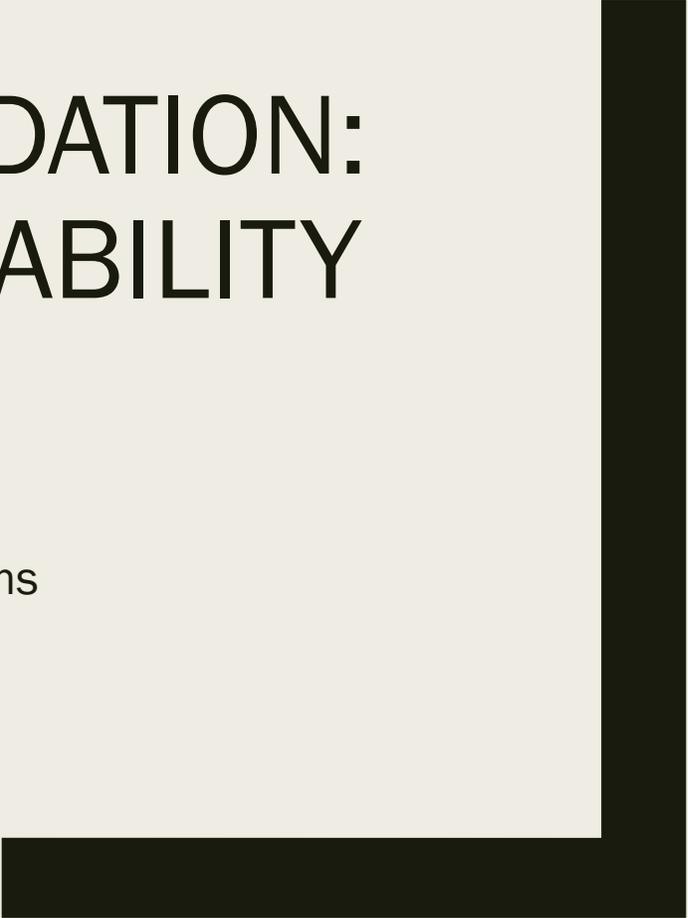




ACCESS AND ACCOMMODATION: CURRENT ISSUES IN DISABILITY COMPLIANCE

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Some History



- Title II of the ADA applies to all public colleges and universities, while Title III applies to private colleges, which are considered “public accommodations.”
- Section 504 of the Rehabilitation Act applies to all federal funding recipients.
- Between them, they require two basic things.
- ***Program Accessibility*** refers to ensuring that facilities and programs take certain steps to ensure that facilities and programs are generally accessible.
- ***Reasonable Accommodations*** are case-by-case modifications in policy or practice to permit a specific individual to participate.

The Roadmap

1. Web Accessibility
2. Service and Support Animals
3. Tips on the Interactive Process

Web Accessibility in Three Acts



ACT I:

In the beginning, Title II required access to the “services, programs, or activities of a public entity.”

But what does this mean? The 1991 and 2010 ADA Regulations do not specifically tell us what “accessibility” means for websites. So universities and private companies try to glean the rules from a series of court opinions.

Meanwhile, the Worldwide Web Consortium develops the Web Content Accessibility Guidelines (WCAG), which provide uniform but purely advisory standards on how to make websites accessible for people with disabilities.

Web Accessibility in Three Acts



ACT II:

In 2010, the Department of Justice issues a notice of proposed rulemaking on web accessibility. Comments are solicited and received. Years pass. Nothing happens.

Then, in July 2014, DOJ issues actual proposed regulations. They would:

- Establish WCAG 2.0 AA as the general accessibility standard.
- Establish a 2-year compliance window after adoption.
- Exempt archived web pages and many pre-existing conventional documents.
- Exempt password-protected course materials available only to a limited audience.

Web Accessibility in Three Acts



ACT III:

It is 2016. The regulations still have not been promulgated.

Suddenly, in April, DOJ withdraws the proposed regulations. Days later, it declares a “do over,” requesting an entirely new set of comments. It says the regulations will be issued in 2018-ish.

But in November, Donald Trump is elected and issues an executive order saying that for every new regulation issued, two must be repealed. This leads many observers to conclude that Web Accessibility Regulations are DEAD.

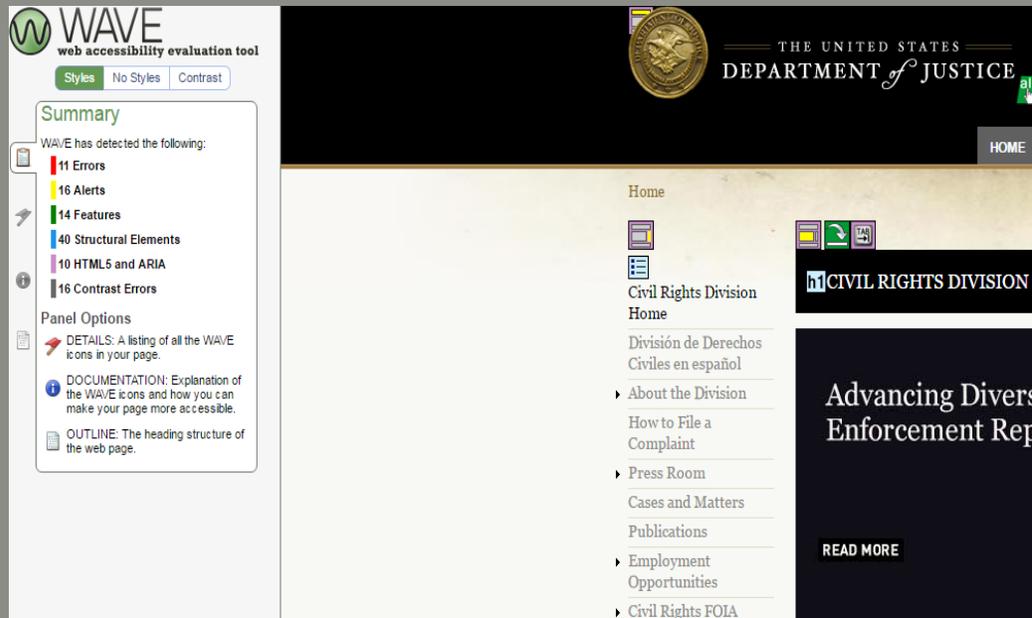
But *are* they?

What We Think We Know.

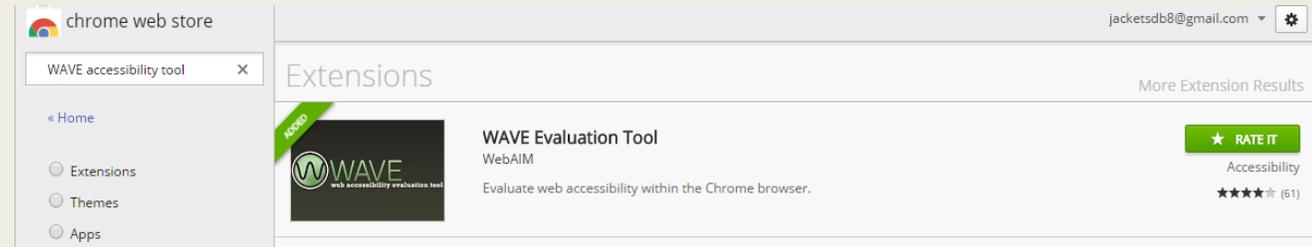


- If you set WCAG 2.0 AA as your standard, you're probably going to be okay.
- If you haven't, you're probably going to need to look at options for captioning video and audio content on any institution website. See, e.g., *Nat'l Assoc. of the Deaf v. Harvard*.
- You probably don't need to worry about **program accessibility** for specific course content on Learning Management System-type sites.
 - *But you do, of course, still have to accommodate individual students in classes using online material.*
- If any websites use your domain name, but are not centrally administered by your IT department, you'll need to review them for WCAG compliance.

Some Tips

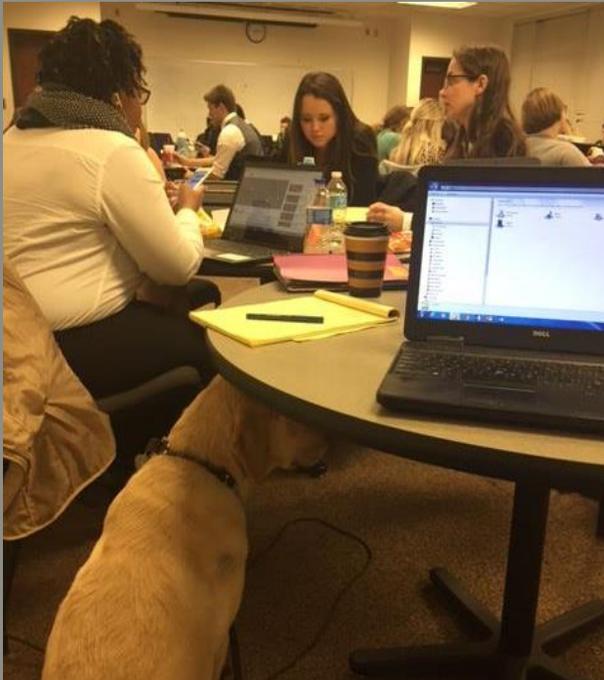


- Want to know if any particular website meets WCAG 2.0 AA? There's a handy Google Chrome extension.



- Just search “WAVE evaluation tool” at the Chrome store.
- Consider a policy requiring WCAG review of all new websites, and a periodic review and updating of all sites.
- It might be a good time to consider taking inventory and purging out-of-date sites under your domain name.

What is a service animal?



- A service animal is “a dog* that has been individually trained to do work or perform tasks for an individual with a disability. The task(s) performed by the dog must be directly related to the person's disability.”
- *Or miniature horse.
- Examples: Seeing-eye dogs, dogs that detect and respond to low blood sugar or the onset of epileptic seizures.
- Key characteristic: Trained to **do something** directly related to disability.
- What about animals that don't exactly do anything?



What is an emotional support animal?



- Emotional support animals (ESA's) provides support or companionship to mitigate anxiety or other symptoms of disability, but *is not trained to actually do anything*.
- Unlike service animals, ESA's are *not* specifically covered by ADA regulations.
- However, they are covered by the Fair Housing Act (FHA) and a few other federal laws.
- Some states and cities have laws on ESA's, but Mississippi is not among them.
- They can be just about anything, subject to a few limitations.

What are the basic legal rules?



- Service animals must be allowed to accompany their handlers within any public accommodation, subject to some limitations.
- Emotional Support Animals are not entitled to enter any public accommodation ***except perhaps*** a person's living space, subject some restrictions.

Service Animal Rules



- ADA Regulations (35 C.F.R. 136) govern here.
- Public entities must modify policies or procedures to permit access to public accommodations.
- Animals may be removed for two reasons:
 - *Out of control and handler does not take steps to control it; OR*
 - *Is not housebroken.*
- Or has a documented history of violating either of these rules.
- May require leash or harness unless it would interfere with task.
- Institution is not responsible for the care or supervision of a service animal.
- Institution may not impose surcharges, but may apply any rules applicable to other animals, or charges for any damage.

Service Animal Rules



- Only very limited questions may be asked about the animal.
 - *Is the animal required because of a disability?*
 - *What work is the animal trained to do?*
- May not require documentation of training as a service animal, or require professional training.
- May require proof of vaccination, registration and/or license if applicable laws require this of all animals.
- Should not make inquiries when animal's function is readily apparent, such as with seeing-eye dogs.
- Animals are not required to wear any special identification.
- May **offer** but not **require** a voluntary registration with the institution.

Can service animals ever be excluded?



- Yes, if inclusion would “fundamentally alter” the nature of the program or service.
- But this is very rare. The department of justice give the example of a dormitory area reserved for people with pet allergies. Also swimming pools.
- Potentially Challenging Case: Labs with hazardous materials.
 - *Consider adopting a standard procedure under which legal compliance and health & safety personnel both review the matter.*

Emotional Support Animal Rules



- Unlike those with service animals, students who wish to keep ESA's in housing facilities must ***affirmatively request an accommodation*** under the institution's policy.
- Procedures and standards come from DOJ's 2015 with the University of Nebraska-Kearney.
- As with all disabilities, verification may be required only if the disability is not readily apparent. The institution may require verification from a medical provider.
- The institution may also request information to evaluate whether the animal is necessary to accommodate the disability, and whether it imposes an ***undue burden*** on the institution.

The Interactive Process



- Once a student establishes that a disability exists and requests an accommodation, the institution must engage in an ***interactive process*** to determine whether that accommodation is feasible, or if not, whether another accommodation might facilitate access.
- Major Grounds for Denial:
 - Fundamental alteration of program or academic standards.
 - Undue financial hardship
- Deference: General consensus that institutions' decisions are owed some degree of deference (see, e.g., *Wynne v. Tufts*, 1st Cir. (1992)) provided they:
 - Consulted relevant officials
 - Considered alternatives, feasibility, cost
 - Reached a rationally justified conclusion
 - Didn't do anything that obviously indicates bias

The Interactive Process



SOME GENERAL TIPS:

- Document the conversation.
 - *The student should identify the requested accommodation in writing.*
 - *If the answer isn't "yes," document (1) who was consulted; (2) what factors were considered; and (3) what if any alternatives were proposed.*
 - *Provide a succinct summary to the student and invite a response in writing.*

- Undue Financial Burden
 - *While this is a potential defense in many instances, consider carefully what discovery in litigation might look like.*
 - *Institutions may require student to seek state vocational or private funding first, but may only deny funding based on showing of undue hardship.*

The Interactive Process



- Sign language translation: Most likely a reasonable accommodation, unless a specific, equally effective alternative is identified.
- Second chances: Unless there is evidence discrimination may have affected an outcome, after-the-fact requests to retake classes or re-do assignments typically are not mandated by ADA.
- Conduct violations: Institutions are not required to retroactively waive student conduct rules, but may have to relax certain standards if a condition is disclosed in advance.
- Involuntary Withdrawal: Policies should not reference “mental illness” or similar terms, but rather, should speak in terms of objective danger the student poses to the institution’s community.



QUESTIONS? COMMENTS?
VEHEMENT
DISAGREEMENT?