



## Accessible IT – A status report on legal milestones

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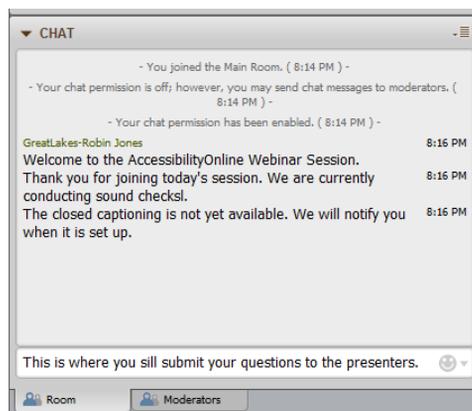
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## Accessible IT – A status report on legal milestones

November 17, 2016

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## An Intro to Some Disability Rights Laws

- Americans with Disabilities Act
  - Title I (Employment) – damages, injunctions, fees
  - Title II (Public entities) – damages, injunctions, fees
  - Title III (Public Accommodations) – injunctions, fees
- Rehabilitation Act – damages, injunctions, fees
  - Programs and activities of the federal government and those receiving federal financial assistance
- State laws
  - California: Unruh Civil Rights Act and Disabled Persons Act
  - Massachusetts: Equal Rights Act

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## A Primer on the Americans with Disabilities Act

- Title I of the ADA prohibits discrimination in employment (42 U.S.C. § 12112(a)):

“No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment”

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## A Primer on the Americans with Disabilities Act

- Title I's general prohibitions (42 U.S.C. § 12112(b)):
  - limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;
  - utilizing standards, criteria, or methods of administration— (A) that have the effect of discrimination on the basis of disability; or (B) that perpetuate the discrimination of others who are subject to common administrative control;
  - excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

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## A Primer on the Americans with Disabilities Act , 2

- Title I's general prohibitions (42 U.S.C. § 12112(b)):
  - not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;
  - using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

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## A Primer on the Americans with Disabilities Act , 3

- Title I's general prohibitions (42 U.S.C. § 12112(b)):
  - failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

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## A Primer on the Americans with Disabilities Act , 4

- Title II of the ADA prohibits discrimination by “public entities,” i.e., state and local governments (42 U.S.C. § 12132):

“no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”

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## A Primer on the Americans with Disabilities Act , 5

- Broad Scope: This mandate applies to virtually everything that public entities do
  - *Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 2002)
  - *Johnson v. City of Saline*, 151 F.3d 564, 569 (6th Cir. 1998)
- Program-Level Access: Are the public entity's services, programs, or activities, when viewed in their entirety, readily accessible to and usable by individuals with disabilities
  - “Meaningful access” - evenhanded access to the offered activity from which someone can benefit. *Henrietta D. v. Bloomberg*, 331 F.3d 261 (2nd Cir. 2003)
  - Some granular level focus in specific cases (absentee voting v. entire voting system, *infra*)

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## A Primer on the Americans with Disabilities Act , 6

- Title III of the ADA broadly prohibits discrimination by public accommodations (42 U.S.C. § 12182(a)):

“[n]o 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 by any person who owns, leases (or leases to), or operates a place of public accommodation.”

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## A Primer on the Americans with Disabilities Act, 7

- Categories of general prohibitions (42 U.S.C. § 12182(b)(1)):
  - denying the opportunity of a person with a disability to participate in or benefit from what a covered entity offers
  - providing an opportunity to participate in or benefit from what a covered entity provides that is not equal to that afforded to persons without disabilities
  - providing a separate or different opportunity to participate in or benefit from what a covered entity provides when it is not necessary to make an effective offer
  - not providing a person with a disability in the most integrated setting appropriate to the needs of the individual
  - denying a person with a disability their choice not to accept a separate or different benefit
  - denying someone the opportunity to participate in or benefit from what a covered entity provides because of that person's association with a person with a disability

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## A Primer on the Americans with Disabilities Act, 8

- Specific types of discrimination (42 U.S.C. § 12182(b)(2)):
  - imposing eligibility criteria that screen out or tend to screen out a person with a disability unless it is necessary to provide what the covered entity provides
  - **failing to reasonably modify policies, practices, or procedures, when it is necessary to provide what the covered entity provides, unless the entity can demonstrate that making such modifications would fundamentally alter what the covered entity provides**
  - **failing to provide an auxiliary aid when doing so would not fundamentally alter what the covered entity provides, or impose an undue burden**
  - failing to remove structural barriers when it is readily achievable
  - failing to remedy barriers to certain types of transportation

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## A Primer on the Americans with Disabilities Act, 9

- The ADA enumerates just 12 categories of public accommodations, grouped according to the goods and services they offer, but the examples within each category are non-exhaustive (42 U.S.C. § 12181(7)):
  - (A) an inn, hotel, motel, or other place of **lodging**, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
  - (B) a **restaurant**, bar, or other establishment serving food or drink;
  - (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or **entertainment**;
  - (D) an auditorium, convention center, lecture hall, or other place of **public gathering**;
  - (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other **sales or rental establishment**;

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## A Primer on the Americans with Disabilities Act, 10

- (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other **service establishment**;
- (G) a terminal, depot, or other station used for **specified public transportation**;
- (H) a museum, library, gallery, or other place of **public display or collection**;
- (I) a park, zoo, amusement park, or other place of **recreation**;
- (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of **education**;
- (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other **social service center establishment**; and
- (L) a gymnasium, health spa, bowling alley, golf course, or other place of **exercise or recreation**.

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## A Primer on the Americans with Disabilities Act, 11

- As with the rest of the ADA, the scope of the categories on the exhaustive list “should be construed liberally to afford people with disabilities equal access to the wide variety of establishments available to the nondisabled.” *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 676-77 (2001).
- Covered entities cannot “contract away” their obligations to provide full and equal enjoyment of goods and services. *Botosan v. Paul McNally Realty*, 216 F.3d 827, 833 (9th Cir. 2000).
  - A covered entity can indirectly do that which it would be prohibited from doing directly. 43 Fed. Reg. 2132, 2134 (Jan. 13, 1978) (now codified at 29 C.F.R. § 41.51); *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1067 (9th Cir. 2010)
  - Some states’ anti-discrimination laws may allow for aid and abet liability <sup>25</sup>

## A Primer on the Rehabilitation Act

- The Rehab Act (Section 504) prohibits discrimination by recipients of federal financial assistance (29 U.S.C. § 794(a)):

“No otherwise qualified individual with a disability in the United States, . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any **program or activity** receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.”
- Programs and activities specifically include (29 U.S.C. § 794(b)):
  - State and local governments (including employment)
  - Institutions of higher education and public school systems
  - Private entities accepting federal financial assistance

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## A Primer on the Rehabilitation Act, 2

- The Rehab Act and the ADA are interpreted as providing the same substantive rights
- In some cases, the burden of persuasion on proving causation is more demanding under the Rehab Act (solely because of disability vs. disability is one of several motivating factors)
- In many cases, both laws will apply (e.g., state government that receives federal financial assistance), but in other instances the Rehab Act provides the only claim (e.g., federal government)

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## A Primer on the Rehabilitation Act, 3

- The Rehab Act (Section 508) requires that digital technology used by federal agencies be accessible to employees and members of the public with disabilities (29 U.S.C. 794d):

“When developing, procuring, maintaining, or using electronic and information technology, each Federal department or agency, including the United States Postal Service, shall ensure, unless an undue burden would be imposed on the department or agency, that the electronic and information technology allows, regardless of the type of medium of the technology—

  - (i) individuals with disabilities who are Federal employees to have access to and use of information and data that is comparable to the access to and use of the information and data by Federal employees who are not individuals with disabilities; and
  - (ii) individuals with disabilities who are members of the public seeking information or services from a Federal department or agency to have access to and use of information and data that is comparable to the access to and use of the information and data by such members of the public who are not individuals with disabilities.”

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## Limitations on the ADA and Rehabilitation Act

- Covered entities needn't make fundamental alterations of the relevant service or accommodations that are an undue burden
  - "Undue burden" means significant difficulty or expense. It is determined by five factors (28 C.F.R. § 35.150 (Title II), 28 C.F.R. § 36.104 (Title III)):
    - (1) The nature and cost of the action needed;
    - (2) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site;
    - (3) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;
    - (4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and
    - (5) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

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## Accessibility Laws and Websites

- People with disabilities also rely on the Internet
  - Blind and print-disabled users employ screen access software that reads the code of a website and then renders it in whatever format is accessible to that person (speech, refreshable braille, etc.)
  - Deaf users rely on captioning of aural content
  - Users with limited manual dexterity or motion use dictation software to give commands instead of mouse and keyboard control
- Despite the existence of technology and techniques to make websites and mobile apps accessible for users with disabilities, digital barriers abound
  - Nat'l Ctr. on Disability & Access to Educ., Project GOALS Evaluates 100 Pages in Higher Education for Accessibility Against Section 508 Standard, NCDAAE Newsletter (Apr. 2008) (97% of sampled post secondary school websites contained accessibility issues)
  - Darrell M. West, The Brookings Inst., State and Federal Electronic Government in the United States, 2008 (81% of state government websites were inaccessible)

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## Accessibility Laws and Websites, 2

- Because the Internet as we know it did not exist when the ADA was enacted in 1990, courts have been forced to interpret the law
- There are at least two schools of thought on this question:
  - A website owned or operated by a public accommodation is covered by Title III, PERIOD

and

  - A website owned or operated by a public accommodation is covered by Title III, *only if there is a nexus between a public accommodation's brick-and-mortar location and a service or benefit on its website*

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## Accessibility Laws and Websites, 3

- The Expansive Coverage School of Thought
  - The ADA, as a remedial statute, must be read broadly in favor of protection from exclusion
  - The statute is ambiguous as it defines the term “public accommodation,” using the term “entity,” which is a place-less concept, but also uses the terms “place” and “establishment,” which might suggest a physical space
  - Courts must use tools of statutory construction and legislative history to resolve the ambiguity
    - everyday use of the word “place” includes virtual “places” (e.g., Facebook “wall,” “chatroom”)
    - entries in the legislative history indicate that Congress expected the law to adapt with the development of new technology
    - many services of the listed public accommodations can and routinely are accessed online or over the phone
    - the DOJ has opined that websites are covered

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## Accessibility Laws and Websites, 4

- The Expansive Coverage School of Thought
  - Foundational cases:
    - *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994)
    - *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999)
    - *Palozzi v. Allstate Life Ins. Co.*, 198 F.3d 28 (2nd Cir. 1999)
  - Recent applications:
    - *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196 (D. Mass. 2012)
    - *Nat'l Fed'n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565 (D. Vt. 2015)

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## Accessibility Laws and Websites, 5

- The Nexus/No Coverage Schools of Thought
  - Emphasis on the use of the words “place” and “establishment” in the definition of “public accommodation” and the canon of *noscitur a sociis* mean that a physical location must be involved
  - DOJ regulatory definition of “public accommodation” includes “facility” – a concept that arguably relates to a physical place
  - Congress amended the ADA recently, so their inaction to specifically include websites means their intent is to exclude them or at worst require a nexus
  - The lack of ADA regulations setting technical standards means that the ADA does not require website accessibility

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## Accessibility Laws and Websites, 6

- The Nexus School of Thought
  - Foundational cases:
    - *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000)
    - *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279 (11th Cir. 2002)
    - *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006 (6th Cir. 1997)\*\*
    - *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998)\*\*
  - Recent applications:
    - *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946 (N.D. Cal. 2006)
    - *Access Now, Inc. v. Sw. Airlines*, 227 F. Supp. 2d 1312 (S.D. Fla. 2002)
    - \*\* - The oft-cited rationale for these two cases adopting the “nexus” approach is *dicta* because they involved insurance benefits sought through an employer, rather than from a public accommodation. Thus, there was never an opportunity for the nexus to be formed. 35

## Accessibility Laws and Websites, 7

- There is less of a debate about whether Title II and Section 508 apply to state and local government websites
- No cases on this issue have gotten to the appellate level
  - Trial-level proceedings, mostly in the higher ed context
    - *Dudley v. Miami University*
    - *Lanzilotti v. Atl. Cape Cmty. Coll.*
  - DOJ settlements and Project Civic Access agreements
- The pending rulemaking on the website accessibility obligations of Title II entities will bring much needed guidance

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## Accessibility Laws and Websites, 8

- The Supplemental Advanced Notice of Proposed Rulemaking (SANPRM), 81 Fed. Reg. 28658 (May 9, 2016):
  - As early as 1996, the DOJ took the position that Titles II and III apply to websites
  - Began discussing the need for regulatory guidance as far back as 2003
  - Announced in 2010 the intention to promulgate regulations on website accessibility
  - In 2015, split the combined Title II and III regulations into separate ones for each Title
  - Title II regulations will go first (RIN: 1190-AA65)
  - Title III regulations have no timeline, but may not even be proposed until 2018 (RIN: 1190-AA61)
    - Difficult to say what a Trump administration will do with these rulemakings (at least further delay, may altogether drop them)

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## Accessibility Laws and Websites, 9

- The Supplemental Advanced Notice of Proposed Rulemaking (SANPRM), 81 Fed. Reg. 28658 (May 9, 2016):
  - Posed 123 questions ranging from the scope of the accessibility mandate, timing, and technical standards
  - Signals that the DOJ is considering:
    - WCAG 2.0 Level AA as the technical standard
      - [This is the consensus standard]
    - Requiring mobile applications to be accessible
      - [This is critical for the law to keep up with technology use]
    - Giving public entities two years from the effective date of the regulations to comply with the technical standard
      - [This is more generous than it should be]
    - Possibility of extended deadline for very small entities
      - [Smaller entities probably need less time than others]
    - Lesser access for extant conventional documents, archives
      - [Shouldn't set inconsistent standards]

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## Accessibility Laws and Websites, 10

- The Supplemental Advanced Notice of Proposed Rulemaking (SANPRM), 81 Fed. Reg. 28658 (May 9, 2016):
  - The regulatory process is still many years away from completion
  - The best practice is to be working towards accessibility NOW; do not wait until the regulations are finalized
    - The technical standards are unlikely to be different (DOT has already adopted WCAG 2.0 AA in its airline regulations)
    - Greater accessibility means greater constituent and customer traffic (more market share and/or labor savings)
    - Protection against possible suits (relief can be granted on the basis of the ADA's general mandate with or without specific regulations )
    - Early start ensures access to consultants and vendors
    - Accessible websites are easy for all and less buggy

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## Accessibility Laws and Websites, 11

- Technical Standards: WCAG 2.0 Level AA and Section 508
  - WCAG 2.0 Level AA
    - Developed by the World Wide Web Consortium (W3C) as part of its Web Accessibility Initiative (WAI) in a rigorous, open process
    - Internationally-accepted
    - “Scalable” in that they are not tied to any specific technology or system, so they promote accessibility in new and emerging platforms as much as they do in established ones
    - Flexible and preserves creativity: describes what should be done to ensure accessibility, rather than mandating how it must be done
    - Entities should be using version 2.0, Conformance Level AA
      - Version 1.0 and Version 2.0 Level A leave many gaps
    - New York City; Harris County, TX; Washington state have adopted WCAG 2.0 AA as their technical standard

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## Accessibility Laws and Websites, 12

- Technical Standards: WCAG 2.0 Level AA and Section 508
  - Section 508
    - Developed by the U.S. Access Board, which is subject to the federal rulemaking process
    - Previously had tracked various guidelines contained in the WCAG 1.0 standards (36 C.F.R. § 1194.21)
    - The “508 Refresh” proposes to replace those standards with WCAG 2.0 AA (80 Fed. Reg. 10880 (Feb. 27, 2015))
      - The Access Board approved this on September 14, 2016
      - Will be a final rule after OMB approval
    - Many states have adopted Section 508 or some modified version of it
      - Maryland: COMAR § 14.33.02.01 through .12
      - California: Gov’t Code § 11135

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## Accessibility Laws and Voting

- Help American Vote Act (HAVA)
  - Passed in response to problems during the 2000 presidential election
  - Requires that at least one accessible voting machine (including electronic ones) be available in all polling places for **federal elections** (52 U.S.C. § 21081(a)(3)):
    - “The voting system shall be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters”
  - Prior to this law, blind voters had to trust that a sighted person would mark their ballot as they requested

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## Accessibility Laws and Voting, 2

- The ADA and Rehab Act also apply to voting
- Each law also reaches state and local elections (HAVA – federal only)
- Election officials must provide appropriate auxiliary aids and services at each stage of the process, from registering to vote to casting a ballot
- In determining the type of auxiliary aid and service to be provided, officials must give primary consideration to the request of the voter
  - Aids may include: ballot overlays or templates, electronic information and information technology that is accessible (either independently or through assistive technology such as screen readers), or recorded text or telephone voting systems

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## Accessibility Laws and Voting, 3

- *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494 (4th Cir. 2016)
  - Absentee voting process (considered separately from the entire voting system) held to violate the ADA
  - Voters could get a hardcopy absentee ballot via mail or online
  - Historically, voters had to hard mark the ballot, which certain voters with disabilities cannot do
  - Maryland Board of Elections had an "online ballot marking tool" that it had allowed overseas and military voters and others to use, but then refused to certify it for voters with disabilities to use
  - 4<sup>th</sup> Circuit ruled that the disparate treatment violated the ADA and that voters with disabilities should be accommodated by being given access to the online ballot marking tool
  - Access to the tool did not fundamentally alter the voting system (certification process) because the substantive concerns about certification were answered at trial: the tool is reasonably secure, safeguards disabled voters' privacy, and had been used in actual elections without apparent incident

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## Accessibility Laws and Voting, 4

- *Eason v. N.Y. State Bd. of Elections*, No. 1:16-cv-04292 (S.D.N.Y.)
  - Lawsuit filed in June 2016 by individuals, National Federation of the Blind, and Center for Independence of the Disabled, New York
  - Challenges the inaccessibility of the inaccessible online voter registration offered by the Board of Elections and the Department of Motor Vehicles
    - DMV webpages and downloadable forms cannot be read out loud by screen access software
    - Because screen access software cannot read the fillable form's section on party affiliation on the Board of Elections website, blind and low-vision voters are forced to disclose this private information when they print out the form and get someone else to help them sign it, destroying their privacy and independence

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## Accessibility Laws and Education

- The ADA applies to schools of all levels of education
  - Title II applies to state and local public schools
  - Title III applies to private schools
- The Rehab Act applies to any school (public or private) of any level that receives federal financial assistance, including indirect federal financial aid (*Grove City College v. Bell*, 465 U.S. 555 (1984))
- The Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 *et seq.*) also applies to primary and secondary education
  - Requires provision of a free appropriate public education in the least restrictive setting
  - The Department of Education has interpreted the Rehab Act compliance standards for schools to be the same as the basic requirements of IDEA
  - The ADA does not offer greater protection

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## Accessibility Laws and Higher Ed

- January 25, 1996 Letter to the President of San Jose State University from the U.S. Dep't of Education, Office For Civil Rights
  - “The ‘information superhighway’ is fast becoming a fundamental tool in post-secondary research. Rather than implementing adaptive software, some institutions . . . utilize personal attendants as the exclusive or primary way of making . . . computer information accessible to blind persons . . . . In most cases, this approach should be reconsidered. An appropriate auxiliary aid . . . [can] foster independence and autonomy in the person with a disability.”
  - “When reasonably priced technology is available that will enable the visually impaired computer user to access the computer, including the World Wide Web, during approximately the same number of hours with the same spontaneous flexibility that is enjoyed by other nondisabled computer users...the objectives of Title II will most effectively and less expensively be achieved by obtaining the appropriate software programs.”
  - <http://www.icdri.org/legal/sjsu.htm>

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## Accessibility Laws and Higher Ed,2

- April 7, 1997 Letter to the President of California State Univ., Los Angeles from the U.S. Dep't of Education, Office For Civil Rights
  - “When making purchases and when designing its resources, a public entity is expected to take into account its legal obligations to provide communication to persons with disabilities that is ‘as effective as’ communication provided to nondisabled persons. At a minimum, a public entity has a duty to solve barriers to information access that the public entity’s purchasing choices create, particularly with regard to materials that with minimal thought and cost may be acquired in a manner facilitating provision in alternative formats.”
  - “When a public institution selects software programs and/or hardware equipment that are not adaptable for access by persons with disabilities, the subsequent substantial expense of providing access is not generally regarded as an undue burden when such cost could have been significantly reduced by considering the issue of accessibility at the time of the initial selection.”
  - <http://www.icdri.org/legal/csula.htm>

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## Accessibility Laws and Higher Ed, 3

- September 1, 2003 Letter to California State Univ., Fullerton from the U.S. Dep't of Education, Office For Civil Rights
  - “The University did not provide the complainant access to alternative media educational materials in the same time frame as educational materials are available to non-disabled students. The delays in receiving alternative media materials had a negative effect on complainant’s opportunities to achieve the same educational opportunity, and (effective communication) as that afforded to non-disabled students.”
  - [ada.osu.edu/AHEADLEGAL07/124\)CSUFullerton.rtf](http://ada.osu.edu/AHEADLEGAL07/124)CSUFullerton.rtf)

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## Accessibility Laws and Higher Ed, 4

- *Gustafson v. Univ. of California, Berkeley Settlement Agreement*
  - Required, among other significant issues critical to students with disabilities, implementation of detailed policies and procedures regarding the provision of access to materials in alternate format
  - [http://dralegal.org/wp-content/uploads/2012/09/settlement\\_2.pdf](http://dralegal.org/wp-content/uploads/2012/09/settlement_2.pdf)
- Resolution Agreements between California State Univ. and the U.S. Dep't of Education, Office for Civil Rights
  - California State Univ., Fullerton in 2003 and 2004
  - California State Univ., East Bay in 2004
  - California State Univ., Los Angeles in 2006
  - California State Univ., San Bernardino in 2006
  - Extends the alternative format mandate to faculty positions

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## Accessibility Laws and Higher Ed, 5

- 2008 Settlement Agreement Between Massachusetts, the National Federation of the Blind, and Apple, Inc.
  - iTunes U, a collaboration between Apple and various educational institutions, provided free content including course lectures, language lessons, lab demonstrations, sports highlights, and campus tours
  - Apple committed to providing Full and Equal Access to all information, interactions, features, products, and services of iTunes (blind customers using Screen Access Software may access or acquire the same information, engage in the same interactions, and enjoy the same iTunes products and services Apple offers its sighted customers with substantially equivalent ease of use)

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## Accessibility Laws and Higher Ed, 6

- September 2011 Voluntary Resolution Agreement (Penn State)
  - Audit to examine the accessibility of tech provided to blind students, prospective students, staff, and faculty (websites, application processes, library services, course management systems, access to classroom podiums and LCD devices, course registration software, personal response systems (“clickers”), and ATMs)
  - Development of an EIT corrective action strategy with time lines
  - Creation of an EIT Accessibility Policy Statement with training
  - Designation of University EIT Policy Monitor with “fixing” authority
  - Compliance with WCAG 2.0 Level AA for University websites
  - On-going accessibility scans to ensure continued accessibility
  - Specific requirements around the University’s Course Management Systems, classrooms, clickers, and banking
  - University may purchase or recommend only accessible tech and RFP language requires bidders to meet accessibility standards of WCAG 2.0 Level AA for web, and Section 508 and the ADA for other
  - <http://accessibility.psu.edu/nfbpsusettlement/>

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## Accessibility Laws and Higher Ed, 7

- February 2012 Settlement Between Florida State University and Christopher Toth and Jamie Principato
  - Future procurement by FSU's Department of Mathematics of digital technology and digital instructional materials shall be accessible to the blind
  - FSU shall take steps necessary to ensure all accessibility barriers are removed from specific designated math courses such that blind students can access the content of the curriculum in an equally effective and integrated manner as their non-disabled peers
  - FSU will explore the development of a campus-wide policy for procurement of accessible instructional technology and content
  - Posting of FSU grievance policy on various FSU websites
  - Specific relief that is specific to the two plaintiffs, including monetary compensation of \$75,000 each and significant attorneys' fees
  - <https://nfb.org/images/nfb/documents/pdf/fsu%20settlement%20agreement.pdf>

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## Accessibility Laws and Higher Ed, 8

- 2013 Settlement Agreement between the U.S. Dep't of Justice and Louisiana Tech University
  - Blind student was unable to participate in a course because of an inaccessible Internet-based application used for coursework
  - Revise policies to ensure deployment of accessible technology and course content, ensure that the University's Office of Disability Services is an effective participant in implementing this policy
  - "[A]ll instructional materials and online courses created by a college, department, program, unit or professor must be fully accessible to individuals with disabilities at the same time they are available to any other student enrolled in that program."
  - Detailed roadmap of what must be covered by the revised Policy, including, as a starting point, a self-audit of University technology and instructional materials, procurement obligations, website compliance with WCAG 2.0 AA, etc.
  - <https://www.ada.gov/louisiana-tech.htm>

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## Accessibility Laws and Higher Ed, 9

- March 8, 2013 Resolution of U.S. Dep't of Education, Office for Civil Rights Compliance Review of South Carolina Technical College System
  - Scope of Review: Whether communications with persons with disabilities are as effective as communications with persons who are not disabled, with a focus on University websites
  - Given findings of non-compliance, the System agrees to ensure that all of its websites will be accessible to students with disabilities, to develop a resource guide that provides information about web accessibility requirements, standards, and links to reference materials, and to review and monitor the colleges' websites
  - OCR will be monitoring compliance
  - <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/11116002-b.pdf>

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## Accessibility Laws and Higher Ed, 10

- March 10, 2014 Resolution Agreement between the U.S. Dep't of Education, Office for Civil Rights and the University of Montana
  - Development of EIT Accessibility Policy and Procedures with substantial comment and implicit approval by the Office for Civil Rights with broad dissemination
  - Posting of grievance procedure for identified accessibility barriers
  - University may purchase or recommend only EITs that will provide the same programs, benefits, and services for all
  - RFP language shall include that bidders meet the accessibility standards of WCAG 2.0 Level AA for web technology, and Section 508 and the ADA for other EIT
  - Develop University website dedicated to accessibility with significant training at all levels of University personnel
  - Appointment of EIT Coordinator
  - Student Survey seeking input on the identification of any and all barriers encountered

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## Accessibility Laws and Higher Ed, 11

- March 10, 2014 Resolution Agreement between the U.S. Dep't of Education, Office for Civil Rights and the University of Montana
  - EIT Accessibility Audit, Corrective Action Strategy based on audit findings and student survey results, including dates by which corrective action shall be completed, with public dissemination
  - The parties anticipate that the University will identify some EIT that is old and not currently or frequently used and that the strategy will not include provisions for going back to make such EIT accessible. If such EIT becomes currently used in a class or program, it will be made accessible in accordance with the EIT Accessibility Policy
  - Specific focused requirements and time frames for Library Services and Library Website, all other University websites, Learning Management Systems and classrooms
  - Extensive Reporting Requirements
  - [https://nfb.org/images/nfb/documents/pdf/agreement\\_university\\_of\\_montana\\_march\\_10\\_2014.pdf](https://nfb.org/images/nfb/documents/pdf/agreement_university_of_montana_march_10_2014.pdf)

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## Accessibility Laws and Higher Ed, 12

- September 2014 Settlement Agreement between the Nat'l Fed'n of the Blind, Maricopa Co. Cmty. College Dist. & Mesa Cmty. College
  - Similar provisions to the University of Montana agreement
  - <https://nfb.org/national-federation-blind-and-maricopa-community-college-district-resolve-litigation>

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## Accessibility Laws and Higher Ed, 13

- November 25, 2014 Resolution Agreement between the U.S. Dep't of Education, Office for Civil Rights and Youngstown State Univ.
  - Extensive publication of a Notice of Nondiscrimination
  - Development of EIT Accessibility Policy to be approved by OCR
  - Designation of EIT Accessibility Coordinator who has been given sufficient resources and authority to coordinate and implement the EIT Policy
  - Required to complete accessibility audits at regular intervals and implement corrective action plans. Specific requirements are incorporated into the Agreement regarding the initial audit
  - Extensive reporting requirements that extend through July 30, 2017
  - OCR-Youngstown Resolution Letter: <http://www2.ed.gov/documents/press-releases/youngstown-state-university-letter.pdf>
  - OCR-Youngstown Agreement: <http://www2.ed.gov/documents/press-releases/youngstown-state-university-agreement.pdf>

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## Accessibility Laws and Higher Ed, 14

- December 2014 Resolution Agreement between the U.S. Dep't of Education, Office for Civil Rights and the University of Cincinnati
  - Significant focus on accessibility of websites and e-learning platforms.
  - OCR-Cincinnati Resolution Agreement: <http://www2.ed.gov/documents/press-releases/university-cincinnati-agreement.pdf>
  - OCR-Cincinnati Resolution Letter: <http://www2.ed.gov/documents/press-releases/university-cincinnati-letter.pdf>

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## Accessibility Laws and Higher Ed, 15

- June 1, 2015 Consent Decree in *Lanzilotti v. Atl. Cape Cmty. Coll.*
  - Two blind students and the NFB reached a consent decree with Atlantic Cape Community College that is the most detailed and comprehensive resolution of its kind
  - ACCC must adopt policies consistent with the requirements of the ADA; opportunities afforded generally to ACCC students are equally afforded to students with disabilities
  - ACCC's "Grievance Policy" applicable to disability-related issues is triggered any time the Office of Disability Support Services has not fully resolved a student's complaint
  - Electronic technology purchased or licensed for, or deployed to students or prospective students is accessible to blind
  - RFP to procure web-based EIT that complies with WCAG 2.0 AA and will request vendors to warrant in writing that any technology provided is accessible

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## Accessibility Laws and Higher Ed, 16

- June 1, 2015 Consent Decree in *Lanzilotti v. Atl. Cape Cmty. Coll.*
  - Extensive training, including:
    - Common assistive technologies and other auxiliary aids and services used by individuals with disabilities in interacting with computers, websites, equipment, and in learning in and outside of the classroom, including non-electronic formats
    - Common technological accessibility barriers encountered by individuals with disabilities, including those found on websites, in various document formats, and equipment and devices used in laboratories and classrooms
    - Common methods, resources, personnel and time frames used in ensuring that word processing, spreadsheet and presentation documents, converted and digital textbooks, informational images, multimedia, and course equipment and devices are Accessible
    - The means by which one creates and provides Accessible instructional materials in the classroom setting or by delivery electronically through course websites or email
    - An overview of accepted accessibility standards;
    - Consideration of selecting course texts that have accessible electronic formats, such as DAISY or

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## Accessibility Laws and Higher Ed, 17

- June 1, 2015 Consent Decree in *Lanzilotti v. Atl. Cape Cmty. Coll.*

### Technology audit:

- Within one year, ACCC shall conduct and complete a Technology Accessibility Audit of all student-facing Electronic and Information Technology, including, but not limited to ACCC's enterprise-wide student facing systems and the public atlantic.edu website
- Accessibility standards for this audit:
  - WCAG 2.0 AA and WAI-ARIA 1.0 for web content;
  - ATAG 2.0 for software used to create web content;
  - UAAG 1.0 for web browsers, media players and assistive technologies;
  - WCAG2ICT for non-web software and content;
  - MathML 3.0 specifications for digital mathematical and scientific notation
  - DAISY or ePub3 for digital publications and documents;
  - BANA Guidelines and Standards for Tactile Graphics (2010) and Guidelines for the Production of Braille Materials through the Use of Braille Production Software (2007) for hardcopy Braille

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## Accessibility Laws and Higher Ed, 18

- June 1, 2015 Consent Decree in *Lanzilotti v. Atl. Cape Cmty. Coll.*

- **Corrective Action Strategy:**

- Within 180 days after the completion of the Technology Accessibility Audit, ACCC shall develop a Corrective Action Strategy based on the Technology Accessibility Audit findings that will make all inaccessible EIT Accessible no later than 3 years after the completion of the Technology Accessibility Audit, except that for students with print disabilities currently enrolled at ACCC or enrolled for any semester prior to completion of the Corrective Action Strategy, ACCC will timely provide Accessible EIT or equally effective alternate access for every class in which such a student is enrolled

- **Websites:**

- ACCC's public website (atlantic.edu) and ACCC's web interface to the student information system (WebAdvisor), as well as any online forms, shall be made Accessible to blind and visually impaired users in accordance with WCAG 2.0 Level AA standards within 240 days of the effective date of the Decree

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## Accessibility Laws and Higher Ed, 19

- June 1, 2015 Consent Decree in *Lanzilotti v. Atl. Cape Cmty. Coll.*
  - Digital content:
    - All instructional materials, co-curricular materials, EIT, and online courses created or used by an ACCC department or professor in connection with any ACCC course offering must be Accessible to individuals with disabilities at the same time they are available to any other student enrolled in that program
    - For example, all content presented visually in a classroom, test, or homework setting for a class that includes a student with a visual disability must be made Accessible in a nonvisual format in time to be used by that student in those same settings, including, for nontextual information, tactile graphics or high resolution magnification, as appropriate
    - ACCC has three years to get all the way there
  - [https://nfb.org//images/nfb/documents/pdf/accc\\_consent\\_decree.pdf](https://nfb.org//images/nfb/documents/pdf/accc_consent_decree.pdf)

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## Accessibility Laws and Higher Ed, 20

- Consent Decree in *Dudley v. Miami University*
  - Blind student sued University for failing to provide across the board access to classes and student life
  - May 2016 – U.S. Dep’t of Justice, Office for Civil Rights intervened
  - August 15, 2016 - Student and the University settled
    - [http://www.disabilityrightsohio.org/assets/documents/dudley\\_final\\_settlement\\_agreement.pdf](http://www.disabilityrightsohio.org/assets/documents/dudley_final_settlement_agreement.pdf)
  - October 13, 2016 – DOJ and the University settled
    - [http://www.disabilityrightsohio.org/assets/documents/dudley\\_consent\\_decree\\_10-17-16.pdf](http://www.disabilityrightsohio.org/assets/documents/dudley_consent_decree_10-17-16.pdf)

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## Accessibility Laws and Higher Ed, 21

- April 2, 2015 Settlement Agreement between the U.S. Dep't of Justice and edX Inc.
  - edX is a MOOC provider created by Harvard and MIT
  - Has approximately 60 universities and institutional members providing over 540 courses to over 3,000,000 learners
  - DOJ deems edX a place of education and a public accommodation under Title III
  - Agreement requires that edX make significant modifications to its website, platform, and mobile applications to ensure accessibility
  - Ensure that there is accurate captioning for the deaf, oral navigation signals for the blind and programming changes so that individuals with dexterity disabilities can navigate content without struggling with a hand-operated mouse
  - Provide guidance and authoring tools to the entities that create and post the courses to assist them in making their content accessible
  - [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/02/edx\\_settlement\\_agreement.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/02/edx_settlement_agreement.pdf)

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## Accessibility Laws and Higher Ed, 22

- *Nat'l Ass'n of the Deaf v. Harvard University* (D. Mass.)
  - Deaf students allege Harvard violates the Title III and Section 504 by denying meaningful access to MOOCs by not closed captioning all of its online audio and audiovisual content as a reasonable accommodation
  - Proposed class action
  - DOJ files a statement of interest in support of plaintiffs
  - Nov. 3, 2016 - District court denied Harvard's motion to dismiss
    - Ruled that the court could decide the matter before the DOJ issues regulations
    - Rejected arguments about undue burden or fundamental alteration, which are factual arguments that cannot be resolved on a motion to dismiss
    - Relies in part on the joint "Dear Colleague Letter" regarding emerging technology
    - MOOCs needn't be connected to a physical location

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## Accessibility Laws and Higher Ed, 23

- University of California, Berkeley MOOCs
  - DOJ investigation of complaints by two deaf individuals who are unable to use Berkeley's MOOCs because they are not captioned
  - Berkeley uses edX's platform, YouTube, and iTunes
  - DOJ issues a letter finding Berkeley in violation of the ADA
    - Videos are uncaptioned or lack an alternative way to access images or visual information (e.g., graphs, charts, animations or URLs on slides), such as audio description, alternative text, PDF files or Word documents
    - Many documents are inaccessible to the blind because they are not compatible with screen access software
    - <https://news.berkeley.edu/wp-content/uploads/2016/09/2016-08-30-UC-Berkeley-LOF.pdf>
    - Resources are available to those creating online content to make it accessible, but do not require it
  - Berkeley has contemplated ending the MOOC program to avoid spending the resources to make them accessible

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## Accessibility Laws and Higher Ed, 24

- Additional Resources:
  - California State Accessible Technology Initiative:  
<http://www.calstate.edu/accessibility/>
  - University of California Electronic Accessibility Policy:  
<http://www.ucop.edu/electronic-accessibility/initiative/policy.html>
  - The Ohio State University Web Accessibility Policy:  
<http://ada.osu.edu/resources/webaccessibilitypolicy.pdf>
  - Temple University policies: <https://temple.edu/about/temple-university-accessibility-statement>
  - University of Minnesota Accessibility Policy:  
<http://accessibility.umn.edu/umn-policies.html>

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## Accessibility Laws and eBooks

- “The most optimistic estimates project that today blind people have access to no more than 5 percent of books and other published works, and that is in the industrialized world.” -Frederic Schroeder
- In 2005, a group of libraries and universities began to work with Google Inc. to digitize their library collections
- In 2008, through the HathiTrust, the University of Michigan made the more than 9 million digital books in its collection available to students, faculty, and staff who had documented print disabilities
- Trade group and some individual authors sued the universities claiming copyright violations
- The NFB intervened as a defendant to argue for the newly-found access as a fair use and a form of access permitted under the Chafee Amendment to the Copyright Act
- *The Author’s Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2nd Cir. 2014) affirmed the district court’s decision in favor of the defendants and held that a university, in discharging its obligations under the ADA, may digitize its library as a fair use under copyright law because it is a “transformative use.”

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## Accessibility Laws and eBooks, 2

- In June 2009, several advocacy groups filed complaints against public and private universities for their use of Amazon’s inaccessible Kindle DX book reader
- Cascade of settlements where colleges agreed not to purchase, require, or recommend use of the Kindle DX, or any other dedicated electronic book reader unless or until the device was fully accessible to blind individuals, or the university/college provided an accommodation or modification so that a student with a disability can acquire the same information, engage in the same interactions, and enjoy the same services as sighted students with substantially equivalent ease of use
  - Case Western Reserve (1/13/2010): [http://www.ada.gov/case\\_western\\_univ.htm](http://www.ada.gov/case_western_univ.htm)
  - Pace University (1/13/2010): [http://www.ada.gov/pace\\_univ.htm](http://www.ada.gov/pace_univ.htm)
  - Princeton University (3/29/2010): <http://www.ada.gov/princeton.htm>
  - Reed College (1/13/2010): [http://www.ada.gov/reed\\_college.htm](http://www.ada.gov/reed_college.htm)

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## Accessibility Laws and eBooks, 3

- January 15, 2010 Settlement Agreement between U.S. Dep't of Justice, Nat'l Fed'n of the Blind, the American Council of the Blind, and Arizona State University
  - ASU committed to provide disabled students, including blind students, with equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs
  - If ASU deploys any e-book reading device in a class, it will choose a device (if commercially available, at a reasonable cost provided that the e-reader meets the requirements of the class) that allows the blind student to access and acquire the same information, engage in the same interactions, and enjoy the same services that the e-book reading device offers sighted individuals with substantially equivalent ease of use.
  - [http://www.ada.gov/arizona\\_state\\_university.htm](http://www.ada.gov/arizona_state_university.htm)

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## Accessibility Laws and eBooks, 4

- June 29, 2010 Joint "Dear Colleague" Letter issued by the U.S. Dep'ts of Justice & Education to College and University Presidents
  - Requiring use of an emerging technology (an inaccessible book reader) is discrimination prohibited by the ADA and Section 504 unless accommodations or modifications can be provided that permit the student with a disability to receive all the educational benefits provided by the technology in an equally effective and equally integrated manner
  - "Technology is the hallmark of the future, and technological competency is essential to preparing all students for future success. Emerging technologies are an educational resource that enhances learning for everyone, and perhaps especially for students with disabilities. Technological innovations have opened a virtual world of commerce, information, and education to many individuals with disabilities for whom access to the physical world remains challenging. Ensuring equal access to emerging technology in university and college classrooms is a means to the goal of full integration and equal educational opportunity for this nation's students with disabilities. With technological advances, procuring electronic book readers that are accessible should be neither costly nor difficult."

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## Accessibility Laws and eBooks, 5

- June 29, 2010 Joint “Dear Colleague” Letter issued by the U.S. Dep’t of Justice & Education to College and University Presidents
  - Under Title II, qualified individuals with disabilities may not be excluded from participation in or denied the benefits of the services, programs or activities of, nor subjected to discrimination by the public university or college
  - Under Title III, students with disabilities at private colleges may not be discriminated against in the full and equal enjoyment of all of the goods and services of the college or university
  - Title II and Section 504 prohibit public colleges/universities from affording individuals with disabilities with an opportunity to participate in or benefit from college and university aids, benefits, and services that is unequal to the opportunity afforded others. And, that, individuals with disabilities must be provided with aids, benefits, or services that provide an equal opportunity to achieve the same result or the same level of achievement as others
  - <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100629.html>

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## Accessibility Laws and eBooks, 6

- May 26, 2011 U.S. Dep’t of Education, Office for Civil Rights “Frequently Asked Questions” document about June 29, 2010 letter
  - Clarified that the “Dear Colleague Letter” was NOT new law
  - The Letter applies equally to elementary and secondary schools; all school operations, including pilot programs; and all faculty and staff
  - Test for compliance: can one acquire the same information, engage in the same interactions, and enjoy the same services as sighted students with substantially equivalent ease of use?
  - This same test applies to those with other print disabilities.
  - Schools must plan for having accessible technology available now: “Just as a school system would not design a new school without addressing physical accessibility, the implementation of an emerging technology should always include planning for accessibility. . . . The planning should include identification of a means to provide immediate delivery of accessible devices or other technology necessary to ensure accessibility from the outset.”
  - <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-ebook-faq-201105.html>

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## Accessibility Laws and eBooks, 7

- EPUB3 – the Format for Optimizing Access to eBooks
  - Developed by the International Digital Publishing Forum
    - <http://idpf.org/a11y>
  - Form of HTML
  - Enables accessibility features to pass through from publishers to readers

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## Accessibility Laws and Employment

- Accessible digital technology can help change the chronic problem of unemployment and under employment of persons with disabilities
  - Significantly higher rate of unemployment among the blind and other persons with disabilities (12.5% compared to 5.9% for non-disabled persons,  
<http://www.bls.gov/news.release/disabl.nr0.htm>)
- Online applications
- Accessible technology in the workplace

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## Accessibility Laws and Employment, 2

- Applications and tests are covered by Title I of the ADA, Rehab Act
  - Requirement to provide accommodations during the application process (pre-employment)
- Job listings websites
  - 2002 study found that zero of 10 job boards and 31 e-recruiting websites were accessible
  - Settlement between NFB, Massachusetts, and Monster.com
- Online applications and tests
  - many online employment websites are inaccessible to users with disabilities (Interview Exchange, Taleo, etc.)
  - 2012 study by Dr. Jonathan Lazar involved 16 blind, screen-reader users, attempting to apply for jobs online found that only 9/32 (28.1%) of application attempts could be completed independently without any assistance
  - IBM's Kenexa employment skills tests (<http://www-01.ibm.com/software/smarterworkforce/products.html>) are now accessible for screen access software users

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## Accessibility Laws and Employment, 3

- *Reyazuddin v. Montgomery County, MD*
  - Feb 26, 2016 - jury found that the county violated the Rehab Act by failing to provide her with accessible software in the 311 call center as a reasonable accommodation
  - Blind employee had been able to do her job well until the county switched to a new program that did not interface with her screen access software
  - Employee was given pointless "make work" or no work at all despite her repeated requests to be given the opportunity to do her job
  - County had initially succeeded in arguing that the call center did not have enough budget for the accessibility modifications, but the 4th Circuit ruled that the relevant pool of resources is the larger governmental entity in its entirety
  - Jury awards compensatory damages and attorneys' fees

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