



OFFICE OF THE PROVOST AND  
EXECUTIVE VICE PRESIDENT FOR ACADEMIC AFFAIRS

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Submitted via Federal eRulemaking Portal ([www.regulations.gov](http://www.regulations.gov))

Kristen Clarke  
Assistant Attorney General  
U.S. Department of Justice  
Disability Rights Section, Civil Rights Division  
U.S. Department of Justice  
P.O. Box 440528  
Somerville, MA 02144

**Re: RIN 1190-AA79 / Docket ID No. 144: Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities**

Dear Ms. Clarke:

On behalf of the University of California (hereafter, “University of California” or “University”), one of the country’s premier public research university systems, serving more than 290,000 students across ten campuses and patients across six academic medical centers, we appreciate the opportunity to comment on the [proposed Title II rule regarding web and mobile application accessibility](#) published in the Federal Register on August 4, 2023.

The University of California appreciates the opportunity to comment on the Department of Justice’s (hereafter “Department”) proposed rulemaking. The University of California strongly urges the department to consider its comments below in finalizing the proposed regulation.

### **1. The University Supports the Department’s Adoption of a Technical Standard**

Given the widespread usage of the Web Content Accessibility Guidelines (“WCAG”), and the University of California’s incorporation of WCAG into its systemwide policies, the University supports the adoption of WCAG 2.1 AA as a technical standard for the proposed regulation. The University encourages the Department to supplement WCAG with additional explanations and use case examples to aid understanding and the proper interpretation of WCAG technical standards. This additional guidance would be especially beneficial in developing or remediating content that may not involve traditional websites or mobile applications (*e.g.*, eCourse/eLearning portals accessed via a web browser).

Further, as written, the technical standard in the proposed regulation is static. The Department may wish to include language in the final regulation which allows for the periodic update of the relevant WCAG technical standard (*e.g.*, WCAG 2.2 AA), and a new

timeline for compliance with the updated standard that includes a grace period. One reason for the University's recommendation is that it may be increasingly difficult in the future to find vendors to remediate content if the Department's technical standard lags behind that of other jurisdictions.

## 2. Proposed Definitions

### a. Archived Web Content

The University's comments pertain to both (1) the definition of "archived web content" and (2) the related proposed exception. Due to the variety of archived content and the location of such content, the University respectfully proposes language to the "archived web content" exception for additional clarity. The University recommends including explicit reference to websites and repositories in the third prong of the "archived web content" definition, as indicated below:

*Archived web content* means web content that—

- (1) is maintained exclusively for reference, research, or recordkeeping;
- (2) is not altered or updated after the date of archiving; and
- (3) is organized and stored in a dedicated website, repository, area, or areas clearly identified as being archived.

The University realizes that the word "area" in the Department's proposed definition could be interpreted to include an entirely separate website; however, the University believes that public entities—including other research institutions—would benefit from clarity within this proposed definition. The explicit inclusion of "websites" is consistent with the intent of this proposed exception. Like other institutions of higher education, the University has websites functioning as repositories entirely dedicated to preserving and making available materials for reference and research purposes, including archival materials and research papers. These materials are usually not required reading for a particular university course, but rather shared in case they are of interest to members of the public as part of their independent research endeavors. One such website is Calisphere (<https://calisphere.org/>), which hosts historical photos, letters, and other archival materials from university libraries, plus a wide variety of content from various historical societies, museums, and other partners.

The University's proposed addition to the definition of "archived web content" would also benefit other public entities that choose to make their archived content available for reference and research on a website, using—for example—web archiving services like Archive-It (<https://archive-it.org/>).

The Department may also wish to clarify how a public entity may "clearly identify content] as being archived." The University recommends the inclusion of examples of "web content... clearly identified as being archived." In addition, the Department should propose specific methods and guidelines by which a public entity may inventory, label, and publicly post

online content that it considers archived with more flexibility than seemingly allowed under the current definition.

The University seeks clarification of the application of this “archived web content” exception to academic journals posted online. Past volumes/editions of the journal are “maintained exclusively for reference [and] research” and are not “not altered or updated after the date of archiving,” but new volumes are added as they are released. The Department should clarify the application of the “archived web content” exception to this type of content where periodic additions of new volumes/editions are commonplace.

Finally, the University reiterates its support for this exception. The impact of this exception on individuals with disabilities is limited. Like many other public entities, the University has in place a process for users to request remediation of specific content in a timely manner and free of charge. The University is concerned that requiring its inventory of archived materials to meet the Department’s proposed technical standard would impose a prohibitive cost that would force archives and museums to remove their online content entirely; as a result, individuals would have to physically travel to the respective archive to access the materials. Such physical travel may unnecessarily exclude individuals with disabilities from benefiting from historical archival content.

b. Conventional Electronic Documents

The University appreciates that the Department’s definition of “conventional electronic documents” consists of an exhaustive list of specific file types. This exhaustive list lends some clarity to the definition. The University recommends that the Department’s definition of “conventional electronic documents” should include images, videos (MP4 files, including animations), and audio files (MP3). Like the file types included in the Department’s definition, image files, video files, and audio files are commonly posted on public entity websites and are not open for editing by the public.

c. WCAG 2.1

Please see the University’s comments on the technical standard above in the section titled “Adoption of Technical Standard.”

d. Web Content

In Question 2, the Department asks whether it should consider alternative definitions of “web content.” The University believes that WCAG 2.1’s definition of “web content” is too technical and should not be used. The Department’s proposed definition is preferable.

However, the University recommends the following refinements to the Department’s proposed definition of “web content.”

- First, it is unclear what content the phrase “or other software” is intended to cover. If the Department intends for the phrase “*or other software*” to reference mobile applications, it should modify the definition to explicitly state that. For example, the Department may modify the definition of “web content” to read: “Web content means information or sensory experience—including the encoding that defines the content’s

structure, presentation, and interactions—that is communicated to the user by a web browser or other software, such as mobile applications.”

- Second, the word “controls” in the context of the “web content” definition is vague and ambiguous. The Department should consider removing the word “controls” or providing specific examples of what might constitute a “control.”
- Third, animations are a type of video. Thus, the inclusion of “animations” in the listed examples of “web content” is redundant because the word “video” is already included.
- Fourth, the department might consider including tables, charts, and diagrams within the examples of “web content.”
- Fifth, the Department should also consider expanding the provided examples of web content to specifically include eCourses or eLearning portals to avoid confusion over whether eCourse or eLearning content is included in the definition.

### **3. Proposed Exceptions**

The University supports the Department’s inclusion of various exceptions in the proposed regulation. As discussed in more detail below, the University respectfully suggests refinement of certain exceptions and the inclusion of the additional exceptions outlined below.

#### **a. Archived Web Content**

The University’s detailed comments regarding the definition of “archived web content” and the related proposed exception are discussed above. The University strongly supports the Department’s proposed “archived web content” exception so that it can continue to make available its extensive collections of historical content for research and reference. These collections, which may date back centuries, aid academic research and provide a wealth of information to interested members of the public.

#### **b. Pre-existing Conventional Electronic Documents**

The University supports the Department’s proposed exception for pre-existing conventional electronic documents. As noted above, the University believes that the Department’s definition of “conventional electronic documents” should include images, videos (MP4 files, including animations), and audio files (MP3).

#### **c. Password-Protected Course Content**

The University strongly supports the Department’s proposed exception for password-protected course content.<sup>1</sup> However, the University has significant concerns about both of the Department’s proposed timelines for remediation under 28 C.F.R. § 35.201(e)(1) and (2).

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<sup>1</sup> In general, the University does not provide parents access to course content, except potentially as a reasonable accommodation/modification (*e.g.*, where a parent acts as a personal care assistant for an enrolled student).

Further, the University also has concerns about the lack of specificity as to what constitutes “[p]ublic postsecondary institutions” being “on notice that an admitted student with a disability is pre-registered in a specific course.” These concerns are outlined below.

*i. 28 C.F.R. § 35.201(e)(1)*

In 28 C.F.R. § 35.201(e)(1), the Department proposes requiring password-protected course content to comply with WCAG 2.1 AA “by the date the academic term begins for that course offering” when the public postsecondary institution “is on notice that an admitted student with a disability is pre-registered.” Other than a reference to “pre-registered,” this timeline for remediation does not consider the date that the student registered for the course in relation to the start of the term. For example, students may sometimes enroll in a course the night before the academic term begins. In that situation, it would be impossible for the University to complete any remediation within the timeline contemplated by 28 C.F.R. § 35.201(e)(1). The Department should reconsider the timeline for remediation under the password-protected course content exception for pre-registered students.

The University recommends that the Department should clarify what constitutes “notice” within the meaning of 28 C.F.R. § 35.201(e)(1). Under the current language of 28 C.F.R. § 35.201(e)(1), a postsecondary institution would be “on notice” if a disabled student informs a college groundskeeper that they need, for example, captioned videos, in a particular course.<sup>2</sup> To avoid this situation, the Department should modify 28 C.F.R. § 35.201(e)(1) to require notice to *appropriate personnel* of the student’s need for specific auxiliary aids and services to access course content.

*ii. 28 C.F.R. § 35.201(e)(2)*

The University recommends that the Department should modify 28 C.F.R. § 35.201(e)(2) to require notice to *appropriate personnel* of the student’s need for accessible password-protected course content. The University is deeply concerned with the Department’s proposed requirement to remediate password-protected course content “within five business days” of receiving notice. This timeline is unrealistic for public postsecondary institutions.

Given the realities of public entity budgets, staffing, resources, and legal requirements for soliciting bids from outside vendors—all of which add to the timeline for remediation—the Department should reconsider its proposed timeline for remediation under 28 C.F.R. § 35.201(e)(2). In doing so, the Department might consider, for example tiered timelines for remediation as follows:

1. *Access needs for a particular student:* For example, prioritizing captioning of course videos for a hard-of-hearing student registered in a course over remediating PDFs for screen-reader accessibility in the same course if no registered students use screen readers. In this example, the timeline captioning course videos would be shorter than the remediation of course PDFs.

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<sup>2</sup> The University generally directs students to their campus Disabled Students Office, which processes requests for reasonable accommodation/modification and coordinates the implementation of approved accommodations/modifications for students with disabilities.

2. *Type of remediation:* For example, the context of remediating videos, ten business days might be needed to produce an [alternative to time-based media](#) (one way public entities may provide video accommodations to users who have vision disabilities, under WCAG [1.2.1](#) and [1.2.3](#)), but producing an [audio description](#) (another way public entities may provide video accommodations to users who have vision disabilities, under WCAG [1.2.5](#)) would likely take much longer—closer to 30 days. The remediation of documents (*e.g.*, PDFs and Word documents), on the other hand, might be feasible on a shorter timeline.

The University strongly encourages the Department to consider both a tiered remediation approach and more realistic remediation timelines that account for (a) the limited resources available to public entities and (b) the longer time necessary to remediate certain types of content, like videos and eLearning content.

d. Individualized Password-Protected Documents

The University supports the proposed exception for individualized password-protected documents. In response to Question 45, the University notes that it makes individualized password-protected documents available in a variety of formats. These documents are typically accessed through websites, email links, and mobile applications. The University estimates that only a small percentage of a given public entity's workforce can remediate documents, depending on the nature and content of the document. One University department estimates that 10-20 hours of guided training would be necessary for individuals with no accessibility experience to make some documents accessible enough to satisfy WCAG 1.3.1 alone. This training would need to be repeated regularly due to staff turnover.

e. The Department Should Consider a Broader Exception for Legacy Content

Outside of the proposed exception for pre-existing conventional electronic documents, the Department does not appear to be considering an exception for legacy content, like websites. In contrast to most government entities or major corporations with a limited number of websites (*e.g.*, [www.apple.com](http://www.apple.com)), the University has a large number of pre-existing websites, many of which may not be actively maintained. Some of these websites may not fit within the "archived web content" exception.

Applying the proposed regulation to these older websites would force the University to incur an inordinate amount of cost and time in reviewing those websites, let alone remediation. The University believes those resources are better directed to more widely used websites and new content. The University can remediate older, legacy websites upon request within a reasonable timeframe.

The University recommends that the Department consider a broader exception for legacy web content that includes websites. Alternatively, the Department might consider a legacy content exception that facilitates the remediation of legacy content on a rolling basis. For example, the Department could set forth tiers prioritizing the remediation of legacy content as follows:

- *First Priority*: Remediation of legacy content with more than 500,000 views within the past two years;
- *Second Priority*: Remediation of legacy content with more than 250,000 views within the past two years;
- *Third Priority*: Remediation of other legacy content; and
- *Expedited Priority*: Remediation of legacy content within a reasonable, expedited timeframe content upon request from an individual with a disability.

The University’s proposal to remediate legacy content on a rolling basis balances the burden of remediating the large quantity of legacy content with the demand for such content. It also allows for the expedited remediation of select legacy content upon request.

f. The Department Should Consider Exceptions for (1) Third-Party Software Output and (2) Pre-existing Social Media Content

The Department should consider additional exceptions for (1) the output of third-party software and (2) social media content. The University, like many other public entities and businesses, uses myriad third-party software programs to generate content. Often, the University does not have control over the accessibility of the content generated by the third party’s software programs. Despite efforts to negotiate more control over the output during the procurement process, software companies are generally hesitant to grant the University sufficient control to remediate the generated content so that it is accessible. In the U.S. Court of Appeals for the Ninth Circuit, neither Title II nor Title III apply to software companies without a brick-and-mortar location; thus, only the University has liability exposure for any accessibility issues with content generated by third-party software—even though the University may not control the content. The University’s suggested exception for the output of third-party software could be incorporated into either a new exception or a broadened version of the Department’s proposed exception for linked third-party content.<sup>3</sup>

Second, the Department should consider an exception for pre-existing social media content posted before the effective date of the regulation. As the Department recognizes, “many entities’ resources may be better spent ensuring that current web content is accessible, rather than reviewing all preexisting social media content for compliance or possibly deleting their previous posts.” Some content, like videos on YouTube and other social media sites, are difficult to remediate. Requiring pre-existing social media content (including YouTube videos) to comply with WCAG 2.1 AA may result in public entities removing their content, creating losses for historical and research purposes. Many institutions and researchers use these older posts and videos for research projects. For example, a political science professor might review social media comments from various election years to determine how public opinion has changed over time.

#### **4. Proposed Timelines for Compliance**

a. The Department’s Proposed Timeline for Compliance is Unrealistic

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<sup>3</sup> 28 C.F.R. § 35.201(d).

The University appreciates the Department’s two- or three-year grace period before public entities are required to comply with the proposed regulation. A lengthy runway is necessary. However, unlike most other public entities—such as a mosquito abatement district, utility district, transit authority, water and sewer board, zoning district, or even large school districts—institutions of higher education generate enormous quantities of digital content as part of their education and research missions. Some institutions of higher education might also have vast digital libraries with centuries of historical content. The University is very concerned that a two- or three-year compliance deadline is unrealistic. A five-year timeline for compliance is more realistic for postsecondary research institutions like the University.

b. Staggered Timelines for Compliance based on Total Population is Unworkable

The University believes that the Department’s current proposal with staggered compliance timelines is unworkable in the higher education context. The Department proposes different timelines based on a public entities’ “total population” or, alternatively, whether the entity is a “special district government.” Both concepts are vague and ambiguous.

The University believes it is squarely within the definition of “special district government.” The University’s “population is not calculated by the United States Census Bureau in the most recent decennial Census or Small Area Income and Poverty Estimates”<sup>4</sup> and the University is granted by Article IX, Section 9 of the California Constitution “sufficient administrative and fiscal autonomy to qualify as a separate government”: “The University of California shall constitute a public trust...with full powers of organization and government.”

Many public entities will struggle to determine their timeline for compliance under the proposed regulations. The Department’s current proposal risks inviting unnecessary litigation over a public entity’s “total population” or whether it is a “special government district” for a period of time. For clarity and simplicity, the University recommends setting a single compliance deadline for all public entities, with a realistic grace period for public entities to ensure their content is accessible.

**5. Other Comments**

a. Captioning of Live-Audio Content

The University believes that the Department should consider a different compliance date for the captioning of live-audio content in synchronized media. This would allow for the continued advancement of Automatic Speech Recognition (ASR) technology. As noted

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<sup>4</sup> Calculating a “total population” might be simple arithmetic for states, counties, cities, and even school districts; in contrast, however, it is impossible to calculate a “total population” for either the entire University or for each of its ten discrete campuses and five medical centers located across California. For example, the University of California has ten campuses and five medical centers located across California. In calculating the “total population” for the University, should the University aggregate its systemwide population from all ten campuses? Or should the University calculate “total population” for each campus individually without aggregating? Further, in the context of public universities, it is unclear which population groups would be counted. Only students? Or should the calculation of a campus’ “total population” also include employees, some of whom might live in nearby cities or adjacent counties? If the Department maintains its current proposal, it should consider how “total populations” are calculated for public university systems with multiple campuses and provide related guidance.



above, for clarity and simplicity, the University believes the Department should set a single compliance date for all public entities.

The Department notes that “[m]odern live captioning often can be created with the assistance of technology, such as by assigning captioners through Zoom or other conferencing software, which integrates captioning with live meetings.” In doing so, the Department continues to emphasize live captioners despite rapid advancements in the (1) timeliness and (2) accuracy of ASR technology for the captioning of live-audio content. ASR captions are already more synchronized with audio than captions provided by live CART<sup>5</sup> captioners, which often lag several seconds behind the audio. Further, ASR captions are increasingly as accurate as live captioners when captioning specialized vocabulary, such as that used in a chemistry lab or medical school lecture. The Department should clarify in the final rule its position on using ASR technology for the captioning of live-audio content.

The Department should also clarify its expectations, especially considering its apparent emphasis on live captioners, for the captioning of audio content during live events hosted on Zoom, such as symposiums. Does the Department expect public entities to secure live captioners for these events even without prior notice from a disabled individual of the need for captioning? If so, this would force public entities to incur unnecessary expense when captioning is not needed. This would also create shortages of live captioners—which are already in very short supply—even in large cities like Los Angeles and San Francisco.

The University believes the Department should consider a final rule that allows explicitly for the use of ASR captioning technology because the captions it generates are (1) synchronous, (2) increasingly accurate even with specialized vocabulary, and (3) in contrast to live captioners, readily available.

b. A Standard to Determine “Nonconformance” is Needed

The Department notes that it “believes that a more nuanced definition of compliance might be appropriate because some instances of nonconformance with WCAG success criteria may not impede access to the services, programs, or activities offered through a public entity’s web content or mobile app.” The University agrees. It believes that the Department should establish a standard to measure or determine “nonconformance” for web content generally. This standard could be “substantial conformance,” “substantial compliance,” a numerical standard, or a graded standard. The University encourages the Department to establish a clear, straightforward standard for nonconformance.

c. The Department Should Consider Increased Storage Costs

The Department’s calculations for operating and maintenance costs exclude increased storage costs. When media is made accessible, the storage size of files (especially eLearning files) increases. This will result in additional expenses (*e.g.*, cloud storage) to accommodate the increased file sizes. The Department should update its cost estimates to account for additional equipment/servers/cloud subscription costs.

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<sup>5</sup> “CART” as used here is an acronym for Communication Access Realtime Translation.

October 3, 2023

Page 10

Thank you for your time and consideration. We look forward to continued engagement on these important accessibility issues. If you have any questions regarding the University's comments, please contact Chris Harrington, Associate Vice President for Federal Governmental Relations, at [Chris.Harrington@ucdc.edu](mailto:Chris.Harrington@ucdc.edu) or 202-997-3150.

Best wishes,

A handwritten signature in black ink that reads "Katherine S. Newman". The signature is written in a cursive style with a large initial "K".

Katherine S. Newman  
UC System Provost and  
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UC Berkeley Chancellor's Distinguished Professor  
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cc: Interim Senior Vice President Reese  
Associate Vice President Harrington