

Department of Justice Notice of Proposed Rule-making – Title II of ADA & WCAG RIN 1190-AA79 (Docket ID No. 144)

On behalf of the Software & Information Industry Association (“SIIA”), I write to comment and provide feedback on the Notice of Proposed Rulemaking (NPRM) on the Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities issued by the Department of Justice (“DOJ”) under Title II of the Americans with Disabilities Act (ADA), specifically with respect to the updated requirement of the Web Content Accessibility Guidelines (“WCAG”).

SIIA is the principal trade association for those in the business of information, representing over 450 companies including the education technology and academic publishing industries. Some 200 SIIA members work with K-12 schools (“K-12”) and institutions of higher education (“IHE”) nationwide to develop and deliver education software applications, digital instructional content, online learning services, and related technologies. They are helping to support teachers and instruction, improve student learning, carry out various administrative operations, and improve school productivity and educational performance.

We are encouraged to see the call for greater accessibility from the DOJ. The ability to access resources online has provided populations of diverse backgrounds, skills, and abilities to participate fully in society’s public opportunities. We acknowledge the DOJ’s critical role in implementing Title II under the ADA and support efforts to ensure high-quality accessibility and to safeguard people with disabilities. The industry has long relied on federal Section 508 guidelines for web content and platform tools.

We also understand the importance of ensuring that providers to public entities, such as schools and IHEs, are supporting the success of all students. SIIA wants to ensure that all students have access to high-quality educational resources suited to their needs. However, SIIA has several concerns about the reasonableness of the DOJ’s expectations for public entities, particularly public educational institutions, and their third-party content providers. Our answers are below and focus on the following:

- The effect on small public entities will be largely disproportionate to the large public entity. We believe a longer phase-in period would be appropriate, giving smaller entities adequate time to enhance their website accessibility.
- Innovative technologies may increase accessibility of historically inaccessible services.
- DOJ must maintain the ability to offer conforming alternate versions of materials to citizens.
- DOJ should allow for remediation for isolated and temporary non-conformance.

Software and Information Industry Association
Responses to CRT Docket No. 144 - Nondiscrimination on the Basis of Disability;
Accessibility of Web Information and Services of State and Local Government
Entities

Requirements for Web and Mobile Accessibility

Question 4: What compliance costs and challenges might small public entities face in conforming with this rule? Do small public entities have internal staff to modify their web content and mobile apps, or do they use outside consulting staff to modify and maintain their web content and mobile apps? If small public entities have recently (for example, in the past three years) modified their web content or mobile apps to make them accessible, what costs were associated with those changes?

Answer: SIIA member companies serve public entities of all sizes - from the federal government, as one of the larger customers, to small school districts, some that fall well below the small entity threshold of 50,000 students¹. In these small school districts, employees often serve multiple roles: an IT director may also be the math teacher and the soccer coach.

SIIA's member companies have been working diligently with their customers - many of which include public entities like schools and local governments - to ensure products conform to WCAG 2.0 Level AA standards and, in some states, WCAG 2.1 Level AA. These standards were developed in a consensus process involving participation from both industry and disability advocates and represent the best accessibility standard that is currently available.

Ensuring that all technologies conform to the latest standards will be especially difficult for smaller public entities that rely on contracted services or even volunteer hours to maintain a public-facing website.

Larger Public Entities and Small Public Entities

Question 9: How will the proposed compliance date affect small public entities? Are there technical or budget constraints that small public entities would face in complying with this rule, such that a longer phase-in period is appropriate?

Answer: SIIA appreciates the DOJ's consideration for smaller public entities, but strongly recommends a longer phase-in period. The new guidelines will have a disparate impact on small public entities, which have fewer resources to enable compliance by the end of a short phase-in period. To put it into context, many larger organizations have whole

¹ For example, in upstate New York, Long Lake Central school district serves fewer than 100 students.



departments that can dedicate time and energy to the new conversion of their websites. In contrast, smaller entities might have a single person tasked with handling their technology responsibilities.

If a smaller public entity like a school district is required to conform, substantial costs are likely to come from the conversion or upgrade of outdated content and content management systems that cannot support the new standard to a modern system that can.

Question 12: Should the Department consider factors other than population size, such as an annual budget, when establishing different or tiered compliance requirements? If so, what should those factors be, why are they more appropriate than population size, and how should they be used to determine regulatory requirements?

Answer: SIIA believes other factors should be considered when implementing this rule towards public entities. As mentioned before, whether large or small, governmental entities vary by type, size, and scope. For example, a state department of motor vehicles and the county courthouse cannot and should not be considered “similar” governmental entities, due to their differences in services. Likewise, K12 and IHE should not be considered the “same” as the aforementioned government entities. Public educational institutions face a number of increased challenges in conforming to the proposed rule that other governmental agencies do not face, including budgetary limitations, multiple channels of content distribution, and requirements of other federal and state laws on ensuring equal access to the curriculum for students. Understanding this, the DOJ should consider other factors such as the annual budget when implementing the rollout of this rule.

Captions for Live-Audio Content

Question 13: Should the Department consider a different compliance date for the captioning of live-audio content in synchronized media or exclude some public entities from the requirement? If so, when should compliance with this success criterion be required and why? Should there be a different compliance date for different types or sizes of public entities?

Answer: SIIA agrees with DOJ that compliance with the live captioning of audio content requirement should be deferred. While there are technologies available to automate the capture of audio, both prerecorded and live, the accuracy of such services today is not 100 percent. The department has noted this limitation itself in concerns about publicly available content of IHEs.

New tools like those using artificial intelligence (AI) technologies may assist with captioning the live-audio content. The U.S. Department of Education's recently released report,



*Artificial Intelligence and the Future of Teaching and Learning*², emphasizes the importance of utilizing the advances of AI and its contributions to student learning and accessibility. The report states: “Educators see opportunities to use AI-powered capabilities like speech recognition to increase the support available to students with disabilities, multilingual learners, and others who could benefit from greater adaptivity and personalization in digital tools for learning.” These tools continue to advance in their capabilities and will be useful as public entities large and small conform to existing and new requirements.

Exception: Third-Party Web Content

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

Answer: Accessibility in education is critical. K-12 schools and IHEs contract with third parties for tools to help facilitate communications with families, curriculum tools for students to access important educational information, and more. These third parties are working diligently to meet the latest standards and to meet the needs of their customer populations.

Exception: Password Protected Class or Course Content of Public Educational Institutions - Postsecondary Education

Question 35: Should the Department consider an alternative approach, such as requiring that all newly posted course content be made accessible on an expedited time frame, while adopting a later compliance date for remediating existing content?

Answer: SIIA believes that DOJ should adopt a later compliance date for remediating existing content. Under current law, IHEs are able to provide immediately accessible alternative resources to these students that are equivalent in academic content and rigor and aligned with the student's individual needs. This flexibility must be maintained for a “conforming alternate version” and would be in line with the ADA, the Rehabilitation Act, the Individuals with Disabilities Education Act (IDEA), and the Elementary and Secondary Education Act (ESEA).

Content should be treated as instructional material and schools should be allowed the flexibility to provide equivalent alternatives based on an individual student's needs. The timeframe given for content uploaded to a course site, especially existing content, should

² U.S. Dept. of Ed., Office of Ed. Tech, “Artificial Intelligence and the Future of Teaching and Learning” (May 2023), at 1 (<https://www2.ed.gov/documents/ai-report/ai-report.pdf>).



be based on a reasonable standard that gives IHE staff and professors adequate time to provide accessible resources to students with disabilities. Suitable exceptions are necessary to ensure students with disabilities are accommodated immediately without denying schools the flexibility to adopt new and innovative technologies and digital learning resources.

Conforming Alternate Versions:

Question 49: Would allowing conforming alternate versions due to technical or legal limitations result in individuals with disabilities receiving unequal access to a public entity's services, programs, and activities?

Answer: Under current law, school districts and institutions of higher education are able to provide immediately accessible alternative resources to these students that are equivalent in academic content and rigor and aligned with the student's individual needs. This flexibility must be maintained for a "conforming alternate version" and would be in line with the ADA, the Rehabilitation Act, the Individuals with Disabilities Education Act (IDEA), and the Elementary and Secondary Education Act (ESEA).

Further, the DOJ's rule must maintain a school's current ability to provide conforming alternatives that best suit a student's needs. School districts are currently best suited to evaluate an individual student's needs and provide tailored instructional content, regardless of whether it is, for example, a different digital textbook, a previous version of the same text, or a print alternative.

SIIA does agree that all digital content should strive to achieve the WCAG 2.1 Level AA standards and a conforming alternative exception should not be a loophole to allow web content to ignore them. SIIA's recommendation is that the Department continue to allow for schools and institutions of higher education to provide students with disabilities the instructional content best suited for their needs. A well-executed conforming alternative exception can still push all content towards WCAG 2.1 Level AA but give schools the flexibility to adopt innovative technologies.

Measuring Compliance:

Question 57: What policies and practices for testing and remediating web and mobile app accessibility barriers are public entities or others currently using and what types of testing and remediation policies and practices are feasible (or infeasible)? What types of costs are associated with these testing and remediation policies?

Answer: The Voluntary Product Accessibility Template (VPAT) is fairly common in the education space and is useful for vendors and customers. Please see Section 508 of the Rehabilitation Act³.

³ Section508.gov. (n.d.). <https://www.section508.gov/sell/vpat/>



Question 66: How should the Department address isolated or temporary noncompliance with a technical standard and under what circumstances should noncompliance be considered isolated or temporary? How should the Department address noncompliance that is a result of technical difficulties, maintenance, updates, or repairs?

Answer: The department should ensure that remediation for isolated and temporary noncompliance is based on a reasonableness standard, using quality assessment, industry norms, and strategies that provide guidance on proper protocols that should be followed to assist public entities with compliance. That reasonableness standard will also inform the customary timeline of repair and maintenance of accessibility technology. The flexibility of a reasonableness standard is well-known in other federal laws and will incentivize public entities are held to not only bring their accessibility features up to date, but to keep them current into the future. This flexibility will ensure web content developers are constantly working to seamlessly build and maintain accessible content while keeping the cost of providing a website at sensible levels.

Lastly, websites are a kind of software and, like every kind of software, will have issues. The cost of building, testing, and maintaining a full website, digital instructional materials, or software platform by a public entity or a service provider that has, and will never have, a technical issue is impossible, regardless of the size of the organization, and would leave entities open for complaints and liability.

Conclusion

In conclusion, we agree that accessibility for all individuals is essential. Nonetheless, the proposed approach of requiring this new accessibility standard will have significant consequences for America's learners, as well as the economic growth and sustainability of education around the country.

Thank you for your attention to this important issue. SIIA and our member companies look forward to further working with the DOJ and other federal agencies to support policies that provide greater access to high-quality, innovative technologies. Please feel free to reach out to me with questions or to discuss these issues further.

Sincerely,



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