# STORM CLOUDS ON THE HORIZON: LESSONS TO BE TAKEN FROM THE RECENT WAVE OF DIGITAL ACCESSIBILITY CHALLENGES

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## I. Introduction

For several years, colleges and universities have been urged to prioritize efforts to enhance digital accessibility on their campuses and wherever else their institutional and digital footprints may fall. The challenge in such efforts can prove to be extraordinary, often involving updating or retro-fitting technological platforms, drafting policies that align with vague laws and extensive technical industry standards, training staff, and ensuring that procurement policies align with accessibility needs. These efforts can prove to be expensive in both time and resources, and without an internal or external mandate, it is often challenging to command the attention to the issue that is necessary to truly encourage change at any institution, large or small. As a result, the issue has largely remained on the backburner for many institutions.

This all changed in the past year, with the U.S. Department of Education's Office for Civil Rights ("OCR") instituting a wave of individual complaints across the nation, many of which were resolved with binding resolution agreements for higher education institutions. Moreover, several other higher education institutions were faced with ongoing investigations triggered by the U.S. Department of Justice ("DOJ") or litigation from national advocacy groups and other individuals who felt that they were harmed or limited by inaccessible digital environments. If yours was one of the institutions impacted by any of these complaints, then you have likely started paying attention to the issue. This article seeks to summarize the current state of this issue and convey one overarching message: digital accessibility is a critical issue for your institution and your community, and steps should be taken now to ensure that individuals within your community can access the ever-increasing digital environments maintained by many higher education institutions.

## II. Legal Foundation

Several NACUA authors have addressed the legal background for digital accessibility in the past two years, and I encourage readers to also read their helpful materials.[2] Given that these

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[2] *See, e.g.*, "*Accessibility and Your Campus: Challenges and Solutions for a Digital Age*," (Materials for the NACUA National Conference, 2017); "*Digital Accessibility: A Practical Look at Achieving Compliance and a Review of Recent Legal Developments*," (Materials for the NACUA National Conference, 2016).

authors have already extensively addressed the legal foundation for digital accessibility, I will just summarize it in this section.

In sum, post-secondary institutions are bound by two primary federal anti-discrimination laws: Section 504 of the Rehabilitation Act of 1973 ("Section 504")[3] and the Americans with Disabilities Act, as amended ("ADA").[4] With regard to the ADA, public institutions are bound to adhere to the requirements of Title II, and private institutions are bound to adhere to the requirements of Title III, which also covers businesses, hotels, and other places that satisfy the criteria of being "public accommodations." Finally, many states have similar anti-discrimination laws that implicate digital accessibility, and each institution should be familiar with their own state's requirements, as well as the requirements of any state in which they offer educational programs or activities.

Both Section 504 and the ADA broadly require that no institution shall, on the basis of disability, exclude an individual from participation in, deny them the benefits of, or otherwise subject them to discrimination in an institution's educational programs or activities. (Title III of the ADA achieves the same results more broadly, given the broader charge of enforcing its provisions to a range of different types of public accommodations.) Section 504 and the ADA are often interpreted interchangeably, with the primary differences being that Section 504 tends to be slightly more specific than the ADA, and the fact that OCR enforces Section 504 and Title II of the ADA, while the DOJ enforces Title III of the ADA. Importantly, however, nowhere in either the law or the regulations for Section 504 or the ADA are the concepts and realities of terms like "digital accessibility" or "web accessibility" fully addressed.

Section 508 of the Rehabilitation Act of 1973 ("Section 508") is another federal law that does explicitly address electronic and information technologies (commonly referred to as "EIT"), but it previously was interpreted to only apply to federal agencies or post-secondary institutions that are contractors for federal agencies. Some have argued that all post-secondary institutions that receive federal funding are, by extension, "federal contractors," but that is not a universally held position. While older OCR resolutions referenced Section 508, recent decisions and resolution agreements have felt it unnecessary to venture into this discussion of Section 508's broader applicability because Section 504 is already triggered by the receipt of Federal financial assistance and the ADA – through Title II or Title III – already applies to virtually every post-secondary institution. Still, Section 508 is a valuable resource because it discusses the requirement that federal agencies must "develop, procure, maintain, or use" only accessible EIT. Both the OCR and the DOJ also characterize Section 508 and its requirements as a helpful guideline or tool for institutions under the purview of the other applicable laws mentioned above.

Still, in advising colleges and universities, the same question is asked repeatedly: how can a federal regulatory agency or a court force an institution to make broad aspects of its digital environment accessible or require the adoption of a specific industry technical standard if the regulations do not require that result? This question re-emerged with added vigor when the Trump Administration's DOJ recently delayed and then publicly shelved relevant rulemaking

[3] 29 U.S.C. § 794 (1973). Its implementing regulations are at 34 C.F.R. Part 104.

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

efforts to update technical guidance for websites under the ADA. As one author succinctly stated in a broader context, "[t]his leaves…[institutions] in a precarious position – one where inaccessibility can be considered discriminatory, but without any guidance as to what 'inaccessibility' actually means." https://webaim.org/blog/dojhaltswebguidance/. The basic, high level answer is that the federal government broadly construes the requirement that individuals with disabilities should have an equal opportunity – or equally effective alternate access – to participate in the institution's programs and activities regardless of whether offered digitally or terrestrially. The challenges arise, however, in trying to determine – either as an individual institution or in the context of a federal review – what exactly is required to be "accessible" in the digital universe.

## III. Entering the Fray

As previous authors have discussed, litigation in this area is not new, but it may feel unending. In 2015, the National Association of the Deaf brought separate but simultaneous class action suits against the Massachusetts Institute of Technology and Harvard University. The lawsuits alleged the institutions discriminated against individuals with disabilities by providing online resources with inadequate auxiliary aids or services, such as closed captioning, in violation of Section 504 and Title III of the ADA. The U.S. District Court of Massachusetts denied various motions to dismiss the claims and they remain pending.[5]

Similarly, individuals associated with the National Federation of the Blind brought a class action suit in April 2016 against Barbri Bar Review. The suit alleged Barbri discriminated against disabled individuals by failing to provide accessible materials to blind students via its website, mobile app, and course materials, in violation of Title III of the ADA and Texas state law. The parties settled on January 22, 2018, with Barbri agreeing to upgrade its online resources in conformity with W3C's Web Content Accessibility Guidelines ("WCAG"), train employees, and audit current offerings.

In September 2017, a blind individual brought separate class actions alleging discrimination in violation of Title III of the ADA, Section 504, and New York state law against eight New York higher education institutions, at least one of which was settled in January 2018. In a public statement, the public relations director for the National Federation of the Blind stated that "[w]e do not condone just filing a blizzard of lawsuits in order to get settlements. That's not solving the underlying problem." *See* Vivian Wang, *College Websites Must Accommodate Disabled Students, Lawsuits Say*, New York Times (Oct. 11, 2017), https://www.nytimes.com/2017/10/11/nyregion/college-websites-disabled.html. Instead, the National Federation of the Blind expressed its preference for developing clearer federal guidelines on web accessibility.

Many other institutions across the country have been subject to similar challenges and several groups collect information related to each one. *See, e.g.*, http://www.d.umn.edu/~lcarlson/atteam/lawsuits.html. While these cases are all fact-specific

[5] *See Nat'l Ass'n of the Deaf v. Harvard Univ.*, No. 3:15-cv-30023-MGM (D. Mass. Feb 12, 2015); *Nat'l Ass'n of the Deaf v. Massachusetts Inst. of Tech.*, No. 3:15-cv-30024MGM (D. Mass. Feb. 12, 2015). Interestingly, the DOJ submitted a Statement of Interest expressly supporting the plaintiffs' claims. While acknowledging the affirmative defenses of fundamental alteration and undue burden, the DOJ argued that the ADA and Section 504 duties are applicable to web accessibility.

and critical to our understanding of institutional requirements, 2017 could truly be said to be the year of federal regulatory action on this issue.

Prior to 2017, both the DOJ and the OCR were already active with regard to post-secondary digital accessibility efforts.[6] However, in late 2016 and into 2017, everything changed when an individual began filing OCR complaints against scores of colleges and universities (as well as public school districts) across the country.

The individual OCR complaints followed a pattern: the complainant utilized several versions of popular web-checking software on publicly accessible portions of an institution's website, she would list the error codes that were returned on those pages, and she alleged that the inaccessibility of these public-facing websites constituted a violation of Section 504 and/or Title II of the ADA.[7] (Fewer cases were received by the DOJ, which has Title III jurisdiction, because the DOJ's complaint process is not as efficient and the DOJ has more autonomy than OCR to decide which cases it investigates or takes no action on.)

Initially, the targeted institutions took these OCR complaints in stride and treated them with the level of seriousness and care given to any notice that the federal government intended to investigate an issue on campus. Many institutions offered to fix the eight to twelve public facing websites listed by the complainant and seek to resolve the matter, either via a formal or informal resolution with OCR. However, for a time OCR viewed these cases much more broadly. Instead of limiting itself to the public facing sites listed by the complainant, the OCR sought assurances that <u>all</u> online content and functionality developed, procured, or used by the institution in question must be fully accessible to individuals with disabilities. This included new content, but also older, legacy content (although some OCR offices did agree to limit the amount of legacy content to be remediated). It included public-facing web pages (*e.g.*, admissions, financial aid, athletics pages), but also course content and internal pages like various human resources platforms and learning management systems, such as Canvas or BlackBoard.

Many institutions understood that these challenges existed in their own digital environments and, facing the risk of a long, arduous OCR investigation, many sought to affirmatively resolve the matters utilizing Section 302 of OCR's Case Processing Manual, which allows institutions to avoid an investigation if a resolution agreement can be reached. As these resolution agreements began flowing out of OCR at a trickle that grew into a stream, institutions began taking notice, particularly with regard to the requirements that OCR was seeking through the monitoring agreements. A non-exhaustive list of these requirements included:

- Institutions were required to audit or retain an outside auditing firm to review the accessibility of their entire digital environment. For many institutions, this equated to over 100,000 pages and costs that often averaged between $10,000 to $100,000, depending on the amount and complexity of the content in question.

[6] *See, e.g.*, *Dudley v. Miami Univ. et al.*, No. 1:14-cv-00038 (the DOJ intervened before the matter was settled via consent decree in 2016); OCR Resolution Agreement involving the University of Montana, OCR Case No. 10-12-2118 (resolved in 2014).

[7] The author represents more than two dozen of these institutions and requested the underlying complaints under the Freedom of Information Act from each individual OCR office. Almost every complaint followed this pattern. By no means does this purport to speak to any other complaint that was not reviewed by the author.

- Upon concluding the audit, institutions were required to create specific corrective action plans for how they would remediate the errors found. It was demanded that these corrective action plans be fully executed within one or two years.

- Institutions were also required to ensure the accessibility of vendor-created or other third-party content hosted on the institution's website. Some of the complaints specifically referenced institution-related Facebook or YouTube pages, and the OCR agreements commonly covered third-party services like human resource management tools, employee investment resources hosted by financial vendors, library pages, athletic pages maintained by vendors, campus radio and television stations, personal faculty-created pages that related to the institution's course offerings, etc. Many institutions complained that they had limited, if any, say in the accessibility of the content created by the financial industry or the insurance industry, for example, and those were the sites linked from the institutional website that were called into question, *e.g.*, a link from College X's site to a private employee health insurance company. In sum, every piece of the institution that touched the digital world was potentially ripe for inclusion in OCR's agreements.

- Institutions were also required to develop policies and procedures that addressed digital content development, procurement processes, and the use of technology, amongst other topics. The typical OCR agreement also required that institutions benchmark their accessibility efforts against the WCAG 2.0 Level AA standard and the Web Accessibility Initiative Accessible Rich Internet Applications Suite ("WAI-ARIA") 1.0 for web content. (These benchmarks have since been updated to reflect updated technical standards.)

- If institutions sought to utilize a fundamental alteration, undue burden, or academic freedom defense to changing a website, the justification had to be in writing, reviewed by the president of the institution, and subject to OCR scrutiny.

- Finally, institutions were required to train individuals with regard to website accessibility and how to make content accessible. OCR indicated that the scope of the training extended to "all appropriate personnel, including, but not limited to: content developers, webmasters, procurement officials, *and all others responsible for developing, loading, maintaining, or auditing web content and functionality*." The italicized portion was critical to understanding the scope of this effort because, with OCR focused on external content as well as course content, the term "all others responsible for developing, loading, or maintaining" web content likely included most teaching faculty who used a learning management system like Canvas or BlackBoard to run their courses.

This process with OCR continued for many, many institutions for almost the entirety of 2017, with no indication of slowing.[8] If an institution had not yet received an OCR complaint, many began consulting with counsel to assess their risk. In sum, it appeared to be a matter of "when," not "if," an institution would receive a notice from OCR that it was beginning an investigation.

In March of 2018, OCR updated their Case Processing Manual and the particular provisions that related to dismissal of cases that create an administrative burden. Following that change, many complaints were dismissed. OCR subsequently created an updated standard agreement that was much less intrusive than the prior agreements, and sought to harken back to the traditional and more general standards of Section 504 and the ADA, which require institutions to take actions "necessary to ensure that individuals with disabilities have an equal opportunity to participate in the institution's programs and activities…or equally effective alternate access."

With that change in approach, the trickle that grew into a stream that turned into a flood of OCR complaints seemed to stop. Higher education institutions could rest easy now, right?

## IV. Efforts Moving Forward

In my personal view, the answer to the rhetorical question that institutions can rest easy is simple: wrong! As the prior section, and the work of all of the NACUA attorneys who have written and presented on this issue make clear, this remains a critical area of risk for colleges and universities. While 2016-17 could be characterized as the year of OCR enforcement on this issue, many institutions are actively engaged in litigation and DOJ monitoring of consent decrees. These legal actions are not solely being taken by national organizations advocating for individuals with disabilities, but they are also being brought by individuals harmed or potentially harmed by inaccessible digital content, programs, or activities. Moreover, OCR has currently chosen to utilize a provision of the Case Processing Manual designed to address the sheer number of cases being filed; in no way has OCR or the DOJ ceded authority on these matters or indicated that digital accessibility is outside their jurisdiction. In short, the past few years may be merely a preview to a litigious future until institutions can create accessible digital environments.

Complicating matters further, I personally do not know of a single institution who is advocating that they *reduce* their digital or online presence. To the contrary, most institutions are seeking to expand their digital footprint through the use of online course content, online education, virtual access to campus life, online payment and personnel systems, etc. With careful planning, all of it can and should be designed to be accessible to all. More than that, however, institutions should understand that this is more than a technical challenge. It is also very much a cultural shift in thinking about the digital world, thinking about pedagogy, and thinking about how content – any content – is designed. The following are some steps that can help institutions work through this transitive period:

[8] While OCR never disclosed the named-complainant, the likely complainant for many of these cases maintains an active social media presence, and made no efforts to conceal her plans to continue with her efforts.

- Understand the Scope of the Problem: First and foremost, institutions must understand the laws that apply and the amount of digital content that could be implicated by those laws and regulations. The DOJ and OCR have resources available that spell out these parameters to a greater or lesser degree. Resolution agreements and consent decrees, as well as guidance documents, from these agencies should be carefully monitored. If the active litigation described above leads to public settlements, they should be studied. But that is just half of the battle. Institutions must also self-assess the amount of content being created, who is creating it, and how it is being implemented on their campuses. Most institutions that I work with are amazed at the amount of content that is created on even a quarterly basis. While OCR's press for an outside auditor proved costly for many schools, these efforts can also be conducted internally and more efficiently over time with adequate know-how and experience.

- Create a Task Force or Action Plan: Many professionals in higher education grimace at the mere thought of convening yet another committee or a task force, given the glut of such groups on many campuses. This does not need to be yet another inactive subcommittee on your campus. The problem is real, however, and the solution implicates many groups on campus. For example, while web developers and other IT professionals are certainly involved in the solution, a surprising amount of schools that had website design policies found those policies in their marketing departments. Disability service professionals are critical to remediating most accessibility concerns on a campus, but faculty are also potential "content developers" in the federal view of compliance. If a faculty member is going to be required to provide more or different materials in class, they will want a voice in that decision. General counsel, online education professionals, procurement officials, media relations, athletic departments, and the list continues: all play an important role in ensuring that the campus is digitally accessible. Accordingly, all may want a voice in the solutions chosen for your campus.

- Draft Appropriate Policies for the Institution: Early OCR agreements required the creation of explicit policies and procedures for issues surrounding digital accessibility. More recent agreements have removed that obligation, but it still remains a good practice for many institutions. While the drafting can be daunting, it is the primary way to communicate institutional values and direction, in addition to the technical requirements that are expected to be achieved. What should individual web pages include with regard to accessibility efforts? How will individuals alert the institution to inaccessible sites? How do faculty determine if a digital accessibility issue constitutes a fundamental alteration or an undue burden? What role does disability services play versus the more traditional web developers who may be housed in myriad institutional departments? Policies and procedures are not a panacea that will (or even should) answer all of these questions at every institution, but they can be helpful, provided they are tailored to the institution. (While many institutions have wonderful and publicly available processes and procedures to review for ideas, they may not be well-suited to schools with less or different resources. Accordingly, these policies and procedures should be well tailored by

institution, with a careful eye towards the technical standards, the law, and the institutional realities.)

- Improve Procurement Policies and Processes: Another surprise for many institutions was in learning about the number of vendors that worked on different aspects of their web environment and the sheer number of employees that purchase technology for their departments and/or the larger institution. Institutions should understand what contracts, licenses, products they have purchased and what assurances they have with regard to the accessibility of the item in question. Many contracts that I have reviewed contain no assurances whatsoever. Others contain vague references to "accessibility" with no assurance as to how that will be assessed (*e.g.*, WCAG, Section 508, something else) and who will remediate any accessibility concerns. More and more institutions are beginning to utilize Voluntary Product Accessibility Templates ("VPATs"), but many are also uncertain of what technical criteria they should pay attention to in those VPATs. Finally, many procurement officials feel they have no institutional guidance with regard to what terms should be in a given contract and what assurances are necessary from the vendor.

- Create a Tailored Training Regime: As the OCR agreements made clear, training is imperative and it should be focused on more than just technical content developers. Commonly used software like the Microsoft Office Suite or Adobe have accessibility features built in, if the user knows how to access them. Many professionals have never seen examples of how assistive technology actually functions with accessible (versus inaccessible) materials. Faculty often do not consider the challenges created by utilizing media without necessary captions or alt-tagging. All of these groups have an important role to play in accessibility efforts, but they are very different. A one-size-fits-all training regime simply does not work in this context.

In sum, every year provides new technological achievements in higher education, and every year digital environments expand accordingly. Dodging a federal review or litigation in any given year provides no protection from future challenges. Instead, it provides only one benefit to a college or a university: time. Institutions should use that time as effectively as possible before the next wave crashes. In doing so, they will also be improving their environment in a very real way for students, colleagues, and the members of the public.