements for website accessibility, including: adding a text equivalent to accompany every image posted; making website text readable by assistive technology; and implementing technology that permits website users to control the colors and font within the site.

8. On July 22, 2010, Assistant Attorney General Thomas E. Perez, testified before the U.S. House of Representatives Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Liberties at a Hearing on the Americans with Disabilities Act, stating, "But new technologies can also pose significant challenges, and we must remain vigilant to ensure that as new devices are introduced, people with disabilities are not left behind. The rapid development of new technologies has made our lives more efficient, but many of these technologies from Web sites to cell phones, from ticket kiosks to e-books, remain either in whole or in part inaccessible to people with disabilities, particularly those who are blind or have low vision, those with limited manual dexterity, and those who are deaf or hard of hearing."[17]"

9. On July 26, 2010 DOJ issued and published in the *Federal Register* the Advance Notice of Proposed Rulemaking on Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations. *See* Section III(E) *infra*.

10. Upon publication of the 2010 Standards in the *Federal Register* on September 15, 2010, DOJ again reiterated its firm belief that Title III applies to website accessibility. It stated that "[a]lthough the language of the ADA does not explicitly mention the Internet, the Department has taken the position that Title III covers Access to Web sites of public accommodations. The Department has issued guidance on the ADA as applied to the Web sites of public entities, which includes the availability of standards for Web site accessibility. . . . As the Department stated in ["Accessibility of State and Local Government Websites to People with Disabilities" publication issued by DOJ in June 2003], an agency (and similarly a public accommodation) with an inaccessible Web site also may meet its legal obligations by providing an accessible alternative for individuals to enjoy its goods or services . . . ."[18]

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[17] Thomas E. Perez, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice (July 22, 2010) (statement *available at* http://www.justice.gov/ola/testimony/111-2/07-22-10-perez-americans-with-disabilities-act.pdf) (last visited Oct. 15, 2011).

[18] Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed Reg. 56236 (Sept. 15, 2010) (codified at 28 C.F.R. pt. 36).

11. On November 9, 2010, DOJ entered into a Consent Decree with Hilton Worldwide Inc., which owns and operates more than 900 hotels across the U.S.

    (a) As part of a comprehensive settlement requiring Hilton to bring its existing facilities into compliance with the ADA, Hilton also agreed to bring its website (www.hilton.com) into compliance with WCAG 2.0, Level A success criteria.

    (b) As stated in DOJ's November 9, 2010 press release, this settlement "represents the first time that a hotel chain has been required to make its online reservations system accessible and to provide current data on its website about accessible features in guest rooms throughout the chain."[19]

12. On April 25, 2011, the Law School Admissions Council ("LSAC") settled a lawsuit filed by NFB and subsequently joined by DOJ. This settlement is of particular relevance for academic institutions as LSAC is a testing company that administers the Law School Admissions Test ("LSAT") and provides application services to law schools and law school applicants. *Nat'l Fed'n of the Blind v. Law School Admission Council, Inc.*, Case No. RG-09436691 (Cal. Super. Ct., Alameda County Feb. 2009)

    (a) In this lawsuit, NFB alleged that several features on www.lsac.org were inaccessible to individuals who have visual impairments. According to the complaint, the LSAC website contained multiple barriers to accessibility that made it difficult for individuals with visual impairments to register online to take the LSAT and impossible to submit their law school applications online without assistance. *Id.* NFB also alleged that none of the online LSAT practice materials were available in accessible electronic formats. NFB sought a court order requiring the LSAC to make all services on www.lsac.org accessible to individuals with visual impairments.

    (b) On June 8, 2010, several universities including the University of California, Hastings College of Law, Thomas Jefferson School of Law, Whitttier Law School, and University of Chapman School of Law were added as additional plaintiffs in the amended complaint.

    (c) On April 25, 2011, NFB and the LSAC, settled their suit via a settlement agreement joined by DOJ requiring that LSAC:

        (i) Provide "full and equal access" to the LSAC website, which means that the website meets the non-visual requirements of WCAG 2.0, level AA. Non-visual requirements of WCAG 2.0 includes ensuring functionality of all content is accessible using only a keyboard, allowing a guest to adjust or turn off any time limits to ensure user has enough time to read content, and help identifying errors in "form" fields for guests using screen-reader technology.

[19] Press Release, U.S. Department of Justice, Justice Department Reaches Agreement with Hilton Worldwide, Inc. Over ADA Violations at Hilton Hotels and Major Hotel Chains Owned by Hilton (Nov. 9, 2010), *available at* http://www.justice.gov/opa/pr/2010/November/10-crt-1268.html (last visited on Oct. 5, 2011).

(ii) Ensure that guests who are blind and utilize screen-reader technology are able to obtain the same information and take part in the same transactions as all other guests.

- LSAC must provide technology that enables participating law schools to add school-specific inquiries in an accessible manner.
- Under the terms of the agreement, NFB will assist LSAC with its initial attempt at fully complying with its obligations to make the website accessible, and will be compensated at a maximum amount of $25,000.
- NFB will continue testing the LSAC website to ensure it retains its accessibility at a frequency agreed upon by both parties. LSAC will be compensated a maximum of $10,000 each time the website is tested.
- LSAC agreed to pay $320,000 to partially reimburse plaintiffs for attorneys' fees and costs.[20]

13. On September 20, 2011, DOJ entered into a Settlement Agreement with the television show the Price is Right to make its production and other related facilities more accessible to individuals with disabilities.

(a) As part of the settlement agreement, The Price is Right will redesign the two websites associated with the Show, www.thepriceisright.com, and http://on-camera-audiences.com/shows/The_Price_Is_Right (operated by Fremantle Productions, Inc.) to meet the accessibility requirements listed in the Settlement Agreement which are based upon the requirements set forth in the current version of Section 508.[21] Some examples of the accessible features that will be added to each website include:

(i) A "skip navigation" link at the top of webpages that allows individuals who use screen readers to ignore repetitive navigation links and skip directly to webpage content;

(ii) Descriptive tags that provide individuals with disabilities the information that they need in order to complete and submit online forms; and

(iii)The addition of titles, context, and other heading structures to help users navigate complex pages or elements (such as webpages that use frames).

E. Advanced Notice of Proposed Rulemaking: Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations ("ANPRM")

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[20] Settlement Agreement between the United States of America and the Nat'l Fed'n of the Blind, the Nat'l Fed. of the Blind of California, Deepa Goraya, Bruce Sexton, Jr., and Claire Stanley, and Law School Admission Council, Inc., dated Apr. 21, 2011, *available at* http://www.ada.gov/lsac.htm (last visited Oct. 5, 2011).

[21] Settlement Agreement between the United States of America, Freemantle Prod, Inc., and CBS Broadcasting Inc. Regarding the Price is Right, dated Sept. 20, 2011, *available at* http://www.ada.gov/price-is-right.htm (last visited Oct. 5, 2011).

1. Overview

   (a) To address the outstanding question of Title III's applicability to website accessibility, and as part of its activities surrounding the 20th Anniversary of the ADA, DOJ announced an ANPRM published in the CFR on July 26, 2010.[22]

   (b) DOJ is contemplating amending its Title II and Title III regulations to require public entities and public accommodations that provide products or services to the public through websites on the Internet to make their sites accessible to and usable by individuals with disabilities, as required by the ADA.[23]

   (c) According to DOJ "removing . . . Web site barriers is neither difficult nor especially costly, and in most cases providing accessibility will not result in changes to the format or appearance of a site. . . . Web designers can easily add headings, which facilitate page navigation using a screen reader, to their pages. They can also add cues to ensure the proper functioning of keyboard commands and set up their programs to respond to assistive technology, such as voice recognition technology."[24]

2. Looking ahead, there are some suggestions regarding what DOJ's regulations for Title III website accessibility could look like . . .

   (a) In the ANPRM, DOJ singled out the Web Accessibility Initiative ("WAI") of the W3C as having created the Web Content Accessibility Guidelines ("WCAG").[25]

      (i) DOJ held public hearings on November 18, 2010 in Chicago, Illinois; December 16, 2010 in Washington, DC; and January 10, 2011, in San Francisco, California during which individuals and representatives from various advocacy groups expressed the belief that that website accessibility standards should at least meet WCAG 2.0 levels A and AA.

   (b) DOJ also indicated that, as initially contemplated, the scope of any web accessibility standards ultimately adopted would be limited to public accommodations that offer goods and services, either exclusively on the Internet (*e.g.*, Amazon.com) or in conjunction with a physical location (*e.g.*, Target stores).

      (i) For example, content posted by individuals on websites covered by the new regulations would not be required to be accessible because "public

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[22] Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460 (proposed July 26, 2010) (to be codified at 36 C.F.R. pts. 35 and 36).

[23] *Id.* at 43462.

[24] *Id.*

[25] Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43465 (proposed July 26, 2010); *see also* Section III(G) *infra*.

accommodations and public entities are not liable for inaccessible content posted to their sites by individuals not under their control as long as they provide their Web site users the ability to make their posts accessible."[26]

3. Projected Timeline of Website Accessibility Regulations

   (a) On July 26, 2010, the ANPRM was announced and published in the CFR.

   (b) Public hearings were held on November 18, 2010 in Chicago, Illinois; December 16, 2010 in Washington, DC; and January 10, 2011, in San Francisco, California.

   (c) On January 24, 2011, the public comment period ended.

   (d) As of October 5, 2011, DOJ had not announced a Notice of Proposed Rulemaking with the proposed Title III regulations pertaining to web site accessibility.

   (e) In the ANPRM, DOJ announced that it is considering a staggered timeline for achieving full compliance with any new website regulations, much like the revised 2010 Standards.[27]

      (i) A newly created or completely redesigned website would be required to comply with the new regulations within six (6) months of the final rule's effective date.

      (ii) New pages on an existing website may have to comply "to the maximum extent feasible."

      (iii) DOJ is also considering that existing websites be granted a period of two (2) years after the effective date to achieve compliance.

F. State and local law obligations

1. In addition to the obligations set forth under Section 508 and/or the ADA, distinct obligations may also be created at the state and/or local level.

2. These obligations most often fall under a states' respective public accommodations laws as they relate to government websites. It is important to be mindful of any statutory or regulatory definitions of "public accommodation", in determining whether or not a website is a place of public accommodation requiring a comparable legal analysis to that developed under federal law as discussed above.

3. Most of the states require Section 508 compliance at a minimum while some go further and require compliance with some iteration of WCAG.

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[26] *Id.*

[27] Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43466 (proposed July 26, 2010) (to be codified at 36 C.F.R. pts. 35 and 36).

4. Most states provide guidelines and best practices to comply with state website accessibility requirements.

   (a) A vast majority of states have published their website accessibility guidelines (or policies) on their official websites. These guidelines are typically based on Section 508 and/or WCAG Standards and are intended to ensure that state websites are accessible to individuals with disabilities.

   (b) While states encourage private entities to operate websites that are accessible, at this time, there are no states that have officially adopted website accessibility standards for the private sector.

G. WCAG 2.0: A Preview Into the Future of Federal Regulation?

1. Although the precise legal obligations and technical standards for private sector website accessibility may be uncertain until DOJ promulgates specific private sector regulations, there is already a significant movement underfoot to create universally accepted technical standards for website accessibility.

2. World Wide Web Consortium Background

   (a) The World Wide Web Consortium ("W3C") is an international organization that works to create standards for the Internet. W3C was founded in 1994, as a joint project between the Massachusetts Institute of Technology, The European Organization for Nuclear Research, and the European Union, and headed by Tim Berners-Lee.[28]

   (b) The stated mission of W3C is "to lead the World Wide Web to its full potential by development protocols and guidelines that ensure the long-term growth of the web."[29]

   (c) W3C has recognized that that the Internet can eradicate barriers to communication and interaction faced by individuals with disabilities. To that end, W3C has created the Web Accessibility Initiative ("WAI") to develop guidelines for international standards of website accessibility. The WAI membership includes individuals from private industry, disability organizations, the government, accessibility research organizations and private citizens.

3. WAI Guidelines

   (a) WAI has created several guidelines: Web Content Accessibility Guidelines ("WCAG"), Authoring Tool Accessibility Guidelines ("ATAG"), and User Agent Accessibility Guidelines ("UAAG"). These guidelines are primarily technical

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[28] World Wide Web Consortium, *Facts About W3C*, http://www.w3.org/Consortium/facts (last visited Oct. 5, 2011).

[29] World Wide Web Consortium, *W3C Mission*, http://www.w3.org/Consortium/mission (last visited Oct. 5, 2011).

standards referenced by Web developers as they create and refresh websites to make them accessible; however, they provide significant background into how a website can be made usable to individuals with disabilities. WCAG addresses the technical standards for making website content accessible; ATAG address how to make website authoring tools (*e.g.*, HTML, XML, SMIL) accessible; and UAAG address making user agents (*e.g.*, developers of Web browsers, media players, and assistive technologies) accessible.

4. WCAG 2.0

   (a) The WCAG are arguably the most relevant existing guidelines for the issue of website accessibility. The first iteration of these guidelines was WCAG 1.0, first published in May 1999. In December 2008, WCAG 2.0 was published. Similar to the Access Board's draft of the Section 508 refresh, WCAG 2.0 moves away from formulaic, stagnant checklists and embraces a more holistic approach to accessibility founded on "the Four Principles of Accessibility" – all content must be perceivable, operable, understandable, and robust.

   (b) For each of these principles, there is a set of guidelines that describe the methods for achieving the principles. For each guideline, there are success criteria that detail the actions that can be taken to achieve the guidelines. There are gradations of compliance: level A (lowest), level AA, and level AAA (highest).[30]

   (c) WCAG 2.0 also suggests specific technical methods to meet each of these success criteria, which a web developer can utilize to appropriately design the website so that it is accessible to individuals with disabilities.

5. While WAI is unaffiliated with DOJ and the Access Board, both have utilized WCAG 2.0 as a standard of website accessibility.

   (a) For example, DOJ stated in its recent settlement with LSAC that "LSAC shall provide 'Full and Equal Access' to the lsac.org website . . . 'Full and Equal Access' means that www.lsac.org meets the nonvisual [sic] requirements of WCAG 2.0, level AA and that blind guests using screen-reader software may acquire the same information and engage in the same transactions as are available to sighted guests with substantially equivalent ease of use."

   (b) In its published draft of the revised Section 508 regulations, the Access Board noted that it is considering that web pages, as defined by WCAG 2.0, which are compliant with Level AA, be deemed compliant with the Section 508 requirements for website accessibility.[31]

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[30] World Wide Web Consortium, *Understanding Conformance*, http://www.w3.org/TR/UNDERSTANDING-WCAG20/conformance (last visited Oct. 5, 2011).

[31] Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; Telecommunications Act Accessibility Guidelines; Electronic and Information Technology Accessibility Standards, 75 Fed. Reg. 13460 (proposed Mar. 22, 2010) (to be codified at 36 C.F.R. pts. 1191, 1193, and 1194).

6. As noted above, WCAG 2.0 also received support from advocacy groups and their constituents during public hearings for DOJ's ANPRM.

IV. ACCESSIBILITY OF ELECTRONIC READERS AND OTHER EMERGENT TECHNOLOGIES UTILIZED IN EDUCATION

Over the past few years, colleges and universities have begun to utilize educational technology in the form of electronic readers ("e-readers") (*e.g.*, Amazon.com's Kindle DX, Sony's Reader) and other tablet devices (*e.g.*, Apple's iPad2) in the classroom for educational purposes. For example, Rutgers, The State University of New Jersey distributes iPads to each enrolling student at its mini-M.B.A. program.[32] Indeed, some institutions are eliminating textbooks entirely and instead asking students to load the material onto their e-readers, while others use them to supplement hard copy books or other classroom materials like worksheets. While incorporating these technological advancements into education has a variety of upsides for academic institutions, professors, and students alike, issues arise when the e-readers selected are inaccessible to students with disabilities.

For example, two advocacy groups filed private lawsuits and complaints with DOJ alleging that Arizona State University violated both the Rehab Act and the ADA because the Kindle was inaccessible to students who are blind. Arizona State, among other universities, had offered Kindles to their students for educational use as part of a pilot program with Amazon.com, the creator and distributor the Kindle. DOJ settled with multiple universities involved in the pilot program and subsequently issued a strongly-worded "Dear Colleague" letter reminding academic institutions of their obligations to students with disabilities. Thus, it is clear that DOJ and advocacy groups are aggressively challenging the use of such emergent technologies in the face of potential accessibility issues.

As further proof of the keen interest of advocacy groups in policing accessibility issues for new technology, NFB has indicated that it will seek to continue to litigate the issue of inaccessible e-readers. On September 28, 2011, Amazon.com chief executive officer Jeff Bezos announced an updated Kindle named the Kindle Fire. The next day, on September 29, 2011, the National Federation of the Blind issued a press release condemning the lack of accessibility features on the Kindle Fire:

> "Blind Americans have repeatedly asked Amazon to include accessibility for the blind in its Kindle product line. . . . The Department of Education and the Department of Justice have made it clear that Kindle devices cannot be purchased by educational institutions, libraries, and other entities covered by this country's disability laws unless the devices are fully accessible. Despite all this, Amazon has released a brand new Kindle device, the Kindle Fire, which cannot be used by people who are blind. Enough! We condemn this latest action by Amazon and reiterate that we will not tolerate technological discrimination. [Equal access to all technology for blind people] is one of the most critical civil rights issues facing

[32] Press Release, Rutgers, The State University of New Jersey, Rutgers to put iPad to the Test in New Digital Marketing Program (Apr. 20, 2010), *available at* http://news.rutgers.edu/medrel/news-releases/2010/04/rutgers-to-put-ipad-20100420 (last visited Oct. 5, 2011).

blind Americans in the twenty-first century, and we will do everything in our power to see that this right is secured."[33]

As technology continues to pervade most facets of the academic experience, academic institutions must provide accessibility for individuals with disabilities when using emergent technologies, as required by both the Rehabilitation Act and the ADA.

A. Legal Obligations for E-Reader Accessibility

1. Obligations under the Rehabilitation Act. *See* Section 2(A)(3) *supra* for information on Section 504 of the Rehabilitation Act of 1973.

2. Obligations under ADA. *See* Section 2(B)(3) *supra* for information on Title II and Section 2(B)(4) *supra* for information on Title III.

3. Third party liability. Congress has expressly prohibited covered entities from contracting around the ADA's accessibility obligations.[34] Title III states that: "It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity." 42 U.S.C. § 12182(b)(1)(A)(i).

   (a) Congress clearly explained its legislative intent behind this prohibition: "[T]he reference to contractual arrangements is to make clear that an entity may not do indirectly through contractual arrangements what it is prohibited from doing directly under this Act. . . . [O]f course, a covered entity may not use a contractual provision to reduce any of its obligations under this Act. In sum, a public accommodation's obligations are not extended or changed in any manner by virtue of its lease with the other entity." H.R. Rep. No. 101-485(III), at 104, *reprinted in* 1990 U.S.C.C.A.N. 303, 387.

B. *National Federation of the Blind v. Arizona Board of Regents*

1. On June 25, 2009, the National Federation for the Blind ("NFB"), in conjunction with the American Council for the Blind ("ACB") filed a lawsuit in federal court in Arizona seeking to the prevent the Arizona Board of Regents and Arizona State

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[33] Press Release, National Federation of the Blind, National Federation of the Blind Condemns Lack of Access to New Kindle Fire (Sept. 29, 2011), *available at* http://www.nfb.org/NewsBot.asp?MODE=VIEW&ID=854 (last visited Oct. 5, 2011).

[34] "The ADA's prohibitions against discrimination apply to 'any person who owns, leases (or leases to), or operates a place of public accommodation.'" Botosan v. Paul McNally Realty, 216 F.3d 827 (9th Cir. 2000) (citing 42 U.S.C. 1218(a) (holding that a landlord and tenant cannot contract away liability because the plan language of the regulations that any allocation of responsibility between the landlord and the tenant by lease is effective only as between the parties).

University ("ASU") from adopting a pilot program that replaced the use of text books in select classes with an electronic reader device, Amazon's Kindle DX.

(a) NFB and ACB alleged that the Kindle DX is inaccessible to individuals who are blind because – while it has voice-reading capabilities which allow it to read electronic books, or "e-books", aloud – its menu (used for tasks including selecting a book, activating features and configuring device settings), its web browser, and its note-taking feature do not have the same audible capabilities.

(b) Because ASU subsidizes and provides these devices for the students in the class as a part of the pilot program, the plaintiffs alleged that by utilizing the Kindles in the classroom, they were unable to receive the benefits of their integration into the curriculum, as well as being subjected to discrimination at the hands of ASU, all in violation of the ADA and the Rehabilitation Act.

2. ASU responded to Plaintiff's allegations in several ways:

(a) ASU issued several press releases noting it is "committed to equal access for all students" and that it only joined the pilot program for a single course in which students also could use accessible textbooks.

(b) The university also offered to help students with visual impairments in those affected courses through its disability resource centers, which provide the necessary tools for the students to be able to obtain their coursework and readings.

3. In addition to ASU, five other higher education institutions, including Case Western Reserve University, the Darden School of Business at the University of Virginia, Pace University, Princeton University, and Reed College, deployed the Kindle in pilot programs to assess the role of electronic textbooks and reading devices in the classroom.

4. Shortly after filing their own lawsuits against ASU, NFB and ACB filed complaints with the U.S. Department of Education and DOJ against these additional academic institutions and requested that investigations be initiated.

5. DOJ promptly investigated the complaints, which resulted in several separate settlement agreements with: ASU (signed Jan. 11, 2010); Case Western Reserve University (signed on Jan. 13, 2010); Pace University (signed on Jan. 13, 2010), and Reed College (signed Jan. 13, 2010).

(a) The settlements agreements involving Case Western, Pace, and Reed are unpublished; instead, DOJ has made available the "Letters of Resolution" issued to each of these academic institutions. According to a DOJ press release announcing these three agreements, the universities agreed not to purchase, recommend or promote the use of the Kindle DX, or any other dedicated

electronic book reader, in classes unless the devices are "fully accessible" to students with visual impairments. [35]

(b) On March 24, 2010 DOJ issued a similar Letter of Resolution to Princeton University. DOJ did not issue a press release or otherwise indicate that it had entered into a settlement agreement with Princeton. The Letter of Resolution is available on DOJ's website.[36]

C. DOJ Guidance Regarding the Accessibility of E-reader Technology

1. Following the settlements involving the Kindle pilot program, on June 29, 2010, DOJ released a "Dear Colleague" letter in which it expressed concern that post-secondary institutions were using e-readers that were not accessible to students with visual impairments, especially because the readers did not have an accessible text-to-speech utility.[37]

2. DOJ reminded academic institutions that "[re]quiring use of an emerging technology in a classroom environment when the technology is inaccessible to an entire population of individuals with disabilities — individuals with visual disabilities — is discrimination prohibited by the Americans with disabilities Act of 1990 (ADA) and Section 504 of the Rehabilitation Act of 1973 (Section 504)."

3. DOJ referenced its settlement agreements involving the Kindle DX e-reader and emphatically stated that "[i]t is unacceptable to use emergent technology without insisting that this technology be accessible to all students."

V. AUXILIARY AIDS AND SERVICES RELATING TO TECHNOLOGY

As explained above, under Section 504 and Titles II and III, academic institutions have long had a continuing obligation to provide appropriate auxiliary aids and services to students with disabilities.

With regard to Title III, Section 3.303 (a) of the 1991 regulations requires a public accommodation (*i.e.* a place of education) to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking such steps would fundamentally alter the nature of the

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[35] Press Release, U.S. Department of Justice, Office of Public Affairs, Justice Department Reaches Three Settlements Under the Americans with Disabilities Act Regarding the Use of Electronic Book Readers (Jan. 13, 2010), *available at* http://www.justice.gov/opa/pr/2010/January/10-crt-030.html (last visited Oct. 5, 2011).

[36] Letter of Resolution from U.S. Department of Justice, Civil Rights Division, Disability Rights Section to Hannah S. Ross, Office of General Counsel, Princeton University (Mar. 24, 2010), *available at* http://www.ada.gov/princeton.htm.

[37] Letter from U.S. Department of Justice, Civil Rights Division and U.S. Department of Education, Office of Civil Rights, to College or University President (June 29, 2010), *available at* http://www.ada.gov/kindle_ltr_eddoj.htm.

goods, services, facilities, advantages, or accommodations being offered or would result in an undue burden. Implicit in this requirement is the duty to communicate effectively with students and campus visitors who have disabilities affecting hearing, vision, mobility or speech.

To meet the ongoing obligations under the ADA, academic institutions should be familiar with the technological advances and breakthroughs in this area since the 1991 regulations were published. Thus, in addition to the more familiar auxiliary aids and services (*e.g.*, qualified interpreters, note-takers, assistive listening devices, qualified readers, audio records, and Brailled materials), the 2010 Standards expanded this section to include others such as video remote interpreting, additional Brailled materials and displays, screen reader software, magnification software, optical readers, secondary auditory programs, and accessible electronic and information technology.

While the ADA is focused on the future, use of the most advanced technology is not required as long as effective communication is ensured. For these purposes, this multi-faceted approach is to be timely, and provide receipt of the information expressively, receptively and contextually. The choice of which auxiliary aid or service to provide remains with the public accommodation or academic institution on a case-by-case basis. Thus, what may be appropriate for a traditional classroom environment may not be the best option, or, indeed, completely inadequate, for an internet educational process. DOJ stresses that every public accommodation/academic institution does not have to have access to every device/new technology as long as the aid/service is appropriate under the particular circumstance.

Given all the legal factors to be considered — nature, length and complexity of the communication involved — academic institutions may find the same student/visitor requiring different communication needs given the context in which the communication is taking place. Therefore the internet classroom solution may be vastly different when the communication is exchanged in other venues (*e.g.*, arenas, lecture halls, conference spaces, stadiums, museums or gallery spaces). Unlike the legal history surrounding traditional bricks and mortar issues, settlements, case law, and consent orders regarding the rapidly expanding electronic technology issues is still relatively new. Two examples which may help to provide an array of options for this complex area are requirements for providing auxiliary aids and services at museums (*i.e.* the settlement agreement between DOJ and the International Spy Museum) and the methods of achieving effective communication at sporting events (*i.e.*, *Feldman v. Pro Football Inc.*).

A. Auxiliary Aids and Services

1. Traditional Auxiliary Aids and Services. Auxiliary aids and services have been traditionally understood to include assistive listening devices such as telephone amplifiers, sign language interpreters, or other effective methods of assistance to individuals with hearing impairments; effective methods of making visually delivered information available to individuals with visual impairments such as Braille, audio recordings and the acquisition or modification of equipment or devices such as computer keyboards configured for use by individuals with physical impairments.

2. Revised Regulations Keep Pace With Technology. In the 2010 Standards, the definition of "auxiliary aids and services" was expressly expanded to include numerous mentions of accessible electronic and information technology. Specifically, the regulators at DOJ have listed, *e.g.*: qualified interpreters either on-

site or available through video remote interpreting and real time captioning as examples for making information available to individuals who are deaf or hard of hearing. Equally, in its Notice of Proposed Rule Making, the Department noted "that technological advances… (has) increased the range of auxiliary aids and services for those who are blind or have low vision." That list now includes brailled materials AND displays, screen reader software, etc. While expanding the lists, referring to auxiliary aids and services, the newly revised regulations for both Titles II and III maintained the allowance for "other similar services and actions" Title II/Section 35.104 (4); "other effective methods of making aurally delivered information available to individuals who are deaf or heard of hearing" Title III Section 36.303 (b) (1) and "other effective methods of making visually delivered materials available to individuals who are blind or have low vision" Title III Section 36.303 (b) (2).

3. Auxiliary Aids and Services at Title III Entities. DOJ continues to enforce places of public accommodations' Title III obligations to provide appropriate auxiliary aids or services for individuals with disabilities. For example, in June 2008, DOJ and the International Spy Museum, a privately-run museum, located in Washington, DC entered into a settlement agreement with a patron who was blind who had visited the museum with an educational group.[38]

   (a) The complaint alleged that that the Museum had exhibits and programs that were inaccessible to visitors with visual impairments. At that time there were no Braille documents or docents to guide complainant through the Museum exhibits; there were no computers equipped with text-to-speech software; and the Museum lacked any printed materials in alternative formats (*e.g.*, Braille, large print, or audio recording).

   (b) Under the terms of the agreement, the Museum agreed to a variety of changes in order to comply with the ADA, including providing:

   - tactile maps of the museum and floor plan that visitors can borrow;
   - qualified audio describers to describe audiovisual presentations, computer interactive programs or exhibits;
   - a qualified reader to read exhibit labels;
   - captions for all audiovisual, audio-only, and computer-interactive programs, or scripts or wall text to communicate the audio narration or ambient sounds where captioning is not an option;
   - a sample of models, and objects or reproductions of objects for tactile examination accompanied by an audio description;
   - sign language and oral interpreter services and real-time captioning, on advance request, for all public programs;

[38] Settlement Agreement between the U.S. and the International Spy Museum, dated June 3, 2008, *available at* http://www.ada.gov/spymuseum.htm (last visited Oct. 5, 2011).

- advertisement of the availability of auxiliary aids and services;
- integrated wheelchair seating areas and companion seats at certain locations; and
- training for supervisors and managers on the ADA.

4. Access to Aural Content at Stadiums. In *Feldman v. Pro Football, Inc.*, plaintiffs, who were individuals who are deaf or have hearing impairments, sued the Washington Redskins because they were unable to use the assistive listening devices provided at the stadium and the Redskins failed to provide alternative auxiliary aids or services so that they could enjoy the football games. They alleged that the Redskins' failure to caption the audio experience of the game was a violation of Title III. *Feldman v. Pro Football, Inc.*, Nos. 09-1021, 09-1023, 2011 WL 1097549 (4th Cir. Mar. 25, 2011).

   (a) The United States Court of Appeals for the Fourth Circuit affirmed the ruling of the United States District Court for the District of Maryland and held that, to provide full and equal enjoyment of the entire entertainment experience of a sporting event in a stadium, FedEx Field must provide individuals, who are deaf or have a hearing impairment, with the auxiliary aids and services necessary to benefit from the content broadcast over the stadium's public address ("PA") system during Washington Redskins home games. Examples of such audio content are: game-related information; emergency information; advertisements; public service announcements; and song lyrics.

   (b) The Fourth Circuit recognized that places of public accommodation are entitled to select the means of achieving full and equal enjoyment and effective communication and that an individualized and contextual assessment will be required to determine the appropriateness of the chosen auxiliary aid.

   (c) The court also noted that "'full and equal enjoyment' is not such a broad concept as to 'mean that an individual with a disability must achieve an identical result or level of achievement as persons without a disability.'" *Id.* at *25.

   (d) While it is important to note that the Fourth Circuit's holding was framed "in the context of a *professional* football game at a large stadium like FedEx field . . ." *Id.* at *25 (emphasis added), any distinction between professional and amateur sporting events may be minimal. Instead, the size and amenities of the stadium may more important.

VI. CONCLUSIONS & RECOMMENDED BEST PRACTICES FOR ACADEMIC INSTITUTIONS

A. Conclusions

1. As detailed above, regulations relating to accessible technology is in the midst of extensive revision.

2. While these changes come from many fronts – primarily, modifications to the governing laws/regulations and court decisions – they create a climate in which the accessibility obligations of places of public accommodation, including academic institutions, are rapidly expanding.

3. By embracing an expansive civil rights-driven approach, DOJ and the courts are broadly interpreting the ADA's obligations of providing "equal enjoyment" and "effective communication" to encompass new technologies, including those used in an educational environment, that often were not, and could not be, contemplated at the time the ADA was enacted more than twenty years ago.

4. In the words of Assistant Attorney General Thomas E. Perez, Civil Rights Division, U.S. Department of Justice: "Advancing technology is systematically changing the way universities approach education, but we must be sure that emerging technologies offer individuals with disabilities the same opportunities as other students… These agreements underscore the importance of full and equal educational opportunities for everyone."[39]

B. Recommended Best Practices

Given that interpretations and applications of the ADA are extremely fact and context-specific, it would be ultimately unhelpful – and irresponsible – to provide any specific recommendations regarding how academic institutions should address concerns about website accessibility and the use of new technologies in classrooms as well as appropriate auxiliary aids and services. What might work well for one institution could be totally wrong for another (because of *e.g.*, resources, infrastructures, services offered, state and local requirements, etc.) However, there are certainly general measures that academic institutions can undertake to help guard against becoming embroiled in litigation or a governmental investigation.

1. View the ADA and Rehabilitation Act as expansive civil rights statutes rather than a simple checklist of technical obligations;

2. Stay abreast of developments in accessibility law (*e.g.*, the status and substance of the proposed Section 508 revisions and DOJ's proposed private sector website regulations), monitoring DOJ settlements, and becoming more active in the legislative process (*e.g.*, submitting comments when the government issues the website accessibility NPRM);

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[39] Press Release, U.S. Department of Justice, Justice Department Reaches Three Settlements Under the Americans with Disabilities Act Regarding the Use of Electronic Book Readers (Jan. 13, 2010), *available at* http://www.justice.gov/opa/pr/2010/January/10-crt-030.html (last visited Oct. 5, 2011).

3. Assess the impact the adoption of new technology will have on accessibility;

4. Provide regular training regarding accessibility to appropriate staff in a wide variety of positions and across levels of authority (*e.g.*, vice president of communications, director of disability support services, information technology and in-house legal counsel);

5. Review what auxiliary aids and services they currently provide and could additionally provide to ensure that individuals with disabilities can achieve "effective communication" (depending upon the location and type of institution and communication at issue, such auxiliary aids and services might include, without limitation: writing tools; pre-printed materials (including in alternative formats); signage/maps/models; assistive listening devices; handheld devices; induction loops; captioning; and/or sign-language interpreters)

6. Ensure that contractors (*e.g.*, web designers, content managers) are well-versed in accessible technology obligations or supervised/trained by those who are;

7. Confirm the accessibility of websites both from a user-perspective and a design perspective; and

8. Document all efforts to achieve accessibility (ideally involving knowledgeable lawyers in the process to help maintain/assert confidentiality and privilege).