Chapter 2
E-Books and Federal Civil Rights Legislation

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June 29, 2010, the US Department of Education Office for Civil Rights in conjunction with the Civil Rights Division of the US Department of Justice sent a Dear Colleague letter addressed *Dear College or University President*. The letter began:

> We write to express concern on the part of the Department of Justice and the Department of Education that colleges and universities are using electronic book readers that are not accessible to students who are blind or have low vision and to seek your help in ensuring that this emerging technology is used in classroom settings in a manner that is permissible under federal law.[1]

The letter was in response to recently settled agreements with colleges and universities that used the Kindle DX. In the settlement, the universities agreed not to purchase, require, or recommend use of the Kindle DX or another electronic book reader or similar technology that was not accessible to people with visual disabilities.

While some folks thought the Dear College Letter (DCL) of June 29, 2010, imposed new legal obligations, it did not. What it did was reflect the growing understanding on the part of the Departments of Education and Justice about digital accessibility as covered under Section 504 of the Rehabilitation Act of 1973 and under Title II of the Americans with Disabilities Act of 1990.

Even though those laws had been in existence for decades, it wasn't until about 2008 that digital accessibility was an issue the enforcement agencies were learning about. The trail of enforcement actions primarily by the US Department of

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[1] https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100629.html

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Education Office for Civil Rights (OCR) grows larger in the years following the DCL. But the initial findings and solutions were narrow.

Move to the present and the findings have become comprehensive and the resolution agreements much more detailed. The issue of digital accessibility results from the fact that the laws were passed before digital tools were in widespread educational use. But once OCR started to enforce the laws, the noncompliance letters and resulting resolutions became the guidance for the field.

In 1998, Congress amended the Rehabilitation Act of 1973 to require federal agencies make their electronic and information technology (EIT) accessible to people with disabilities. Though technically Section 508 only applied to federal agencies, it contained a set of standards that defined EIT accessibility. Those standards became the guidance that institutions are held accountable to use to improve digital accessibility.

In January 2018, the US Access Board, which is responsible for developing Information and Communications Technology accessibility standards to govern federal procurement practice, refreshed the guidelines. They updated and reorganized the standards to reflect advances in technology and to harmonize the requirements with other standards in the USA and abroad, including standards issued by the Word Wide Web Consortium (W3C). Web Content Accessibility Guidelines (WCAG 2.0) is recognized globally as the design standard for web content.

Now, both OCR and the US Department of Justice (DoJ) use WCAG 2.1 AA as the standard when investigating digital accessibility issues. WCAG 2.0 guidelines[2] address four major principles:

1. Perceivable
2. Operable
3. Understandable
4. Robust

There are three levels of implementation designated as A, AA, and AAA. These conformance levels progress from minimum (A) to maximum (AAA).[3] While the Section 508 refresh is currently tied to WCAG 2.0, W3C has released WCAG 2.1 and currently has a committee meeting to create WCAG 3.0. But, as of 2018, WCAG 2.0 AA is the standard educational institutions (both K-12 and higher education) need to meet to be fully in compliance with digital accessibility. Other legal actions have made it clear that businesses have an obligation to ensure their web and digital tools are covered under ADA and must meet WCAG 2.1 AA.

Students with Disabilities

There are accessibility concerns for print, as well as for digital materials. Students with print disabilities may face accessibility problems either with hard-copy materials or digital materials. While vision disabilities are the most obvious, dyslexia is

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[2] https://www.w3.org/TR/WCAG20/

[3] https://www.w3.org/TR/UNDERSTANDING-WCAG20/conformance.html

more common than blindness. In the rest of this chapter, the focus will be on digital accessibility.

Higher education institutions have well-established procedures for making classroom accommodations for students who register their disability and ask for assistance. Accommodations are generally made for courses that take place in standard classrooms. Because digital materials are now a part of most learning environments, be they traditional classroom, blended, or fully online, this is where the change is needed.

While it is well known the number of students with a disability in higher education who choose to self-disclose their disability is relatively low, the institution still has the responsibility to ensure that learning is accessible to all students with disabilities. While it is hard to obtain accurate data, and estimates vary,[4] somewhere less than 30% of the students with disabilities will self-disclose their disability to the institution.[5]

Neither Section 504 or ADA requires that a person register their disability before learning materials be made accessible. The Department of Education's definition of accessibility is:

> Those with a disability are able to acquire the same information and engage in the same interactions—and within the same time frame—as those without disabilities.[6]

Digital information and resources need to be accessible for all students with disabilities, irrespective of whether or not the institution knows of the disability. Legally, the onus for making materials accessible rests with the institution. It is not acceptable for an instructor, or the institution, to require a student to locate instructional accessible materials on their own.

Though students who are blind or deaf possess obvious disabilities and more often register with their disability services office (DSO), there are greater numbers of students with other less observable disabilities. While "print disability" does not fall under the legally defined disability classification, it identifies the functional ability of students with one or more of a variety of disability. People with visual, physical, perceptual, developmental, cognitive, or learning disability can all be included in the larger print-disability category. And, people sometimes have more than one disability. There is not a single adaptive device that provides accessibility for all types of disabilities. As a result, ensuring that all students have access to digital resources requires evaluation of each student's unique needs, careful study of available digital learning resources designed for accessibility, and selection of the most appropriate.

The screen reader is one adaptive device used by people with reading disabilities to access e-books, websites, and other online content. A screen reader is a software application that reads aloud whatever is on the computer screen. The most obvious screen reader user is blind or has partial vision, but students with other print disabilities also use screen readers, as do students whose first language is not English.

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[4] https://www.bestcolleges.com/resources/college-planning-with-learning-disabilities/

[5] https://doi.org/10.1111/ldrp.12102

[6] OCR Compliance Review 11-11-2128, 06121583, paraphrased from 11-13-5001, 10122118, 11-11-6002

Screen readers start at the top left of the application screen and read text line by line from left to right, reading each line down the page. But, what happens when a screen reader encounters something that's not text? That depends on how accessible the material has been made. A properly accessibly formatted graphic will be coded with a text description of the graphic that is read by the screen reader. Tables designed to have headers identified are read correctly. If not designed to be screen reader accessible, then students using a screen reader are unable to acquire all the information in the document.

Another accessibility problem is encountered when EITs are designed to require a mouse for navigation. Students with motor disabilities may be using a different adaptive device to navigate a computer. It may be as simple as using the tab key to move from section to section or something more complex like a pointer controlled by air puffs. E-Books and all digital content should be accessible to people with motor disabilities.

Color selection and contrast are frequently cited by OCR and DoJ as accessibility issues. Color blindness, which takes a variety of forms, impacts males more than females and is not an obvious disability, and it is one that most institutional disability services offices do not consider a disability. However, the enforcement agencies do consider color blindness a disability. The accessibility issues occur when color is used as the only distinguishing trait in text and web design. If a direction says to select the red button for one action and green for the other, someone color-blind will be forced to guess. There are other issues including captioning of video and access to third-party web content that all play a role in accessibility.

Policy Implications

Any institution of higher education that receives federal funding normally has a comprehensive nondiscrimination statement that lists all the categories protected from discrimination. Though, in review of a number of institutional nondiscrimination statements, it can be seen disabilities are not in the forefront of thinking. Title IX gets a good deal of visibility because of the publicity it has received since it was passed, but Section 504, though equally as established, has not received the same level of recognition. The digital accessibility requirements of Section 504 and ADA are finally getting the recognition they deserve.

More recent settlement agreements (e.g., Dudley v Miami,[7] Wichita State,[8] Louisiana Tech[9]) point to the expectation that the institution will not just look at current accessibility issues, but will take action to prevent the purchase of EIT that

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[7] https://www.ada.gov/miami_university_cd.html

[8] https://www.nfb.org/images/nfb/documents/pdf/higher-ed-toolkit/wichita-state-agreement.pdf

[9] https://www.washington.edu/accessibility/requirements/accessibility-cases-and-settlement-agreements/

is not accessible. It is necessary to explain to faculty that, if the EIT content they want to purchase is not accessible, they must find accessible alternatives. Additionally, those and other settlements require creating the position of accessibility coordinator; adoption and dissemination of policies; training for faculty, students, and staff; and an accessibility audit. Many colleges and universities have created an accessibility coordinator position even though they haven't had an OCR or DoJ settlement. Though there are a variety of titles, the people filling these positions generally have the lead in ensuring that the institution is taking action to confirm all digital materials are fully accessible to people with disabilities.

Once the institution has created policies about the use of accessible materials, the first line of defense is the staff who select the digital materials. Recently, a university selected a new textbook to be used in two of its graduate program courses. The hard-copy text included a DVD with video segments that were referenced in the text. The electronic version of the text had a website with the same video segments. Unfortunately, neither the DVD version nor the linked website version of the videos was captioned. Video that is not captioned is not accessible. The publisher's representative was contacted and told the textbook purchase would not happen without captioned video. Within a week, a new link was provided to the video content with closed captioning.

This story illustrates two issues. The most obvious is digital materials must be reviewed for accessibility before purchase. The second presents a more hidden issue, that of third-party websites. Any website link that is included in a course needs to meet the same accessibility standards as content within the institution's website. That would be interpreted to include web links included in an e-book used as a text. And the definition of website, used by OCR in its compliance reports, is very broad. It includes online courses and all other digital materials that are part of the institution.

The level of closed captioning of digital materials has been clearly specified both in WCAG 2.1 AA standards and in OCR and DoJ enforcement. It is expected that the captioning is at least 99% accurate and is timed to match the spoken words. Ideally, captioning should be properly capitalized and punctuated and also be descriptive when necessary. The need for 99% accuracy means that the 2020 level of auto-captioning provided by YouTube does not meet the acceptable level.

One more true story, though this is about a K-12 program. A statewide online education program required all courses to be reviewed against a set of quality standards, with one element of those standards being, of course, accessibility. The staff charged with conducting those reviews never received training on the standards and approved most of the courses submitted to them. It was only a few years later when it was pointed out that many of the courses approved were not fully accessible. The program had to go back to the vendors of the problem courses, inform them that their courses were erroneously approved, and require they have full accessibility retrofitted into the existing courses within a specified time frame. It is not easy to retrofit accessibility into digital materials and online courses that were not designed to be inclusive.

Below are two resources to help with the selection of accessible e-books. Ask your e-book vendor two questions: Do they have a VPAT for the product? Does their e-book conform to the EPUB 3.0 specification?

The VPAT (Voluntary Product Accessibility Template) is a document produced by the product vendor explaining how the EIT product conforms to the WCAG 2.0 standards.[10] The VPAT is generally a requirement in federal government solicitations. It is becoming common practice for higher education institutions to ask for the VPAT as part of their product solicitation. The key word in the title is "voluntary." Vendors complete the VPAT on their own. As a member of the Technology Working Group for the *Center on Online Learning and Students with Disabilities*,[11] we found the accuracy of vendor VPATs was dependent on who in the company completed the form. It was always most accurate when completed by the engineers that built the product and least accurate when left to the marketing people. Depending on their commitment to and understanding of accessibility, the VPAT may be helpful in the purchase process. In any event, do not rely only on the VPAT as the accessibility review; use it as a component of the review.

The International Digital Publishing Forum approved EPUB 3.0 in 2010 and it became effective as the Recommended Specification in October 2011.[12] The specification has been adopted as the format for digital books and helps improve their accessibility. But, while the standard has been widely adopted, its use doesn't automatically make a product that conforms to the EPUB 3.0 standard also meet the legal accessibility standards. So, like with the VPAT, knowing a digital product has been developed in conformance with EPUB 3.0 is a positive indicator, though it should not be the only component of a product accessibility review.

The Bottom Line

It is the responsibility of the academic institution to ensure *those with a disability are able to acquire the same information and engage in the same interactions—and within the same time frame—as those without disabilities.* The onus is therefore on the academic institution to be proactive in meeting its responsibilities under the laws.

Below are the basics.

In order to meet federal ADA Section 504 compliance regulations, your institution should have:

- An accessibility coordinator
- Policies about accessibility including a process to review digital content prior to purchase
- A plan that spells out how and when legacy EIT materials—that are not accessible—will be replaced
- People responsible for accessibility reviews of materials trained to recognize WCAG 2.0 AA standards and have the tools to help conduct those reviews

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[10] https://www.section508.gov/sell/vpat

[11] http://www.centerononlinelearning.res.ku.edu/

[12] http://idpf.org/epub/30