

Schools and Organizations that Serve Education: Beware OCR Complaints Addressing Online Accessibility

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By Vivian Cullipher

From Rural School Districts to Prominent Universities, Lack of Website Accessibility Reaps Tidal Wave of Complaints

The issue of whether or not private sector enterprises must make their online and digital materials accessible to people with disabilities centers around whether Title III of the Americans with Disabilities Act (ADA) applies to websites. Because the ADA does not name websites and electronic content specifically, courts look to precedent and Department of Justice statements, sometimes leading to conflicting decisions.¹ More often than not, however, judgments support the idea that inaccessible websites prevent people with disabilities from having similar access to information and function as those without, violating the ADA.²

But online accessibility doesn't just affect private industry. A slew of complaints submitted to the U.S. Department of Education's Office of Civil Rights (OCR), along with several prominent lawsuits, shine a glaring spotlight on schools—public and private—that host content that people with disabilities can't perceive, use, or benefit from. These websites, as well as applications and files, present content in a way that prevents access to people who have visual, hearing, motor, or cognitive disabilities. For instance, they may have images without accompanying descriptions; screen readers rely on these descriptions to relay descriptive information to the visually impaired. Or, videos may lack captioning for people who are deaf or hearing impaired. The complaints target educational organizations of all shapes and sizes, from small, rural school districts to large and prominent colleges and universities.

The laws that affect the education sector—including primary, secondary, and higher education—prohibit discrimination against anyone on the basis of a disability. These laws include Title III of the ADA, which covers private sector schools and universities. They also include Title II of the ADA, which covers public sector organizations, including schools which may or may not receive federal assistance status. Section 504 of the Rehabilitation Act of 1973 applies to organizations that receive federal assistance, including public and private educational organizations at all levels.

The OCR enforces the application of ADA and Section 504 civil rights laws in schools. OCR policy interprets these laws to include website accessibility:

Technology plays an increasingly important role in education at all levels. For example, schools and colleges commonly use computers in traditional classrooms, electronic book readers that supplement or replace paper textbooks, online classes, and online registration and class scheduling. Section 504 and Title II require schools and colleges to ensure that the technology they use is fully accessible to individuals with disabilities or otherwise to provide equal access to the educational benefits and opportunities afforded by the technology.³

In their instructions on “How to File a Discrimination Complaint with the Office for Civil Rights,” the OCR also clearly states what organizations may be subject to a complaint:

These civil rights laws extend to all state education agencies, elementary and secondary school systems, colleges and universities, vocational schools, proprietary schools, state vocational rehabilitation agencies, libraries and museums that receive federal financial assistance from ED. These include all public schools and most public and private colleges and universities.⁴

Essentially, making a website, application, PDF, or other digital component accessible means that a visitor or user with disabilities—whether that disability affects a person’s vision, hearing, motor or cognitive functioning—have access to the same information as a person without those disabilities.

Educational organizations that have not prioritized the accessibility of their online pages, mobile site, or applications may be inadvertently discriminating against current and potential students, alumni, student family members, job applicants, and any member of the public who access the school’s information online. This discrimination puts the organization at risk of both OCR complaints and legal action.

Education Sector Complaints, Investigations, and Consequences

On June 29, 2016, the Department of Education (DOE) issued a press release announcing settlements with seven U.S. states and Guam.⁵ The OCR had received complaints that the organizations’ websites were inaccessible to people with disabilities. Each website had several characteristics that would keep people who are blind, have low vision, or have poor fine motor control from accessing information. Within each settlement, these organizations volunteered to take several corrective actions, including auditing existing content, making all new website content

accessible, developing corrective action plans for inaccessible content, and providing training to appropriate staff.

But the complaints that precipitated these settlements are not isolated. Since October 1, 2013, at least 236 schools and other educational institutions nationwide have entered into voluntary resolution agreements with the OCR to address the accessibility of their websites.⁶ In October, the Great Falls Tribune reported that one Michigan civil rights advocate, Marcie Lipsitt, has filed 1,800 OCR complaints across the country since 2014.⁷ An earlier article in the Richmond-Times Dispatch reported that Lipsitt's plan is to file a minimum of 100 complaints a month.⁸ Lipsitt documents both her complaint filings and results on her Facebook page, the Special Education Wall of Shame.⁹ Her goal is to make sure that all people, including those with disabilities, can access information online, and she files complaints to raise awareness of the issue and motivate compliance.¹⁰

Complaints brought to the OCR are evaluated on merit and timeliness before resulting in OCR investigations. For those that proceed, the results can be costly in both time and staff resources. Investigations include a variety of fact-finding techniques that determine whether the school's website has attributes or functions that fail to serve visitors with disabilities. In the group settlement listed above, the agency examined a sampling of a few pages on each organization's website, finding deficiencies in many of them. Each of the organizations voluntarily agreed to resolve accessibility issues across their websites. Had they not, subsequent steps in the standard OCR resolution process would have included several attempts at negotiations and voluntary agreements to bring the organization into compliance, with final steps for persistent noncompliance including possible termination of new or future federal funding, or a referral to the Department of Justice.

The OCR summarizes their complaint processing procedures more fully on their web page, "How the Office for Civil Rights Handles Complaints."¹¹

Even for those that abbreviate the process by entering into voluntary agreements, the cost of remediating school and district websites presents a heavy financial, time, and personnel investment, particularly within a sector often struggling to use limited resources. Depending on the size of the website, the methods and the number of people involved in updating the digital assets, the accessibility of the technologies used, and other factors, bringing a site into compliance can easily run into the tens, if not hundreds, of thousands of dollars.

Spokane Public Schools made a commitment to improve accessibility in response to an OCR complaint. Kevin Morrison, a spokesman for Spokane, talked with The Spokesman-Review about

initial costs of that commitment. With a website of over 13,000 pages, making the site accessible required redesigning the site, developing a unified set of standards, and retraining staff. Morrison estimates that just developing a plan to become ADA compatible will cost the district \$25,000.¹²

Sometimes, that cost can be deemed too large to overcome. On August 30, 2016, the Department of Justice (DOJ) informed University of California, Berkeley (UC Berkeley) that large segments of UC Berkeley's free, publicly available online content was not accessible to individuals with hearing, vision, or manual disabilities. The DOJ had investigated the university under Title II of the Americans with Disabilities Act following complaints from the National Association of the Deaf (NAD). In their DOJ (not OCR) complaint, the NAD noted that UC Berkeley's publicly available online audio and video materials did not have alternative ways of presenting the content—such as accurate closed captioning—that would make it accessible to individuals with hearing impairments or deafness.

UC Berkeley responded to the DOJ by saying remediation of its stores of multimedia content was cost prohibitive, eventually pulling more than 20,000 free video and audio lectures from public access rather than make those lectures accessible.¹³

Those who keep an eye on how civil rights laws are interpreted and applied to websites by federal agencies are also closely following actions of the current administration. This past July, The Chronicle of Higher Education reported this industry interaction:

The Trump administration, however, may soon ease pressure on colleges to ensure their websites are accessible. Thomas E. Wheeler Jr., an acting assistant attorney general who oversees civil-rights enforcement for the Justice Department, last week told attendees at the annual conference of the National Association of College and University Attorneys that the administration was revisiting the Berkeley decision, reviewing its advice to colleges on web accessibility, and subjecting its enforcement approach to a cost-benefit analysis.

"We get it. Believe me, we get it," he told the college lawyers, who reacted to his remarks with applause.¹⁴

However, federal complaints are not the only means of effecting change toward greater accessibility in school websites and technologies.

Education Sector Lawsuits

School districts and institutions of higher education aren't immune from legal action. In 2014, a blind mother of three Seattle students filed a lawsuit, with the National Federation for the Blind as

a co-plaintiff, for not having equal access to information on the district's websites or the math program used as part of its curriculum.¹⁵ The Seattle School District's website vendor had originally stated that the accessibility issues couldn't be fully resolved, but the lawsuit outcome directed otherwise. EdWeek's Associate Editor Michele Molnar summarized the final consent decree this way:

According to the board's briefing on the issue, the cost to implement the decree is estimated to be between \$665,400 and \$815,400 over its three-and-a-half year term, including \$385,000 to hire an accessibility coordinator, and \$150,000 for an audit and corrective action plan. Web accessibility testing has been budgeted at \$90,000, and another \$105,000 will be needed to train the staff designated in the agreement.

The anticipated costs also include one-time reimbursement of attorney's fees of \$80,412, and paying \$5,000 in damages to Nightingale.¹⁶

The Seattle case also focused on the process used to purchase technology, giving a strong warning to all educators who embrace applications and devices for their students without first checking the accessibility features of those items.¹⁷

In 2015, the National Association for the Deaf filed federal class action lawsuits against both Harvard and M.I.T. The lawsuits contended that the colleges lacked accurate closed captioning for its thousands of audio and video tracks, including online lectures, podcasts, and other educational materials.¹⁸ While the schools attempted to get the cases dismissed, that motion has been denied.¹⁹

Between January 2015 and October 2017, seven website accessibility lawsuits were filed against academic websites. In October, that total more than doubled when eight website accessibility lawsuits were filed against New York-area universities.²⁰ Attorneys charged that the academic websites were inaccessible to their client, who is blind. On her Facebook page, Lipsitt contends that she had also filed complaints with the OCR with some of the New York schools being sued.²¹

Schools Most Affected by Accessibility Complaints or Litigation

School administrators might be reassured if they knew which types of institutions are most vulnerable to complaints or legal action. Perhaps less deep-pocketed ones. Those serving smaller populations. Those with altruistic missions or histories of advocacy or even accessibility.

But that's not the case.

Filing a complaint with the Office of Civil Rights does not incur a fee. Filing a complaint costs only a bit of time: Enough to run a quick check on a website using automated software and then time to document findings according the OCR complaint process. Using this method, Lipsitt has filed complaints naming individual schools, school districts, state departments of education, and colleges and universities. Of course, the ADA and Section 504 are in place to prohibit discrimination against anyone based on disability, regardless of the size, financial standing, or location of the educational institution they attend. But compliance directives usually specify organizations remedy issues within two years, and the extensive efforts to do so can put lower-resourced schools in a staffing and financial bind.

Furthermore, while litigation over website accessibility has impacted other industries, educational organizations can be especially vulnerable to accessibility non-compliance. Whether at the university or K-12 level, school websites are often large, with a great number of departmental or school sections, each with a large number of pages. These sites are often updated and populated by a multiple people throughout the organization, with varying levels of accessibility knowledge and skill. Content changes rapidly. Vendors that may build impressive websites may have a wealth of technical knowledge, but may not be familiar with accessibility requirements—or the content management practices that would facilitate ongoing accessibility after their initial setup. Schools often don't have accessibility policies and practices in place, or they're not comprehensively enforced on all pages. Many schools also incorporate third-party educational apps and web programs to supplement curriculum or otherwise enhance learning. If an accessible equivalent isn't available, such practices could discriminate against students with disabilities.

All of this leaves the education sector entities at high risk of having any number of accessibility errors throughout their online environments.

Key Elements that Keep a Website from Being Fully Accessible

One thing that can lessen the odds of being named in an OCR complaint or lawsuit is to have vigilantly maintained and accessible websites, digital platforms, and electronic assets, whether third-party procured or developed in-house. With these practices, an organization can be in a better position to minimize the impact of an OCR complaint. For instance, the previously mentioned article from The Chronicle of Higher Education notes that only one university avoided further investigation by the OCR after a complaint, “based on the conclusion that its problems were minor and already being fixed.”²²

Fortunately, both OCR and case outcomes can provide guidance in this area. Educational technology teams and developers, content providers, and administrators would all benefit from looking at the elements addressed within OCR complaints, and the terms of the agreements.²³

Common accessibility issues include:

- Images not having “alt text,” or alternative text, that describes salient points when the image cannot be perceived visually.
- Audio and visual media not having alternate ways of accessing the given content using a different sense. For audio files, this may mean providing a transcript that can be read instead of heard. For video files, this usually means providing closed captioning and audio descriptions that can be read aloud by a screen reader.
- Lack of accurate closed captioning for videos. While automated closed captioning is one option, it does not always convey information well.
- Lack of keyboard-only navigation. Many people with disabilities may not use a mouse, so proper navigation structure and labeling is critical to ensuring a user can navigate the website logically and without undue clutter by using the tab key, keyboard shortcuts, and other keyboard facilitated actions.
- Designs with lack of contrast between critical information and its background. For users who have low-vision or color blindness, poor color combinations can make text and images difficult to perceive.
- Lack of compatibility with screen reading software and assistive devices. Digital content must be compatible with the assistive technologies, including screen readers, magnifiers, sip and puff systems, special keyboards, voice recognition software and other applications or devices that many people with disabilities use.
- Flashing or moving elements that can affect someone prone to seizures or distractibility.

What Schools Can Do to Minimize Risk

Schools should keep in mind that accessibility not only applies to web pages and web page navigation, but also anything digital presented on their website, including PDF files, presentations, and other downloadable documents, as well as mobile applications and audio-visual content. It can also include school-generated content on third-party channels, such as YouTube. This “Digital Accessibility Checklist,” is a useful primer on what to look for across various media.²⁴ A persistent and diligent approach to incorporating accessibility can put schools in a better position if faced with a complaint or lawsuit.

Both OCR and litigation outcome documents typically refer to the internationally recognized Web Content Accessibility Guidelines (WCAG) 2.0, Level AA as the benchmarks against which websites and digital content should be measured.²⁵ Automated testing tools, such as WebAIM's WAVE web accessibility evaluation tool and SquizLabs's HTML_Codesniffer (both available for free), can help web administrators gauge general levels of compliance.²⁶ However, automated testing tools can miss critical elements, so they should be coupled with manual testing for a truer sense of accessibility standing.²⁷ The OCR also often cites adoption of Web Accessibility Initiative Accessible Rich Internet Applications Suite (WAI-ARIA) 1.0, which defines ways to make web content and web applications more accessible to people with disabilities. Both WCAG and WAI-ARIA are developed by the World Wide Web Consortium (W3C).

Schools that are considering a refresh of their websites and applications should take this opportunity to learn about accessibility and research how to incorporate accessibility into their new platform. An audit of digital materials that will be migrated from the old site to the new one will be important to minimize the risk of hosting inaccessible content on an otherwise accessible website. They should also develop a plan on how to maintain ongoing accessibility after the website is launched, including building in policies and procedures and room for ongoing training and audits.

Schools who plan on living with their current websites for the immediate future should consider an end-to-end audit that incorporates both manual and automated testing to see where they are most at risk, and then weigh the costs of remediation against a fresh start.

And, while written specifically for institutions of higher education, the following tips—captured from a 2017 presentation by Christian Vinten-Johansen and Michelle McManus of Penn State University—identify seven essential components for ADA compliance that can be applied to most, if not all, education organizations.²⁸ These components, captured in Kevin Gumienny's article, "How to Make Elearning Accessible: Insights from the 2017 CSUN Assistive Technology Conference," were formulated based on their experience with Penn State's OCR resolution agreement and the consent decree signed by Miami University.²⁹

Here's a list of their seven recommendations for accessibility compliance:

- Create a policy for electronic and information technology accessibility
- Appoint an accessibility coordinator
- Include accessibility criteria in technology purchases
- Include a link to an accessibility statement and resources, provide a feedback mechanism
- Complete a prioritized audit of electronic and information technology

- Remediate inaccessible electronic and information technology
- Provide role-based training for faculty, staff, and administrators

OCR complaints and litigation against schools show no signs of slowing down. A proactive approach to evaluating and maintaining organizational websites reduces the risk of being caught up in that wave; allows organizations to plan for changes; makes content more available and accessible to all students, alumni, parents, and the general public; and puts schools in a better position should a complaint be filed.

About Microassist

For 29 years, Microassist has partnered with organizations to better educate their employees, constituents, and clients through the use of traditional classroom training, innovative elearning, mission-critical applications, and ever-changing technology, emphasizing online usability and accessibility. Please visit Microassist at www.microassist.com.

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Endnotes

¹ [The first landmark web accessibility case was against Target in 2008](http://dralegal.org/case/national-federation-of-the-blind-nfb-et-al-v-target-corporation/), resulting in a \$6M settlement and a requirement to update its website (<http://dralegal.org/case/national-federation-of-the-blind-nfb-et-al-v-target-corporation/>). Lawsuits have persisted, accelerating as the use of the internet has grown. In the March 2017 case of [Robles v. Domino's Pizza LLC \(PDF\)](#) (Source: American Bankers Association), the court dismissed an online accessibility lawsuit saying that accessibility requirements for public accommodations aren't yet clearly specified, running against the grain of previous decisions (www.aba.com/Compliance/Documents/RoblesvDominosPizza2017.pdf). The later [Gil v. Winn-Dixie, No. 16-23020-civ-Scola \(PDF\)](#) (Source: Seyfarth Shaw, *ADA Title III News and Insights*) ruling in June of the same year reinforced ADA website applicability, stating that the grocery store chain violated the ADA because its plaintiff couldn't conduct certain transactions online (www.adatitleiii.com/wp-content/uploads/sites/121/2017/04/16-cv-23020-32-Order-on-Dft-MTD-Mtn-Strike-Winn-Dixie.pdf). Additional decisions, such as those in June's [Gorecki v. Hobby Lobby Stores, Inc. \(Case No.: 2:17-cv-01131-JFW-SK\)\(PDF\)](#) (Source: Seyfarth Shaw, *ADA Title III News and Insights*)

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