Disability Accommodations in the Digital Age

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Background

President George H. W. Bush signs the Americans with Disabilities Act in 1990.
# Statistical Highlights

**2013 U.S. Household Computer Ownership**

- **83.8 PERCENT** of U.S. households reported computer ownership
- **78.5 PERCENT** reported having a desktop or laptop computer
- **63.6 PERCENT** reported having a handheld computer

**2013 U.S. Household Internet Use**

- **74.4 PERCENT** of all households reported Internet use
- **73.4 PERCENT** reported a high-speed connection

**2009 Computer Use in Schools**

- **97 PERCENT** of teachers reported having one or more computers in the classroom every day
- **93 PERCENT** of computers in classrooms were connected to the Internet

**Computer Use in the Workplace**

- **64 PERCENT** of employees use computers in the workplace
- **74 PERCENT** of employees using computers are using them for communication via e-mail
Roadmap for Discussion

• Digital Accessibility Defined
• Reach and Requirements of Applicable Law
• Risks of Non-Compliance
Digital Accessibility Defined

Accessibility issues can affect all aspects of our digital world including:

- Websites
- Pages and posts on social media
- Mobile applications and software
- Electronic documents, including emails, spreadsheets, and other documents
Digital Accessibility Defined

Can everyone use your document?

Excluding people with disabilities from access to important documents is not only against common societal value, it can be unlawful.

Documents, spreadsheets, and presentations are important to users and organizations.

But what if some people can’t read or edit them because of their disabilities?
Digital Accessibility Defined

Some people, like those who are blind, use a screen reader to audibly interpret what is on the screen. There are things we can do to help the screen reader software better interpret the document. For example:

- Write “alternative text” for graphics and photos
- Create headers when using tables
- Switch languages in multilingual content
Digital Accessibility Defined

Factors that affect document accessibility:

- Format at creation
- Users’ means of accessing (e.g., e-book on e-book reader)
- Method of transmission
Digital Accessibility Defined

You don’t need to be an accessibility expert to create an accessible document.

Office accessibility checker can help you find and remedy accessibility issues. Look under the File tab, click on the Check for Issues button, and select Check Accessibility. It works like the grammar checker.
Digital Accessibility Defined
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Digital Accessibility Defined

- Trends & Takeaways
- Additional resources available at: https://www.youtube.com/playlist?list=PLtSVUgxIo6Kol5ogCBZuAjB6HprjiaKNM
The Legal Framework

- The Americans with Disabilities Act
- The Rehabilitation Act
- State laws governing accommodations for individuals with disabilities
The Americans with Disabilities Act

Title I
Covers most employers in the workplace

Title II
Covers public entities such as schools and public transportation

Title III
Covers public accommodations such as restaurants, recreational facilities, retail shops
The Americans with Disabilities Act

Trends

• Expanding definition of what constitutes a disability
• Expanding coverage in the public accommodations context
• Evolving regulatory environment
The Rehabilitation Act applies to employers and organizations that receive financial assistance from any Federal department or agency.
The Rehabilitation Act

• Enacted in 1973
• Precursor to the ADA
• Section 504
• Section 508
• Recent regulatory action
The Rehabilitation Act

Section 504 prohibits covered entities from:

- Denying qualified individuals with disabilities the opportunity to participate in or benefit from federally funded programs, services, or other benefits.
- Denying individuals with disabilities access to programs, services, benefits or opportunities to participate as a result of physical barriers.
- Denying individuals with disabilities employment opportunities, including hiring, promotion, training and fringe benefits, for which they are otherwise entitled or qualified.
Applicable State Laws
Covered Institutions

- Employers
- Public Entities
- Recipients of Federal Government Funding
- Places of Public Accommodation
- Educational Institutions
Available Relief

- Compensatory and Punitive Damages
- Injunctive Relief
- Fees and Costs
- Negative Press
- Internal Disruption
ADA Title I – Employment

Title I of the ADA prohibits discrimination based on disability in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment.
ADA Title I – Employment

The Basics

- Identify a request for accommodation
- Engage in the interactive process
- Respond with an available reasonable accommodation (unless doing so would create an undue hardship)

Available Relief Includes

- Compensatory and punitive damages
- Injunctive and equitable relief
- Attorneys’ fees and costs
ADA Title I – Employment

✓ EEOC Informal Opinion Letter (Oct. 27, 2005)


The EEOC noted that it has not yet taken a position on the issue of whether an employer must ensure that its on-line recruiting and application process is compatible with assistive technology (where it only recruits employees online), but noted these potential issues:

- Whether rendering one’s online application accessible to individuals with visual impairments is an issue of reasonable accommodation; and
- Whether one’s inaccessible online application violates provisions of the ADA that prohibit employers from limiting, segregating or classifying individuals with disabilities or provisions that prohibit employers from using standards, criteria, or methods of administration that have the effect of discrimination on the basis of disability.
Pantazes v. Jackson

Background

• Peter Pantazes was employed by the Department of Housing and Urban Development (HUD) for nearly ten years. He had recently been promoted to a GS-14 when he suffered congestive heart failure and a stroke.

• The stroke left Pantazes permanently unable to see in the left visual field and generally diminished his visual acuity, among other things.

• To return to work, Plaintiff needed various visual accommodations.
ADA Title I – Employment

_Pantazes v. Jackson_  
Accommodations Recommended by Pantazes’ Physicians

- A 21 inch computer monitor
- A small TV screen (in addition to the monitor)
- Large print books
- Magnifying aids including Zoomtext Level 2 magnification software
ADA Title I – Employment

Pantazes v. Jackson

The Court identified the following disputed issues of material fact regarding the accommodations requested and provided:

• When the magnification software was installed on Pantazes computer;

• Whether the software installed by the employer had fewer features than the software plaintiff’s physicians recommended; and

• Whether the limitations in the software provided by the employer prevented Pantazes from performing his job efficiently.
ADA Title I – Employment

EEOC v. ITT Educational Services, Inc.

Background

• Defendant, a for-profit educational provider, required applicants to take a timed on-line assessment test as part of the application process.

• Kerry Kirksey, a blind individual, applied to work as an educational recruiter.

• Kirksey used his own screen reading software to take the online-assessment test. Although Kirksey knew the answers, the screen reading software was too slow for him to pass the assessment within the time allotted.
**ADA Title I – Employment**

*EEOC v. ITT Educational Services, Inc.*

**Background**

- According to Kirksey, he contacted ITT to inform them of the issue and requested either additional time or a person read the questions to him aloud.
- The EEOC filed suit against ITT. In the suit, the EEOC alleged that ITT said there was nothing they could do to accommodate Kirksey.
- Nearly two years after the EEOC filed suit, the court entered a Consent Decree.
ADA Title I – Employment

EEOC v. ITT Educational Services, Inc.
Consent Decree

• General injunctive relief
• Payment of $74,775.00 to Kirksey and $24,225.00 to the Legal Aid Society
• Specific Injunctive Relief
  ✓ Policy Changes
  ✓ Accommodations to Applicants
  ✓ Training
  ✓ Posting
  ✓ Reporting
“Employers are increasingly relying on the Internet as part of their hiring process. They need to be mindful of how the application process might impose barriers for people with disabilities.”

EEOC San Francisco District Office Director
Michael Baldonado (9/21/11)
ADA Title I – Employment

*Reyazuddin v. Montgomery County, Md.*

**Background**

- Plaintiff worked at one of the County’s call centers as an Information and Referral Aide in its Department of Health and Human Services.

- Approximately six years after Plaintiff started working for the County, it consolidated its call centers into a 311 hotline, where all calls were routed.

- The County procured new software for the new 311 call center. The consulting group that procured the software for the County was not asked to consider requirements under the ADA or Rehabilitation Act in recommending software.
ADA Title I – Employment

Reyazuddin v. Montgomery County, Md.

Issues

• Was the County required to make its new software accessible so that Plaintiff could transfer to the 311 call center?

• Would this proposed accommodation constitute an “undue hardship” for the County?

• If so, was reassignment an acceptable form of accommodation?
Reyazuddin v. Montgomery County, Md.
Court’s Holding on Plaintiff’s Failure to Accommodate Claim

• Disputed issues of material fact as to whether reconfiguring the call center’s computer system was a reasonable accommodation

• Given the cost of the reconfiguration, however, such an accommodation was an “undue hardship” for the County

• Transfer to an available, but less than full time position, was a reasonable accommodation
ADA Title I – Employment

Trends & Takeaways

• Issues arising in hiring
• Offers of reasonable accommodation that are supported by the facts
• Socializing the relevant issues with various levels of management and staff
Public educational institutions have seen significant action in the area of digital accessibility and accommodations.
ADA Title II – Public Services

Title II of the ADA prohibits covered entities from:

- Excluding qualified individuals with disabilities from the participation in or benefits of the services, programs, or activities of a public entity.

Recovery for Title II violations may include:

- Injunctive relief
- Monetary Damages*
- Reasonable Attorneys’ fees

* Some courts have held that monetary damages are only available if the discrimination was intentional.
### ADA Title II – Public Services

#### Actions by the Departments of Justice and Education

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<th>Dear Colleague Letter</th>
<th>University of Colorado at Boulder DOJ Investigation</th>
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<td>June 2010</td>
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<td>Frequently Asked Questions</td>
<td>University of Montana DOE Resolution Agreement</td>
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<td>May 2011</td>
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Dear College or University President:

“We write to express concern . . . that colleges and universities are using electronic book readers that are not accessible to students who are blind or have low vision. . . .”

Department of Justice/Department of Education
Dear Colleague Letter, June 29, 2010
University of Colorado at Boulder Investigation (2014)

Ongoing investigation relating to allegations of:

- Inaccessible email, document processing, spreadsheets, calendar invites
- Delays in providing digitally formatted textbooks
- Use of visual, touch screen displays around the university
- Inaccessible online student portal and various websites used by faculty
University of Montana and DOE Resolution Agreement

- Implement a policy, subject to comment by the DOE, relating to accessibility of electronic information
- Institute a variety of awareness and training opportunities for faculty and staff
- Establish a grievance procedure
- Establish procedures for the University’s procurement function
- Institute feedback loops
ADA Title II – Public Services

Recent Private Party Actions


ADA Title II – Public Services

*Dudley v. University of Miami*

Plaintiff, a student, alleged that she experienced the following issues obtaining accessible materials:

- Professors used inaccessible programs to distribute, manage and collect assignments;
- Class readings were provided in inaccessible digital formats;
- Distribution of charts and tables for science courses using inaccessible software; and
- Use of inaccessible calendar program to schedule meetings with the University’s Office of Disability Rights.
ADA Title II – Public Services

**Dudley v. University of Miami**

“Like a public accommodation that decides to create unneeded entrance steps and no ramp, accessibility problems arise when a university makes, as Miami has, procurement decisions about digital content without considering whether students with disabilities will have integrated access to the content.” Compl. ¶ 9.
ADA Title II – Public Services

**Dudley v. University of Miami**

- Less than two months after filing her complaint, Plaintiff filed a motion for preliminary injunction seeking (1) the opportunity to retake two courses; (2) waiver of fees for two courses; and (3) that the university provide necessary accommodations to make courses accessible.

- The motion was denied as moot in September 2014 without an opinion.
ADA Title II – Public Services

*Nightingale v. Seattle School Dist. No. 1*

- Plaintiff is the parent of three children enrolled in the school district.
- She alleges that the school district has denied her equal access to informational materials and educational technology and, thus, denied her the opportunity to participate in her children's education in violation of the Rehabilitation Act and Title II of the ADA.
**ADA Title II – Public Services**

*Nightingale v. Seattle School Dist. No. 1*

- Allegedly inaccessible website that includes, among other things, inaccessible navigational links; lack of alt-tags or text on graphics; mislabeled buttons and headings; and other information and controls that are not detectable by screen reading software.

- Allegedly inaccessible course tracking software.
Nightingale v. Seattle School Dist. No. 1

• Just over a month after filing the complaint, the plaintiff moved for a preliminary injunction requiring, among other things, the district to make its website compliant with the WCAG 2.0 AA standards.

• The school district identified its website developer as an indispensible party because the district’s contract with the developer required it to develop an accessible website.

• Although the district agreed to publish an accessible website, it missed its deadline for doing so and the parties (as of April 2015) are continuing to negotiate a resolution of the matter.
## ADA Title II – Public Services

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<th>Trend &amp; Takeaways</th>
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<td>Individuals often seek assistance from the institution first.</td>
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<td>Accessibility compliance is made more difficult when many different technologies are used by many different stakeholders.</td>
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<td>WCAG 2.0 AA remains the standard by which websites are judged for accessibility compliance.</td>
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<td>Educating procurement functions on accessibility issues is an important component of accessibility compliance.</td>
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Courts have been expanding their interpretation of what constitutes public accommodations, thereby expanding the reach of the ADA.
ADA Title III – Public Accommodations

General Rule
No individual shall be discriminated against 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 or by any person who owns, leases (or leases to), or operates a place of public accommodation.

Available Remedies
- Injunctive Relief
- Attorneys’ Fees and Costs
- Monetary penalties in suits brought by the Attorney General
ADA Title III – Public Accommodations

- Lodging
- Establishments Serving Food or Drink
- Exhibition or Entertainment
- Auditoriums or Convention Centers
- Sales/Rental Establishments
- Laundromats, Barber Shops, Pharmacies, Other Services
- Public Transportation Stations
- Museums, Libraries
- Parks, Zoos, Public Recreation
- Private Schools, Other Education
- Day Care, Senior Citizen Centers, Other Social Service
- Gym, Health Spa, Other Exercise or Recreation
ADA Title III – Public Accommodations

“Brick and Mortar” Physical Places

Online Places with a Nexus to “Brick and Mortar” Physical Places

Other Online Places without a Nexus to “Brick and Mortar” Physical Places
ADA Title III – Public Accommodations

- WellPoint Inc. Accessible Information Settlement Agreement
ADA Title III – Public Accommodations


- The plaintiffs alleged that Scribd violated Title III of the ADA by maintaining websites and mobile applications that are inaccessible to the blind.
- Scribd moved to dismiss on the grounds that Title III does not apply to website operators whose goods or services are not made available at a physical location to the public.
ADA Title III – Public Accommodations


“Construing the list of categories [of places of public accommodations] liberally, Plaintiffs have persuasively argued that Scribd’s services fall within at least one of the following categories: "places of exhibition or entertainment," a "sales or rental establishment," a "service establishment," a "library," a "gallery," or a "place of public display or collection."
Earll v. eBay, Inc. & Cullen v. Netflix, Inc.

“We have previously interpreted the term “place of public accommodation” to require “some connection between the good or service complained of and an actual physical place. Because eBay’s [and Netflix’s] services are not connected to any actual physical place, eBay is not subject to the ADA.”

(internal citations and quotations omitted)
WellPoint, Inc. Accessible Information Settlement Agreement

- Two visually impaired customers of WellPoint’s licensed health plans contacted the company through legal counsel.
- The customers claimed:
  1. WellPoint failed to provide informational materials it produced that were accessible for blind or visually impaired individuals; and
  2. The websites WellPoint maintained were not accessible to blind or visually impaired individuals.
ADA Title III – Public Accommodations

WellPoint, Inc. Accessible Information Settlement Agreement

WellPoint Inc. entered into the agreement with the two individual complainants. It provided for the following:

- Website – Ensure compliance with the Web Content Accessibility Guidelines (WCAG) 2.0, Conformance Level AA Success Criteria
- Develop an internal website accessibility policy
- Mobile Applications – Ensure compliance with WCAG 2.0 standards
- Identify an internal or external accessibility consultant
- Dispute resolution procedure
ADA Title III – Public Accommodations

Takeaways & Trends

• A split among courts as to whether online only establishments constitute “places of public accommodation”

• Inconsistent but increasing enforcement efforts from agencies

• Concerted efforts by advocacy organizations in this area

• Stay tuned for regulations and other developments. . .
Practical Guidance