

Access Ready's Comments re. DOJ's Proposed
Rule on Web Accessibility

September 30, 2023

Submitted Electronically via
www.regulations.gov.

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: RIN 1190-AA79; Nondiscrimination on the
Basis of Disability; Accessibility of Web
Information and Services of State and Local
Government Entities

Dear Chief Bond:

Access Ready Strategic Social Purpose Corporation ("Access Ready") appreciates the opportunity to submit comments on the Department of Justice's ("DOJ's") proposed rule, "Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities" ("Proposed Rule"). Access Ready is a social purpose corporation dedicated to the promotion and marketing of adaptive and accessible information and communication technology ("ICT"). We support educational and advocacy efforts to ensure that individuals with disabilities have access to this important technology, which will lead to greater independence, self-determination, and participation in government and non-governmental services, programs, and activities.

Access Ready applauds DOJ's efforts to develop comprehensive regulations

implementing title II of the Americans with Disabilities Act ("ADA") to establish specific requirements for making accessible the services, programs, and activities offered by State and local government ("Governmental") entities through the web and mobile apps. However, we are concerned that the proposed exceptions and staggered compliance deadlines will significantly undercut the purpose of the ADA; hinder access to services, programs, and activities provided by Governmental entities; and impose burden on individuals with disabilities. We also believe that the proposed technical standard does not go far enough to ensure meaningful access by individuals with disabilities to services that Governmental entities provide. Therefore, we offer the following comments to enhance access to services, programs, and activities provided by Governmental entities via the web and mobile apps.

Web Content Accessibility Guidelines ("WCAG") Technical Standards

In the Proposed Rule, DOJ seeks to achieve a dual goal of (1) ensuring that people with disabilities have equal access to government services and (2) providing greater clarity to public entities on appropriate means by which they can meet their obligations under the ADA. DOJ proposes to adopt WCAG 2.1 as the official technical standards that Governmental entities must satisfy for purposes of this Proposed Rule. 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. In support of adopting Level AA, the Proposed Rule notes that Level AA is the same standard that already governs Section 508 of the Rehabilitation Act of 1973. Under this Proposed Rule, the level of compliance will be uniform across all public entities, regardless of size.

Access Ready appreciates DOJ's ongoing efforts to update and standardize technical standards across the industry. These efforts will be effective in mitigating compliance confusion while allowing for flexibility and creativity on the part of the developer.

Although Access Ready supports the adoption of WCAG 2.1 Level AA as the currently standard of accessibility, we encourage DOJ to require the adoption of WCAG 2.2 Level A or AA at the time of the publication of the final rule. WCAG standards have been widely adopted across the industry, and many developers at Governmental entities are already familiar with them.

Therefore, implementing a few more success criteria beyond those contained in WCAG 2.1 would not produce a substantial burden for programmers at Governmental entities. This would ensure that accessibility will remain a priority as technology evolves, and a decision to require the adoption of WCAG 2.2 would further

lend credence to DOJ's commitment to creating better accessibility standards.

We believe that compliance requirements should remain up to date with the most current adaptations of WCAG. To that end, Access Ready encourages DOJ to promulgate an updated version of this proposed rule every two years. By doing so, DOJ can ensure that its accessibility requirements maintain pace with evolving WCAG standards.

Staggered Compliance Dates and Time for Compliance

DOJ's proposal for staggered compliance dates based on the size of the public entity's total population is problematic. The Proposed Rule would establish 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 a

total population of fewer than 50,000 and all special district governments would have three years to implement WCAG 2.1 Level AA.

Access Ready understand DOJ's desire to balance the interests of ensuring accessibility for individuals with disabilities and the resources necessary for technicians to implement the standards appropriately.

However, we do not believe that staggered compliance dates are necessary for balancing these interests; nor do they solve all of the problems for which it is intended to be a solution. Access Ready notes that WCAG 2.1 Level AA was designed for the purpose of being achievable without regard to the size of a public entity's total population. Thus, staggering compliance dates based on the size of the public entity is arbitrary. In addition, DOJ has previously and repeatedly clarified that public entities must ensure that their websites are accessible under the ADA. This Proposed Rule should not come as a surprise to these entities.

The Proposed Rule, therefore, should simply be seen as a clarification of existing standards.

Therefore, DOJ should require compliance with the Proposed Rule regardless of the public entity's size within six months from the date of the final rules' publication. Two and three years is much too long given the quick timeline upon which mobile apps and websites are updated on a regular basis.

Exceptions to Web 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. Access Ready acknowledges that each of the exceptions are accompanied by limitations. However, we believe that even with such limitations considered, the exceptions all but swallow DOJ's efforts to promote

accessibility in the Proposed Rule. Instead of adopting these exceptions as proposed, DOJ should commit to providing technical assistance to Governmental entities to achieve the dual goals of promoting accessibility and ensuring that these entities are not overburdened with regulatory compliance requirements. Alternatively, DOJ should narrowly tailor these exceptions so that they do not completely curb the rights of individuals with disabilities.

Exception: Archived Web Content

DOJ proposes an exception for archived web content, which focuses on content that satisfies all three of the criteria: (1) content that is maintained exclusively for reference, research, or recordkeeping; (2) is not altered or updated after the date of archiving; and (3) is organized and stored in a dedicated area or areas clearly

identified as being archived. Access Ready opposes this exception. Failing to make archived material accessible clearly discriminates, for instance, against blind students or professionals that are performing research using a Governmental entity's archives. More broadly, the ability to access archived public documents is necessary for individuals to fully participate in civic affairs and the democratic process. While the Proposed Rule clarifies that a Governmental entity generally has an obligation to make available free of charge archived web content upon specific request by a person with a disability, such a limitation does not eliminate the potential for discrimination. Additionally, this limitation does not clarify that the entity must provide the requested accessible version of an archived document in a timely manner. In essence, requiring a person with a disability to overcome additional barriers to obtain access to the same information that is readily available

to individuals without disabilities serves only as a sanction on a person for no other reason than having a disability. Additionally, requiring individuals with disabilities to ask for a specific document they need serves only to hinder that person's right to research and obtain knowledge. A Governmental entity's failure to make accessible all of its archived material prevents individuals with disabilities from performing job functions or excelling in their academic or professional endeavors.

Exception: Preexisting Conventional Electronic Documents

The Proposed Rule creates an exception for conventional electronic documents that are preexisting. Such 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

Governmental entity's use are already available on the entity's app or website before this rule takes effect, they do not have to comply with the Proposed Rule's requirements for accessibility.

The exception does not apply to any preexisting documents that are currently used by members of the public to apply for, access, or participate in the entity's services, programs, or activities. This includes guidance or instructional documents. Additionally, in the event that a Governmental entity updates a conventional electronic document after this rule takes effect, the document would no longer be considered "preexisting" and would no longer fall under this exception.

Access Ready opposes this exception. Public documents available to the public using one or more of these formats are diverse, extensive, and vital sources of sharing information with the community. As the Proposed Rule stands, DOJ has not provided public entities clear

parameters of what it means by "used." For instance, one public entity might interpret the word "used" broadly and determine that purely informational documents are "used" because they help inform citizens in deciding to act or participate in public programs or services.

Another entity may exclude informational documents from their interpretation of "used" as they do not directly help an individual "apply for, gain access to, or participate in."

Accordingly, the proposed exception will generate substantial confusion. The lack of consistency in the interpretation of this exception and limitations to the exception could result in a significant disparity of rights for individuals with disabilities.

Exception: Web Content that a Third-Party Posts on a Public Entity's Website

The Proposed Rule contemplates an exception for web content that a third-party posts on a Governmental entity's website. In circumstances where a Governmental entity

chooses to rely on a third party to post content on behalf of the public entity, it is the Governmental entity that ultimately remains responsible to ensure that the content is accessible.

Access Ready encourages DOJ to eliminate this exception. This exception would significantly hinder access to important information, particularly information that is time sensitive and/or geared toward gathering public feedback. This can include crucial information related to crime reports, storm warnings, and other events in the community. Timely access to this type of information is important for the purposes of mitigating the impacts of natural disasters or avoiding areas of high crime. Additionally, this exception largely excludes individuals with disabilities from public discussion of community grievances and/or community planning. For instance, a third party might post inaccessible information about community zoning which could impact a person

with a disability's home or business. Therefore, DOJ should not finalize this exception.

In the event that DOJ moves forward with this exception, DOJ should carve out from this exception third parties that receive funding from the State or local government or third parties that contract with the State or local government to provide activities, programs, services, or items.

Exception: Third-Party Web Content that a Public Entity Links to its Website

Under the Proposed Rule, DOJ states that a Governmental entity is not responsible for the accessibility of third-party web content linked from the Governmental entity's website. This exception does not apply to mobile apps that a third party operates. Additionally, if the Governmental entity uses the linked third-party web content to allow members of the public to participate in or benefit from the public entity's services, programs, or activities, then the public

entity must ensure it only links to third-party web content that complies with the accessibility standards as set forth in this Proposed Rule.

Access Ready opposes this proposal. Although a Governmental entity may not have direct control over the content of a third-party website, the entity does have control over whether to link a third-party website at all. Public entities must, at minimum, share in the responsibility to ensure that links to third-party websites are accessible. This is particularly true given that it is extremely common for the websites of Governmental entities to link third-party information about particular activities, programs, or resources. Accordingly, DOJ should not finalize this exception.

Again, should DOJ choose to move forward with this exception, this exception should not be available if the third party either receives funding from the State or local government or otherwise contracts with the State or local

government to provide items, services, programs, or activities.

Exception: Public Postsecondary Institutions Password-Protected Course Content

Access Ready opposes DOJ's proposed exception for password-protected course content in public postsecondary institutions.

This exception exempts course content available on a Governmental entity's password-protected or otherwise secured website for admitted students enrolled in a specific course offered by a public postsecondary institution. This exception does not apply if a public entity is on notice that an admitted student with a disability is pre-registered in a specific course offered by a public postsecondary institution and that the student, because of a disability, would be unable to access the content available on the public entity's password-protected or otherwise secured website for the specific course. Under these circumstances, the public entity must comply with the accessibility

standards in this Proposed Rule for its secured or password protected website before the academic term in which the course offered commences. Any new content added after the start date must comply with this Proposed Rule's accessibility standards.

Additionally, the exception does not apply once a public entity is on notice that an admitted student with a disability is enrolled in a specific course offered by a public postsecondary institution after the start of the academic term and that the student, because of a disability, would be unable to access the content available on the public entity's password-protected or otherwise secured website for the specific course. Under these circumstances, the public entity must comply with this Proposed Rule's accessibility standards for its secured or password protected website before the academic term in which the course offered commences. Any new content added after the

start date must also comply with this Proposed Rule's accessibility standards.

Again, Access Ready opposes this exception. Exemptions pertaining to classroom and/or course content accessibility would significantly hinder the rights of students with disabilities. A student's ability to have equal access to educational material largely outweighs any institutional hardships that may accompany the implementation of the technical standards adopted in this Proposed Rule. Many public universities conduct their application process, provide housing resources, and offer course selection through websites or mobile apps. Many college students add and drop courses on a frequent basis. If a student must be enrolled in a class in advance for the purpose of giving proper notice to the institution, they will not be permitted to add or drop courses in the same manner as their peers. Such a phenomenon would significantly constrain the

educational opportunities available to individuals with disabilities relative to their peers. Additionally, a significant amount of course content is provided via websites. If this material is not made accessible in advance, it will hinder the student's ability to learn and stay on pace with their classmates.

Not only will this exception create barriers for students, but it will also fail to serve the goal of reducing the burden on public universities.

Public universities will still have to make certain content accessible upon request which means that they will be using time and resources to do so. Access Ready encourages DOJ to consider the reality that the public university's time and resources would be better spent making educational material accessible rather than doing so on a case-by-case basis for individual students upon request.

Exception: Public Elementary and Secondary Schools: Password-Protected Class or Course Content

The Proposed Rule contemplates an exception for password protected class or course content in public elementary and secondary schools. This exception applies to class or course content available on a public entity's password-protected or otherwise secured website for students enrolled, or parents of students enrolled, in a specific class or course at a public elementary or secondary school. DOJ set forth numerous limitations to this exception.

While Access Ready appreciates DOJ's efforts to limit the application of this exception, it ultimately believes that the exception should be eliminated altogether. As stated in our comments to the previous exception, any exception pertaining to classroom and/or course content accessibility would extensively and adversely curtail the rights of students with disabilities. A student's ability to have equal access to educational material largely outweighs any institutional hardships that may

accompany the implementation of the technical standards

adopted in the Proposed Rule. Public elementary and secondary schools disseminate significant amounts of information, reading material, and instruction to both students and parents of students through online platforms. Efforts that are reactive in providing accessibility to students with disabilities may result in delaying education. The inability of a student or parent of a student to access password protected educational information can result in significant setbacks. While the student's peers may start a course on time, the same is not true for a student with a disability who is not provided with immediate accessibility. In the case of accelerated courses, any delay in providing accessibility may completely exclude the student from participation. DOJ should not prioritize administrative ease over equal access of education to students with disabilities. Similarly, to DOJ's proposed exception for public postsecondary institutions, the

implementation of this exception will fail to serve the goal of reducing the burden on public schools. Public schools will still have to make certain content accessible upon request, which means that they will be using time and resources to do so. Access Ready encourages DOJ to consider the reality that the already-limited time and resources available to a public school would be better spent making educational material accessible rather than doing so on a case-by-case basis.

Exception: 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. This exception would not apply where a Governmental entity makes individualized information available in formats other than a conventional electronic document (e.g., HTML format). This exception also only applies when

the content is individualized for a specific person or their property or account.

Access Ready opposes this exception. The amount and variety of personalized password-protected documents to which this exception would apply are extremely vast. In addition to the example of utility bills as stated previously, individualized password-protected information can include but is not limited to transcripts from public universities, information about vehicle registration, information pertaining to traffic violations, and purchased tickets to public events. Although it may be true, as the Proposed Rule states, that there will be many individuals that do not need an accessible version of an individualized, password-protected document. However, the minority status of individuals with disabilities who would be harmed by this exception is not a valid reason to exclude them from the ability to access important information such as bill payment information or medical test results.

This is particularly true given the ease with which public entities can make these documents accessible.

Conclusion

Access Ready appreciates the opportunity to comment on this important rule. We are grateful that DOJ has finally moved forward with this rule and urges the agency to issue final regulations as expeditiously as possible. If DOJ amends the final rule to comport with our comments above, this regulation would be groundbreaking for individuals living with disabilities. As written, however, the Proposed Rule provides too many exceptions that not only create confusion for both Governmental entities and individuals with disabilities but also misses major opportunities to meaningfully advance accessibility interests. We look forward to working with DOJ to ensure that individuals with disabilities have meaningful access to

services, programs, and activities provided by Governmental entities via the web and mobile apps. If you have any questions, please contact me, Doug Towne, at chair-ceo@accessready.org.

Appreciatively

Douglas George Towne (Doug)
Chair and Chief Executive Officer
Access Ready