

Ensuring Effective Communication

2024 Virtual ADA Conference for State and Local Governments

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ADA Effective Communication Basics

1. Public entities must ensure that communications with individuals with disabilities are as effective as communications with others
- Recognizes that persons who have vision, hearing, or speech disabilities use different ways to communicate

ADA Effective Communication Basics

2. Public entities must provide appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity.

Communications Basics

3. In determining what auxiliary aids or services are necessary, public entity shall give primary consideration to the request of the individual with a disability

Expressed choice shall be honored unless the public entity can demonstrate that another effective means of communication exists or that means chosen is not required

NOTE: This standard does not apply for ADA Title III

Communications Basics

4. Individuals or groups of individuals with disabilities cannot be charged for auxiliary aids or services that are required to ensure nondiscrimination

Communication Basics

5. Public entity is not required to take action

- That would fundamentally alter the nature of the program, activity, or service, or
- That would impose undue financial or administrative burdens

Still required to take steps up to that point

Decision must be made by head of agency, in writing, considering all resources, and with a statement of reasons

Remember: the purpose of the effective communication rules is to ensure that the person with a communication disability can receive information from, and convey information to, a covered entity.

Citations

- Statute: 42 U.S.C. 12103 (definition of auxiliary aids), 12134(b) (with respect to communications)
- Title III Regulation: Department of Justice
 - Public Accommodations
 - 28 CFR 36.303
- Title II Regulation: Department of Justice
 - Public Entities
 - 28 CFR 35.160-164 (Subpart E Communications)

Examples of Communication

- Face-to-face, individually or in group settings
- Home visits and inspections
- Public meetings, presentations, hearings, lectures
- Written communication
- Bulletin boards
- Aural communication (phone, internet)
- Televisions programs, video tapes, DVDs that you produce
- Web pages and mobile applications
- Employment situations
 - Job interviews
 - Reasonable accommodation and interactive process
 - Training

Auxiliary Aids or Services

- ADA term of art
- Generally includes equipment or services that
 - make aurally delivered information available to those who are deaf, deaf-blind, or hard of hearing or
 - visually delivered information available to those who are blind or have low vision

Types of auxiliary aids and services

- Qualified interpreters and readers
- Exchange of written notes
- Real-time computer-aided transcription services
- Written materials
- Telephone handset amplifiers
- Assistive listening devices and systems
- Telephones compatible with hearing aids
- Video Remote Interpreting

More auxiliary aids and services

- Open and closed captioning, including “real time” computer-aided transcriptions services and captioning
- Voice, text, and video-based telecommunications products
- Accessible electronic and information technology
- Taped texts and audio recordings

Still More Auxiliary Aids and Services

- Brailled materials and large print materials
- Optical readers
- Secondary auditory programs (SAP)
- Screen readers or magnification software
- Communication boards
- Speech synthesizers

“Qualified interpreter

- “Qualified interpreter” defined
 - One who can interpret effectively, accurately, and impartially
 - Both receptively and expressively
 - Using any necessary specialized vocabulary
 - Includes sign language, oral, and cued speech interpreters/translitterators
 - Need not be “certified”



“Qualified reader”

- “Qualified reader” defined
 - One who reads effectively, accurately, impartially
 - One who can use necessary specialized vocabulary

Factors for determining effectiveness

- Individual's method of communication
- Nature of communication
 - Length
 - Complexity
 - Importance
- Context
- Number of people involved
- Importance of the communication

Communication with everyone

Covers communication with applicants and participants, not just “primary” communicator

Anyone who would be able to communicate/participate in the program, service, or activity

Examples

- Court: not just parties; also jurors, spectators
- Hospitals: deaf spouse of hearing patient
- Graduation: not just students; also guests
- Parent-Teacher Conference: deaf parents of hearing student
- Social service agencies: deaf foster parent on behalf of hearing children

Companions, Too

- Companions
 - Covered entities must communicate effectively with companions
 - Family members, friends, associates with whom it is appropriate for public entity to communicate

Companions as Interpreters

- Can't require person to bring own interpreter
- Can't rely on companions to interpret except in emergency or by request of person who is deaf and assent by the companion
- Emergency: imminent threat to safety or welfare and no interpreter available
- Special rule for minors: Only can rely on minors in emergency situation

Video Remote Interpreting

A system of Internet-based video transmissions that allows an individual who is deaf or hard of hearing in one location to view and sign to a live interpreter in another location, also allowing others to communicate by speaking



VRI: Regulatory Requirements

All of the following specific performance standards must be met:

- real-time, full-motion video and audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection
 - with high-quality video images
 - With no lags, choppy, blurry, or grainy images
 - With no irregular pauses in communication
- sharply delineated images that show the interpreter's face, arms, hands, and fingers, and the face, arms, hands, and fingers of the person using sign language, regardless of body position;
- clear, audible transmission of voices; and
- adequate staff training to ensure quick set-up and proper operation.

VRI: Where Effective

- VRI is effective in many situations involving routine medical care, including emergency rooms where urgent care is important, but no in-person interpreter is available
- VRI may not be effective in situations where the patient is limited in his or her ability to see the video screen or where there are multiple people in a room and the information exchanged is highly complex and fast-paced.
- Source of controversy: some think that public entities over-rely on VRI

Telephone Calls

- Automated attendant systems, including automated voice mail, interactive voice response systems
 - Obligation: Provide effective real-time communication with individuals using auxiliary aids and services, including TTY's and relay systems
- TRS Calls
 - Entity must answer telecommunications relay calls in same manner as it answers others
 - Know how to use the State's free telecommunications relay service

Advance Notice

- Covered entities may require reasonable advance notice from people requesting aids or services, based on the length of time needed to acquire the aid or service, but may not impose excessive advance notice requirements.
- “Walk-in” requests for aids and services must also be honored to the extent possible.

ADA Enforcement Activities: Usual Areas

- Health care: Hospitals, doctor's office
- Courts, Law enforcement, Prisons
- Emergency services: 9-1-1 calls, emergency preparedness planning and implementation, notifying public of emergencies, shelters
- City council meetings: on-site and televised
- Voting: registration, information, election day
- Websites and mobile apps
- Postsecondary education: classes and online learning
- General government services

Websites: ADA Requirements

- Because the Internet as we know it today did not exist in 1990, neither the ADA nor the first ADA regulations specifically address access to websites
- ADA's broad and expansive nondiscrimination mandate reaches goods and services provided by public accommodations and all the activities of public entities
- Title II and Title III of the ADA require
 - Equal opportunity to enjoy goods and services
 - Auxiliary aids and services to ensure “effective communication”

ADA Regulations

- Department of Justice has consistently said that websites are covered by the ADA – in letters of finding, policy statements, technical assistance documents, settlement agreements, and court filings
- Department’s 2010 regulation includes “accessible electronic information technology” as a type of auxiliary aid or service

DOJ Guidance

- In March 2022 DOJ released guidance addressing web accessibility; it provided practical tips and resources for making websites accessible.
- It no longer included the use of 24/7 staffed telephone lines as an alternative to accessible websites because getting the same information or requesting the same service using a staffed telephone line takes more steps and may result in wait times or difficulty getting the information.

Guidance on Web Accessibility and the ADA on [ada.gov](https://www.ada.gov).

Support Service Providers

- Many deaf-blind individuals use support service providers (SSPs) to assist them in accessing the world around them. SSPs are not “aids and services” under the ADA. However, they provide mobility, orientation, and informal communication services for deaf-blind individuals and are a critically important link enabling them to independently access the community at large.
- Source: DOJ Guidance on Web Accessibility

Federal Regulations

Web content and mobile applications

- On August 3, 2023, Department of Justice issued proposed rule addressing web content and mobile apps under Title II of the ADA
- On September 14, 2024, Department of Health and Human Services issued comprehensive Section 504 proposed rule which included provisions on web, mobile, and kiosk accessibility
- Both Departments are working toward issuing final rules by May 2024
- Note: This PowerPoint was developed on April 5, 2024; if either of these rules are finalized before the Conference, more detailed information will be provided.

Important Features of Department of Justice Proposal

- Rule would apply to all State and local governments
- Rule proposes to adopt Web Content Accessibility Guidelines (WCAG) Version 2.1, Level AA as the technical standard that State and local governments will need to follow
- State and Local Governments would have to comply with this technical standard within 3 years for small public entities (serving less than 50,000 people) and 2 years for large public entities (serving 50,000 or more people)

DOJ Proposal Features (2)

- DOJ proposal offered a series of exceptions addressing situations where the public entity would not have to comply with the technical standards
- The obligation to comply with the standard would also not require actions requiring a fundamental alteration in the nature of the entity's program or in undue financial or administrative burdens
- DOJ suggested use of compliance measures where, in certain situations, nonconformance with WCAG may not impede access to a public entity's web content or mobile app

Important Features of Department of Health and Human Services Proposal

- The HHS proposal implements Section 504 of the Rehabilitation Act and applies to recipients of Federal funding from HHS
- Because of considerable overlap in coverage between the two rules, HHS is ensuring that its regulatory approach and language follows the lead of DOJ under the ADA
- Unlike the DOJ rule, the HHS rule applies to private entities that receive Federal funds from HHS (e.g., doctors and health care practitioners)
- For HHS, large recipients are those with 15 or more employees and small recipients are those with fewer than 15 employees

What Should a Public Entity Do?

Steps to Effective Communication

1. Make use of your ADA Coordinators and legal counsel
2. Examine your existing policies on effective communication
3. Update policies and procedures or create needed policies:
 - A. Types of Policies:** *How to request auxiliary aids
 - *Answering TRS calls
 - *Alternate Formats
 - *Contracts for hiring interpreters
 - *Meeting protocols
 - *Video Remote Interpreting
 - *Websites and mobile apps
 - B. Different policies for different agencies** within the State or County: One size with not fit all
 - C. If new Federal Regulations:** It's a New Era

Steps to Effective Communication

4. Let the public know your policies, including persons with disabilities and the organizations that represent them
5. Train your staff, continue training annually and as personnel changes
6. Be flexible: expect the unusual and share decisions and best practices

Settlement Agreement

U.S. and Service Oklahoma

- Issue: Service Oklahoma, a public entity, has a Mobile ID App that provides users with important benefits, including creating a government-issued digital ID card.
- DOJ, investigating a complaint from a blind user, found that the app had barriers that did not allow persons with vision disabilities to use the app.
- Settlement agreement (1/19/2024): Service Oklahoma will take steps to make any mobile application that it creates, administers, or maintains conform to Web Content Accessibility Guidelines ("WCAG") 2.1, Level AA.

Settlement Agreement

Arizona Department of Corrections

- Department of Justice the found that the Arizona Department of Corrections failed:
 - to provide auxiliary aids and services, such as Brailled materials, audio recordings, and screen reader software, to ensure that people with disabilities could communicate effectively while incarcerated;
 - failed to provide accessible processes for requesting accommodations or filing disability-related complaints; and
 - over relied on other incarcerated people to help people with vision disabilities without properly training or supervising those providing help.

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Arizona Settlement

- Settlement agreement (11/23/2023)
- State agency agreed to retain an expert consultant to help revise its policies and practices, train its personnel, and provide necessary modifications, aids and services, and assistive technology to people with vision disabilities in custody.
- It will adopt robust screening and documentation procedures to ensure people with vision disabilities are provided with any aids and services they need throughout their incarceration.
- The State agency will also designate a systemwide ADA Administrator and Facility ADA Coordinators to ensure consistent implementation of the agreement across all state facilities.

Voting Systems

Letter of Findings: Four Texas Counties

- DOJ issued letters to four Texas Counties: Colorado County, Runnels County, Smith County, and Upton County
- DOJ found that the websites are not accessible to individuals who are blind or have low vision, or who cannot grasp a mouse, and use screen readers, keyboards or other assistive technology. For example, on all four of the election websites, menus and links do not function properly for people who use a keyboard to navigate, and posted documents are inaccessible to people who use assistive technologies.

Emergency Preparedness Planning

Notifying the public of emergencies:

- If you use emergency warning systems such as sirens or audible alerts, provide alternate ways to provide prompt notification of emergencies to people who are deaf or hard of hearing.
 - Combine visual and audible alerts to reach a greater audience than either method would reach by itself.
 - Consider using telephone calls with pre-recorded messages, auto-dialed TTY (teletypewriter) messages, text messaging, emails, and direct door-to-door contact with pre-registered individuals.
 - Also use open captioning on emergency broadcasts on local television stations and dispatch qualified sign language interpreters when emergency announcements are televised.

Emergency Preparedness, 2

Communication in Shelters

- Adopt procedures to provide effective communication for people who are deaf or hard of hearing, people with severe speech disabilities, and people who are blind or have low vision.
- Train staff on the basic procedures for providing effective communication, including exchanging notes or posting written announcements to go with spoken announcements.
- Provide a TTY in each shelter for persons who are deaf, are hard of hearing, or have speech disabilities.
- Provide interpreters when necessary to ensure effective communication.
- Train staff and volunteers to read printed information, upon request, to persons who are blind or who have low vision.

Guidance Documents

- From the Department of Justice on ada.gov
 - ADA Requirements: Effective Communication
 - ADA Update: A Primer for State and Local Governments
 - Access for 9-1-1 and Telephone Emergency Services
 - Communicating with People who are Deaf or hard of Hearing – A Guide for Law Enforcement Officers
 - Model Policy for Law Enforcement – Communication with People Who are Deaf or hard of Hearing
 - Emergency Planning
 - ADA Best Practices Tool Kit for State and Local Governments
- From the ADA National Network on adata.org
 - Effective Communication: A Fact Sheet, and other publications, seminars, and resources

ADA Title II: New Subpart H Web Content & Mobile Apps

- On April 9, 2024, DOJ announced new final ADA rules on web content and mobile applications
- Rules will be published in Federal Register and take effect 60 days after publication
- This significant change will require coordinated effort by all public entities
- This addendum provides a first look at the important new requirements

Basic Requirement

28 CFR 35.200

- A public entity shall ensure that the web content and mobile apps that it provides or makes available, directly or through contractual, licensing, or other arrangements, is readily accessible to and usable by persons with disabilities.
- To do so, it must comply with an existing, specific standard: Level A and Level AA success criteria and conformance requirements specified in the Web Content Accessibility Guidelines (WCAG) 2.1.
- Large public entities (with total population of 50,000 or more) have two years to meet this standard; small public entities (those with total population less than 50,000 or are special districts) have three years.
- Public entities must meet this standard unless they can demonstrate that compliance with section 35.200 would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.

Web Content; Mobile Apps

28 CFR 35.104 (Definitions)

Web content means the information and sensory experience to be communicated to the user by means of a user agent (e.g., a web browser), including code or markup that defines the content's structure, presentation, and interactions.

It includes text, images, sounds, videos, controls, animations, and conventional electronic documents.

- Mobile apps means software applications that are downloaded and designed to run on mobile devices, such as smartphones and tablets.
- WCAG 2.1 *G 2.1* means the Web Content Accessibility Guidelines (“WCAG”) 2.1, W3C Recommendation 05 June 2018, <https://www.w3.org/TR/2018/REC-WCAG21-20180605/> and <https://perma.cc/UB8A-GG2F>.
- WCAG 2.1 is incorporated by reference in the rule; it is not in the rule itself.
- DOJ chose WCAG 2.1 Level AA because it includes criteria that provide web and mobile app accessibility to individuals with disabilities—including those with visual, auditory, physical, speech, cognitive, and neurological disabilities—and yet is feasible for public entities' web developers to implement.

Exceptions

28 CFR 35.201

- The rule contains five specific exceptions from compliance with the technical standards.
- If content falls under an exception, it means that the public entity does not need to make content conform to WCAG 2.1 Level AA.
- **But note:** Upon request from a specific individual, a public entity may have to provide web content or content in mobile apps to that individual in an accessible format to comply with existing ADA obligations under Title II.
- These obligations include making reasonable modifications to avoid discrimination on the basis of disability, ensuring that communications with people with disabilities are as effective as communications with people without disabilities, and providing people with disabilities an equal opportunity to participate in or benefit from the entity's services, programs, or activities.

Five Exceptions

- **Archived web content;**
- **Preexisting conventional electronic documents**, unless such documents are currently used to apply for, gain access to, or participate in the public entity's services, programs, or activities;
- **Content posted by a third party**, unless the third party is posting due to contractual, licensing, or other arrangements with the public entity;
- **Conventional electronic documents** that are about a specific individual, their property, or their account and that are password-protected or otherwise secured; and
- **Preexisting social media posts.**

Archived Web Content

28 CFR 35.201(a)

- Archived web content means web content that—
 - (1) Was created before the date the public entity is required to comply with this rule, reproduces paper documents created before the date the public entity is required to comply with this rule, or reproduces the contents of other physical media created before the date the public entity is required to comply with this rule;
 - (2) Is retained exclusively for reference, research, or recordkeeping;
 - (3) Is not altered or updated after the date of archiving; and
 - (4) Is organized and stored in a dedicated area or areas clearly identified as being archived.
- The definition is meant to capture historic web content that, while outdated or superfluous, is maintained unaltered in a dedicated archived area for reference, research, or recordkeeping.

Archived Web Content, 2

- DOJ notes several instances where the archived web content would no longer be subject to the exception:
- If the public entity later alters or updates the content after it is posted in an archive, the content would not meet the third part of the definition of “archived web content” and it would generally need to conform to WCAG 2.1 Level AA.
- If a public entity posts web content that identifies the current policies or procedures, or posts web content containing or interpreting applicable laws or regulations related to the public entity, that web content is unlikely to be covered by the exception because the content is notifying members of the public about their ongoing rights and responsibilities. It therefore is not, as the definition requires, being used exclusively for reference, research, or recordkeeping.

Pre-existing Conventional Electronic Documents

- “Conventional electronic documents” are defined as web content or content in mobile apps that is in the following electronic file formats: portable document formats (“PDF”), word processor file formats, presentation file formats, and spreadsheet file formats. The definition thus provides an exhaustive list of electronic file formats that constitute conventional electronic documents.
- Examples of conventional electronic documents include: Adobe PDF files (i.e., portable document formats), Microsoft Word files (i.e., word processor files), Apple Keynote or Microsoft PowerPoint files (i.e., presentation files), and Microsoft Excel files (i.e., spreadsheet files).
- The term “conventional electronic documents” provide an exception for certain such documents that are available as part of a public entity’s web content or mobile apps before the compliance date of this rule, **unless such documents are currently used to apply for, gain access to, or participate in the public entity’s services, programs, or activities.**
- 28 CFR 35.201(b)

Content Posted by a Third Party

28 CFR 35.201(c)

- DOJ emphasizes the narrowness of this exception—any third-party content that is posted due to contractual, licensing, or other arrangements with the public entity would not be covered by this exception.
- For example, a public entity that links to online payment processing websites offered by third parties to accept the payment of fees, parking tickets, or taxes must ensure that the third-party web content it links to in order for members of the public to pay for the public entity's services, programs, or activities complies with the web accessibility requirements of § 35.200.
- This exception would generally apply, for example, where the public entity enables comments from members of the public on its social media page and third-party individuals independently comment on that post,

Individual Password-Protected Documents 28 CFR 201(d)

This exception applies to individualized, password-protected or otherwise secured conventional electronic documents that are: (1) About a specific individual, their property, or their account; and (2) Password-protected or otherwise secured.

This exception alleviates the potential burden on public entities of making all individualized, password-protected or otherwise secured conventional electronic documents generally accessible.

It still requires allowing individuals with disabilities to be able to access information from documents that pertain to them.

Examples of individualized documents include medical records or notes about a specific patient, receipts for purchases (like a parent's receipt for signing a child up for a recreational sports league), utility bills concerning a specific residence, or Department of Motor Vehicles records for a specific person or vehicle.

Content that is broadly applicable or otherwise for the general public (i.e., not individualized) is not subject to this exception.

Note: exception only applies to conventional electronic documents.

Pre-existing Social Media Posts

28 CFR 35.201(e)

- Exception for preexisting social media post provides that the requirements of § 35.200 will not apply to “a public entity’s social media posts that were posted before the date the public entity is required to comply with this rule.”
- This means that public entities will need to ensure that their social media posts going forward are compliant with this rule’s requirements beginning on the compliance date outlined in § 35.200(b), but not before that date.
- But note: DOJ does not require public entities to ensure that social media platforms themselves conform to WCAG 2.1 Level AA

External Mobile Apps

DOJ rule covers the use, by public entities, of mobile apps that are developed, owned, and operated by third parties, such as private companies, to allow the public to access the public entity's services, programs, or activities.

External mobile apps are subject to § 35.200 in the same way as mobile apps that are developed, owned, and operated by a public entity because such external apps are generally made available through contractual, licensing, or other means, and this approach ensures consistency with existing ADA requirements that apply to other services, programs, and activities that a public entity provides in this manner.

Examples: external mobile apps to pay for parking in a city (e.g., "ParkMobile" app) or to submit non-emergency service requests such as fixing a pothole or a streetlight (e.g., "SeeClickFix" app).

Conforming Alternate Versions

28 CFR 35.202

- Section 35.202 allows the use of conforming alternate versions.
- As WCAG 2.1 defines it, a conforming alternate version is a separate version of web content that is accessible, up to date, contains the same information and functionality as the inaccessible web content, and can be reached in particular ways, such as through a conforming page or an accessibility-supported mechanism.
- Conforming alternate versions are permissible only when it is not possible to make web content directly accessible due to technical or legal limitations
- Potential problems with conforming alternate versions:
 - *could be interpreted to permit a segregated approach and a worse experience for individuals with disabilities.
 - *can be difficult to maintain conforming alternate versions because it is often challenging to keep two different versions of web content up to date.

Minimal Impact on Access

28 CFR 35.205

- Regulation allows nonconformance with the technical standard in limited circumstances
- When a public entity can demonstrate that its nonconformance to the technical standard has such a minimal impact on access that it would not affect the ability of individuals with disabilities to use the public entity's web content or mobile app to
 - access the same information,
 - engage in the same interactions,
 - conduct the same transactions, and
 - otherwise participate in or benefit from the same services, programs, and activities as individuals without disabilities,
- in a manner that provides substantially equivalent timeliness, privacy, independence, and ease of use.

Common Barriers to Access

- Individuals who are deaf may be unable to access information in web videos and other multimedia presentations that do not have captions.
- Individuals with low vision may be unable to read websites or mobile apps that do not allow text to be resized or do not provide enough contrast.
- Individuals with limited manual dexterity or vision disabilities who use assistive technology that enables them to interact with websites may be unable to access sites that do not support keyboard alternatives for mouse commands. These same individuals, along with individuals with cognitive and vision disabilities, often encounter difficulty using portions of websites and mobile apps that require timed responses from users but do not give users the opportunity to indicate that they need more time to respond.
- Some governmental entities use inaccessible third-party websites and mobile apps to accept online payments

Common Barriers to Access, 2

- A common barrier to accessibility is an image or photograph without corresponding text (“alternative text” or “alt text”) describing the image. Generally, a screen reader or similar assistive technology cannot “read” an image, leaving individuals who are blind with no way of independently knowing what information the image conveys (e.g., a simple icon or a detailed graph).
- If websites lack headings that facilitate navigation using assistive technology, they may be difficult or impossible for someone using assistive technology to navigate.
- Websites or mobile apps may fail to present tables in a way that allows the information in the table to be interpreted by someone who is using assistive technology.
- Web-based forms, which are an essential part of accessing government services, are often inaccessible to individuals with disabilities who use assistive technology. For example, field elements on forms, which are the empty boxes on forms that receive input for specific pieces of information, such as a last name or telephone number, may lack clear labels that can be read by assistive technology. Inaccessible form fields make it difficult for people using assistive technology to fill out online forms, pay fees and fines, or otherwise participate in government services, programs, or activities using a website

What's a Public Entity to Do?

- In short, get busy.
- The good news, you've done this before – after 1990 with all the provisions of the ADA. You've done self-evaluations and transition plans. You've successfully changed how you do business.
- Now you're making the digital world that you operate in accessible – your use of web content and mobile apps.
- Pull your resources together; involve the ADA Coordinators, your digital staff, your legal counsel, and include persons with disabilities and other knowledgeable stakeholders;
- Learn what the new DOJ regs require; Learn what WCAG 2.1 requires;
- Look at your programs, services, and activities; analyze where they fall short and where you need to make changes;
- Marshall your available resources, financial and other; and
- Develop an action plan with priorities for actions over the next 2 (or 3) years).
- Begin taking steps and making changes right away.

Questions?