# Highlights from reading DOJ ADA pdf

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This document from US Attorney General Merrick Garland responds to those comments and suggestions explaining which of those shaped the new regulations and why others were not integrated.

Document link:

<https://www.ada.gov/assets/pdfs/web-rule.pdf>

Summary link

<https://www.ada.gov/notices/2024/03/08/web-rule/>

The PDF is 320 pages long and a great deal is devoted to how they decided on how the regs would be made based on comments. I’ve put parts within quotation marks as well as making those bold and italicized to indicate copy/pastes from the document. Those stood out for me, especially where they pertained to us in higher education. What I may have left out does not indicate those parts were not of importance but just not what I focused upon.

## Which WCAG standard will be used?

They are going with WCAG 2.1 AA as the standard even though 2.2 has been out since October of 2023. They chose not to go with WCAG 2.0 as some wanted. Nor did they go with AAA standards of WCAG or other international accessibility standards.

## Timeframe to come into compliance based on population size.

Public entities greater than 50,000 (need more exploration on this criteria) are to be in compliance two years from this being finalized. Those smaller ones under 50,000 have three years to be in compliance. I assume but may be wrong that UW would be in the 50k category and Olympic College where I work, in the less than 50k zone.

***“Under § 35.200(b)(2), a public entity with a total population of less than 50,000 must comply with these requirements beginning three years after the publication of this final rule.”***

## Archive section not needing to be remediated as well as exceptions to that rule.

There is mention of public entities being able to have an archive section, clearly denoted on web sites where older content lives and is not required to be remediated to bring those files/documents into accessibility compliance. Similar exemption exists for older social media content prior to the rule being in effect.

Newly created content starting from the above compliance dates will need to be made accessible, even if later it will be moved to the archives section.

Older content that is still in use for those making use of a public entity are not exempted as they are needed by all, including those with disabilities, to do their transactions with the public entity.

***“unless such documents are currently used to apply for, gain access to, or participate in the public entity’s services, programs, or activities;”***

For us in higher education that might be documents and web pages used to register, get financial aid, enroll in classes and so on. These would not be exempt and allowed to be placed in an archive zone.

## Five Specific Exemptions

***“Department has set forth five specific exceptions from compliance with the technical standard required under § 35.200:***

***(1) archived web content;***

***(2) preexisting conventional electronic documents,*** ***unless such documents are currently used to apply for, gain access to, or participate in the public entity’s services, programs, or activities;***

***(3) content posted by a third party, unless the third party is posting due to contractual, licensing, or other arrangements with the public entity;***

***(4) conventional electronic documents that are about a specific individual, their property, or their account and that are password-protected or otherwise secured; and***

***(5) preexisting social media posts.”***

## Conforming Alternate Versions

Also, of note is conforming alternate versions that is occasionally used. The early waped.org site had a text only and a “regular” site that existed in tandem. We had to make updates in both each time changes were made. Eventually we ditched this poor practice originally created by the third party contracted to make the site and instead strived to make just one accessible web site. (one can go to archive.org and look up those early versions)

The alternate conforming is only allowed as a rare exception when there isn’t a technical way to be accessible otherwise, and not as a regular practice for a web site.

***“Conforming alternate versions are permissible only when it is not possible to make web content directly accessible due to technical or legal limitations.”***

Some entities wished to provide 24/7 phone access as an alternative to having a fully accessible web site and the DOJ said,

***“The Department’s March 2022 guidance did not include 24/7 staffed telephone lines as an alternative to accessible websites. Given the way the modern web has developed, the Department no longer believes 24/7 staffed telephone lines can realistically provide equal opportunity to individuals with disabilities. Websites—and often mobile apps—allow members of the public to get information or request a service within just a few minutes, and often to do so independently. Getting the same information or requesting the same service using a staffed telephone line takes more steps and may result in wait times or difficulty getting the information.***

***For example, State and local government entities’ websites may allow members of the public to quickly review large quantities of information, like information about how to register for government services, information on pending government ordinances, or instructions about how to apply for a government benefit. Members of the public can then use government websites to promptly act on that information by, for example, registering for programs or activities, submitting comments on pending government ordinances, or filling out an application for a government benefit. A member of the public could not realistically accomplish these tasks efficiently over the phone.”***

## Mobile apps and third-party sites

***“this rule simply requires that when public entities provide or make available web content or mobile apps, they must ensure that that content and those apps comply with the requirements set forth in this rule.”***

***“For example, even when a city does not design, create, or own a mobile app allowing the public to pay for public parking, when a contractual, licensing, or other arrangement exists between the city and the mobile app enabling the public to use the mobile app to pay for parking in the city, the mobile app is covered under § 35.200. This is because the public entity has contracted with the mobile app to provide access to the public entity’s service, program, or activity (i.e., public parking) using a mobile app. The Department believes this approach will be familiar to public entities, as it is consistent with the existing framework in title II of the ADA.”***

***“For example, a public entity that links to online payment processing websites offered by third parties to accept the payment of fees, parking tickets, or taxes must ensure that the third-party web content it links to in order for members of the public to pay for the public entity’s services, programs, or activities complies with the web accessibility requirements of § 35.200. Similarly, if a public entity links to a third-party website that processes applications for benefits or requests to sign up for classes or programs the public entity offers, the public entity is using the third party’s linked web content as part of the public entity’s services, programs, or activities, and the public entity must thus ensure that it links to only third-party web content that complies with the requirements of § 35.200.”***

***“External Mobile Apps***

***Many public entities use mobile apps that are developed, owned, and operated by third parties, such as private companies, to allow the public to access the public entity’s services, programs, or activities. This part of the Section-by-Section Analysis refers to mobile apps that are developed, owned, and operated by third parties as “external mobile apps.”249 For example, members of the public use external mobile apps to pay for parking in a city (e.g., “ParkMobile” app250) or to submit non-emergency service requests such as fixing a pothole or a streetlight (e.g., “SeeClickFix” app251). In the final rule, external mobile apps are subject to § 35.200 in the same way as mobile apps that are developed, owned, and operated by a public entity. The Department is taking this approach because such external apps are generally made available through contractual, licensing, or other means, and this approach ensures consistency with existing ADA requirements that apply to other services, programs, and activities that a public entity provides in this manner. Consistent with these principles, if a public entity, directly or through contractual, licensing, or other arrangements, provides or makes available an external mobile app, that mobile app must comply with § 35.200 unless it is subject to one of the exceptions outlined in § 35.201.”***

## Course Content and change from remediation on demand to making it all compliant/accessible.

A key standout among the 320 pages is about instructional content. There had been a proposed structure wherein upon request from a person with a disability, that content would be made accessible within 5-days with other course content not needing to be made compliant. Fortunately, commenters influenced change to convince the DOJ that this was too problematic for public entities to successfully carry this out in a timely manner and more importantly, the negative impact that people with disabilities would endure if that allowance remained.

***“The Department proposed these exceptions in the NPRM based on its initial assessment that it might be too burdensome to require public educational institutions to make accessible all of the course content that is available on password-protected websites, particularly given that content can be voluminous and that some courses in particular terms may not include any students with disabilities or students whose parents have disabilities. However, the Department recognized in the NPRM that it is critical for students with disabilities to have access to course content for the courses in which they are enrolled; the same is true for parents with disabilities in the context of public elementary and secondary schools. The Department therefore proposed procedures that a public educational institution would have to follow to make course content accessible on an individualized basis once the institution was on notice that there was a student or parent who needed accessible course content because of a disability. Because of the need to ensure prompt access to course content, the Department proposed to require public educational institutions to act quickly upon being on notice of the need for accessible content; as discussed above, public entities would have been required to provide accessible course content either by the start of the term if the institution was on notice before the date the term began, or within five business days if the institution was on notice after the start of the term.***

***Public Comments on Proposed Course Content Exceptions***

***The overwhelming majority of comments on this topic expressed opposition to the course content exceptions as proposed in the NPRM. Many commenters suggested that the Department should take an alternative approach on this issue; namely, the exceptions should not be included in the final rule. Having reviewed the public comments and given careful additional consideration to this issue, the Department has decided not to include these exceptions in the final rule. The public comments supported the conclusion that the exceptions would exacerbate existing educational inequities for students and parents with disabilities without serving their intended purpose of meaningfully alleviating burdens for public educational institutions.***

***Some commenters argued that because making course content accessible often takes time and intentionality to implement, it is more efficient and effective for public educational institutions to create policies and procedures to make course content accessible proactively, without waiting for a student with a disability (or student with a parent with a disability) to enroll and then making content accessible reactively.267 Some commenters pointed out that although the Department proposed the course content exceptions in an effort to make it easier for public educational institutions to comply with the rule, the exceptions would in fact likely result in more work for entities struggling to remediate content on the back end. 267 Many***

***Commenters noted that in many cases, public educational institutions do not generate course content themselves, but instead procure such content through third-party vendors. As a result, some commenters stated, public educational institutions may be dependent on vendors to make their course content accessible, many of which are unable or unwilling to respond to ad hoc requests for accessibility within the expedited time frames that would be required to comply with the limitations to the proposed exceptions. Some commenters argued that it is more efficient and effective to incentivize third-party vendors to make course content produced for public educational institutions accessible on the front end. Otherwise, some commenters contended, it may fall to individual instructors to scramble to make course content accessible at the last minute, regardless of those instructors’ background or training on making content accessible, and despite the fact that many instructors already have limited time to devote to teaching and preparing for class. One commenter noted that public educational institutions can leverage their contracting power to choose only to work with third-party vendors that can offer accessible content. This commenter noted that there is precedent for this approach, as many universities and college stores already leverage their contracting power to limit participation in certain student discount programs to third-party publishers that satisfy accessibility requirements. Some commenters suggested that rulemaking in this area will spur vendors, publishers, and creators to improve the accessibility of their offerings.***

***Approach to Course Content in the Final Rule***

***Having reviewed the public comments, the Department believes it is appropriate to, as many commenters suggested, not include the previously proposed course content exceptions in the final rule. For many of the reasons noted by commenters, the Department has concluded that the proposed exceptions would not meaningfully ease the burden on public educational institutions and would significantly exacerbate educational inequities for students with disabilities. The Department has concluded that the proposed exceptions would have led to an unsustainable and infeasible framework for public entities to make course content accessible, which would not have resulted in reliable access to course content for students with disabilities. As many commenters noted, it would have been extremely burdensome and sometimes even impossible for public educational institutions to comply consistently with the rapid remediation time frames set forth in the limitations to the proposed exceptions in the NPRM, which would likely have led to widespread delays in access to course content for students with disabilities. While extending the remediation time frames might have made it more feasible for public educational institutions to comply under some circumstances, this extension would have commensurately delayed access for students with disabilities, which would have been harmful for the many reasons noted by commenters. The Department believes that it is more efficient and effective for public educational institutions to use the two- or three-year compliance time frame to prepare to make course content accessible proactively, instead of having to scramble to remediate content reactively.***

***Accordingly, under the final rule, password-protected course content will be treated like any other content and will generally need to conform to WCAG 2.1 Level AA.***

***The Department believes the better approach is to not include the course content exceptions in the final rule to avoid the need for public educational institutions to make content accessible on an expedited time frame on the back end, and to instead require public entities to treat course content like any other content covered by this rule.”***

## Social media, pre-existing content vs newly created content when law goes into effect.

***“Preexisting Social Media Posts***

***This final rule includes an exception in § 35.201(e) for preexisting social media posts, which provides that the requirements of § 35.200 will not apply to “a public entity’s social media posts that were posted before the date the public entity is required to comply with this rule.” This means that public entities will need to ensure that their social media posts going forward are compliant with this rule’s requirements beginning on the compliance date outlined in § 35.200(b), but not before that date.”***

## Reactive vs Pro-active accessibility

***“First, commenters suggested that public entities should be permitted to provide what they called an “accommodation” or an “equally effective alternative method of access” when web content or mobile apps are not accessible. Under the approach these commenters envisioned, people with disabilities would need to pursue an interactive process where they discussed their access needs with the public entity and the public entity would determine how those needs would be met. The Department believes that adopting this approach would undermine a core premise of the rule, which is that web content and mobile apps will generally be accessible by default. That is, people with disabilities typically will not need to make a request to gain access to services, programs, or activities offered online, nor will they typically need to receive information in a different format. If the Department were to adopt the commenters’ suggestion, the Department believes that the rule would not address the gaps in accessibility highlighted in the need for this rulemaking discussed in Section III.D.4 of the preamble to the final rule, as the current state of the law already requires public entities to provide reasonable modifications and effective communication to people with disabilities.359 Under title II, individuals with disabilities cannot be, by reason of such disability, excluded from participation in or denied the benefits of the services, programs, or activities offered by State and local government entities, including those offered via the web and mobile apps.360 One of the goals of the ADA also includes reducing segregation.361 Accordingly, it is important for individuals with disabilities to have access to the same platforms as their neighbors and friends at the same time, and the commenters’ proposal would not achieve that objective.***

***Second, commenters suggested a process, which is sometimes referred to as “notice and cure,” by which a person with a disability who cannot access web content or a mobile app would need to notify the public entity that their web content or mobile app was not accessible and give the public entity a certain period of time to remediate the inaccessibility before the entity could be considered out of compliance with the rule. The Department is not adopting this framework for reasons similar to those discussed in relation to the “equally effective alternative” approach rejected in the previous paragraph. With this rule, the Department is ensuring that people with disabilities generally will not have to request access to public entities’ web content and content in mobile apps, nor will they typically need to wait to obtain that access. Given the Department’s longstanding position on the accessibility of online content, discussed in Section III.B and C of the preamble to the final rule, public entities should already be on notice of their obligations. If they are not, this rule unquestionably puts them on notice.***

***Third, commenters suggested a flexible approach to compliance that would only require substantial compliance, good faith effort, reasonable efforts, or some similar concept that would allow the meaning of compliance to vary too widely depending on the circumstances, and without a clear connection to whether those efforts result in actual improvements to accessibility for people with disabilities. The Department declines to adopt this approach because it does not believe such an approach would provide sufficient certainty or predictability to State and local government entities or individuals with disabilities. Such an approach would undermine the benefits of adopting a technical standard.”***

***“This final rule is being promulgated under part A of title II of the ADA.”***