



October 3, 2023

SUBMITTED ELECTRONICALLY

The Honorable Rebecca B. Bond
Chief, Disability Rights Section
Civil Rights Division
Department of Justice
Attention: RIN 1190-AA79
P.O. Box 440528
Somerville, MA 02144

RE: ITEM Coalition’s Comments on Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities (RIN 1190-AA79)

Dear Chief Bond:

The undersigned members of the Independence Through Enhancement of Medicare and Medicaid (“ITEM”) Coalition appreciate the opportunity to submit comments on the Department of Justice’s (“DOJ’s”) proposed rule that would establish requirements governing the accessibility of public services, programs, and activities offered by State and local government entities through the web and mobile apps (“Proposed Rule”).¹ The ITEM Coalition is a national consumer- and clinician-led coalition advocating for access to and coverage of assistive devices, technologies, and related services for persons with injuries, illnesses, disabilities, and chronic conditions of all ages. Our members represent individuals with a wide range of disabling conditions, as well as the providers who serve them, including low vision, hearing loss, limb loss and limb difference, multiple sclerosis, spinal cord injury, brain injury, stroke, paralysis, cerebral palsy, and other life-altering conditions.

In 1991, when DOJ first issued regulations to implement the Americans with Disabilities Act (“ADA”), DOJ did not include provisions pertaining to web or mobile app access because the internet was still in its infancy. When the internet started to become more widely available, public entities began to recognize the internet as a valuable platform to inform the general public. Websites and mobile apps now play an integral role in providing services and information to all members of the community. Websites and mobile apps have the potential to virtually level the playing field for people with disabilities and, to date, have

¹ Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities, 88 Fed. Reg. 51,948 (Aug. 4, 2023), <https://www.federalregister.gov/documents/2023/08/04/2023-15823/nondiscrimination-on-the-basis-of-disability-accessibility-of-web-information-and-services-of-state#h-34>.

enabled people with disabilities to have greater access to services, health care, and other societal benefits. State and local government entities are increasingly providing services to the public via their websites or mobile apps, particularly during and after the COVID-19 public health emergency. For example, government entities utilize their websites and mobile apps to announce important public health information; schedule health care visits, including vaccination appointments; apply for state-run health care programs; file complaints in connection with the provision of healthcare services; and provide information regarding health insurance and providers in the community.

However, these web- and mobile app-based services are not equally accessible to individuals with disabilities. For instance, websites and mobile apps may lack features that enable individuals to convert the visual information on a website into speech via a screen reader. Similarly, websites or mobile apps that do not allow text to be resized or do not provide enough contrast create significant barriers for individuals with low vision.

This Proposed Rule attempts to provide the necessary direction for public entities to comply with their duties to provide effective communication and refrain from discrimination based on a person's disability under the Title II of the ADA. This Proposed Rule has the potential to benefit individuals with disabilities by allowing them to experience greater independence, privacy, flexibility, and ability to participate in public programs, while reducing frustration and reliance on others to obtain important information. We applaud the Department of Justice for issuing this regulation, however, we believe that the Proposed Rule in its current form does not sufficiently protect the rights of those with disabilities. Specifically, the staggered compliance dates and numerous exceptions would hinder meaningful and timely access to web- and mobile app-based services, activities, and programs. Therefore, we respectfully urge DOJ to make the following revisions to the Proposed Rule.

Technical Requirements for Accessibility

DOJ is proposing to adopt the Web Content Accessibility Guidelines (“WCAG”) 2.1 Level AA as the standard that State and local government entities must comply with for purposes of web content and mobile app accessibility. WCAG 2.1 contains three levels of conformance: A, AA, or AAA. Level “A” represents the most basic level of accessibility, while Level “AAA” represents the highest level of accessibility.

We thank DOJ for its efforts in mandating technical accessibility standards across all State and local government entities that provide services, programs, and activities through the web and mobile apps. Standardized accessibility standards would help eliminate barriers that prevent individuals with disabilities from interfacing with their public agencies, and they equip public agencies with the accessibility tools to better serve their communities.

Although the technical standard that DOJ proposes, WCAG 2.1 Level AA, is *currently* an appropriate standard for accessibility, we urge DOJ to mandate the implementation of WCAG 2.2 at the time of the publication of the final rule. We understand that the World Wide Web Consortium is expected to publish WCAG version 2.2 in the near future. We strongly believe that local and State government entities should be required to comply with the most current

adaptations of WCAG. We do not believe that this would impose substantial burden on local and State government entities as WCAG standards have been widely adopted across the industry.

Staggered Compliance Deadlines

Under this Proposed Rule, the level of compliance will be uniform across all public entities, regardless of size. However, DOJ is proposing staggered compliance deadlines based on the size of the public entity such that public entities with a total population of 50,000 or more must comply with WCAG 2.1 Level AA within two years after the publication of a final rule. Public entities with fewer than 50,000 and all special district governments would have three years to implement WCAG 2.1 Level AA.

We believe that staggering compliance dates based on the size of the public entity is largely arbitrary. The size of a public entity is not a reliable measure of its ability to incorporate accessibility standards. For years, local and State government entities have been on notice that their websites and mobile apps must be accessible under the ADA. Therefore, the Proposed Rule should not come as a surprise to these entities. Furthermore, WCAG 2.1 Level AA was designed to be achievable without regard to the size of a public entity's total population. Public entities do not need *years* to come into compliance with the proposed technical standards. We note that accessibility tools and services exist that can assist public entities in complying with the proposed standards in a faster timeframe. Therefore, DOJ should not delay the required implementation of WCAG 2.1 Level AA based on the size of the public entity. Individuals with disabilities should not be forced to wait *years* to access to important documents, services, activities, and programs that impact their health, function, and independence.

Exceptions to Accessibility Requirement

DOJ proposes seven exceptions to the proposed WCAG 2.1 Level AA standard. If one of the seven exceptions applies—without limitation—then the public entity's web or mobile app content would not need to comply with the accessibility standards as outlined in the Proposed Rule. These proposed exceptions include:

1. Archived web content;
2. Conventional electronic documents that are preexisting;
3. Web content that a third-party posts on a public entity's website;
4. Third-party web content that a public entity links to its website;
5. Course content that is available on a public entity's password-protected or otherwise secured website for students that are enrolled in a specific course that a public postsecondary institution offers;
6. Class or course content that is available on a public entity's password-protected or otherwise secured website for both students enrolled and/or parents of students enrolled, in a specific class or course that the elementary or secondary public school offers; and
7. Password protected or otherwise secured conventional electronic documents that pertain to a specific individual, their property, or their account.

Each of the exceptions are accompanied by limitations. If a limitation applies, the public entity must comply with the WCAG 2.1 Level AA accessibility standards. Our comments are limited to exceptions 2, 3, 4, and 7 and are detailed below.

2. Conventional Electronic Documents That Are Preexisting

“Conventional electronic documents” are defined as “web content or content in mobile apps that is in the following electronic file formats: portable document formats (PDFs), word processor file formats, presentation file formats, spreadsheet file formats, and database file formats.” If such documents—created either by or for a public entity’s use—are already available on the public entity’s app or website before this rule takes effect, they do not have to comply with the Proposed Rule’s requirements for accessibility.

This exception enshrines the status quo by allowing existing inaccessible documents to remain that way. It is critically important that individuals with disabilities have access to preexisting conventional electronic documents. In the healthcare context, such preexisting documents can be instrumental in accessing care in the future. Directives on healthcare payment, coding, or coverage can govern medical decision-making long after they are published. Disputes related to coverage of healthcare claims can take years to resolve, making existing documents relevant for years to come. Communications from a State to its Medicaid program or managed care organizations often come in the form of PDF manuals, letters, and guides that are not frequently updated. Additionally, even if they are updated, new documents do not always clearly “replace” the old documents. Partial revisions or modifications to existing documents make it necessary to have both versions accessible for comparison. Because of the importance and continued relevance of such documents, this exception should be eliminated.

3. Web Content That a Third-Party Posts on a Public Entity’s Website

This exception focuses on web content that a third-party posts and is available on a public entity’s website. It only applies when the third party, rather than the public entity, posts content. This is true even when the public entity posts content that was originally created by a third-party such as scheduling tools, maps, calendars, or payment systems.

In the age of social media, where State and local government entities have Facebook, X (formerly known as Twitter), or Instagram pages, third-party replies interacting with the content that the entity posts can be as important as the original post itself. Third-party comments can clarify remaining questions or can provide more up to date information than the original post. Additionally, such third-party comments can be an important way to voice grievances and gauge public opinion. For instance, third-party posts may include health information regarding where vaccines are available, opinions on certain healthcare treatments, and testimonials related to a particular healthcare provider. When such content is exempted from accessibility requirements, it limits the ability of those with disabilities to contribute to virtual public forums and glean important health information from them. As social media becomes an increasingly important part of the world, accessibility of such third-party information is necessary to fully participate in community life. Therefore, this exception should be eliminated.

4. Third-Party Web Content That a Public Entity Links to its Website

Under this exception, a public entity is not responsible for the accessibility of third-party web content linked from the public entity's website. If the third-party website functions to allow the public to participate in or benefit from the public entity's services (such as a third-party payment page), then the third-party website must comply with the accessibility standards. This exception does not apply to mobile apps that a third party operates.

Public entities heavily utilize third-party links to disseminate important information. State and local governments often link to third-party websites when content needs to be disseminated to the public quickly or when a third-party may have more robust information on a topic than the public entity itself. For example, the COVID-19 pandemic has highlighted the need for up-to-date information on disease outbreaks and interventions to prevent community spread. Information such as where one can receive a vaccination, what doctors are accepting new patients, and where one can find community-based services and supports often require links to third parties who provide these services.

All third-party linked content should be required to comply with the proposed accessibility standards. If an individual with a disability cannot timely access third-party information, it may be too late for that person to receive time-sensitive health care services and support. Therefore, DOJ should eliminate this exception.

7. Individualized, Password-Protected Documents

This exception is for web-based conventional electronic documents that are about a specific individual, their property, or their account; and are password-protected or otherwise secured. For privacy and security purposes, important documentation containing health information, such as medical bills or explanations of benefits, are password-protected. This exception would significantly limit the ability of individuals with disabilities to timely access information related to their medical care. If such documents are not easily accessible, patients must go through a timely process to individually request that these documents be made accessible to them. There is no reason why individuals should be forced to wait to access documentation that is critical to their healthcare. Therefore, this exception to the Proposed Rule should be eliminated.

We appreciate the opportunity to comment on this important rule and further commend DOJ's continued efforts to enhance communication and prevent discrimination against individuals with disabilities. This Proposed Rule has the potential to make significant strides toward achieving this goal. For the aforementioned reasons, however, we believe that DOJ should revise the Proposed Rule so that individuals with disabilities can harness the full potential of meaningful and timely access to State and local governments' programs, services, and activities. We look forward to working with DOJ to ensure that the text and the spirit of the ADA is fully implemented.

For additional information about the ITEM Coalition, please contact the ITEM Coalition coordinators, Peter Thomas (Peter.Thomas@PowersLaw.com), Leela Baggett (Leela.Baggett@PowersLaw.com), or Michael Barnett (Michael.Barnett@PowersLaw.com).

Sincerely,

The Undersigned Members of the ITEM Coalition

Access Ready

ACCSES

ACI Alliance

ALS Association*

American Academy of Physical Medicine and Rehabilitation

American Association for Homecare

American Association on Health and Disability

American Macular Degeneration Foundation

American Therapeutic Recreation Association

Amputee Coalition*

Assistive Technology Industry Association (ATIA)

Association of People Supporting Employment First (APSE)

Autistic Women & Nonbinary Network

Blinded Veterans Association

Christopher & Dana Reeve Foundation*

Council of State Administrators of Vocational Rehabilitation (CSAVR)

Epilepsy Foundation

Helen Keller Services

Institute for Matching Person & Technology

Lakeshore Foundation

Long Island Center for Independent Living, Inc.

Miami Project to Cure Paralysis

Muscular Dystrophy Association

National Association for the Advancement of Orthotics and Prosthetics

National Association of Councils on Developmental Disabilities

National Association of Rehabilitation Research and Training Centers

National Disability Rights Network (NDRN)

National Registry of Rehabilitation Technology Suppliers

Prevent Blindness

Spina Bifida Association*

The Buoniconti Fund to Cure Paralysis

The Viscardi Center

United Cerebral Palsy

United Spinal Association*

VisionServe Alliance

**** ITEM Coalition Steering Committee Member***