



CommunicationFIRST

Because communication is a human right.

Comments of CommunicationFIRST

to the

U.S. Department of Justice

on its

Nondiscrimination on the Basis of Disability (Title II of the ADA) Proposed Rule: Accessibility of Web Information and Services of State and Local Government Entities

88 Fed. Reg. 51,948 (Aug. 4, 2023); RIN 1190-AA79

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Key Takeaways

- The self-evident truth of the ADA is that all people with disabilities have the right to belong to and be treated as equals in American society. Assuring digital access and inclusion is paramount to achieving this vital national goal.
- If people with speech and motor disabilities are effectively barred from accessing websites and apps, and exercising the personal agency that comes from doing so, their lives, opportunities, and futures will be even more limited, segregated, and marginalized.
- Effective communication for people with communication disabilities requires digital accessibility at the state and local levels.
- The walls of digital exclusion are just as high, impenetrable, and life-robbing as those that existed when George H.W. Bush signed the ADA in 1990.
- State and local government websites and apps are the new millennium's version of the public square.

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- Government websites and apps are a central portal and lever for exercising our civic and constitutionally grounded rights and responsibilities of freedom of expression, assembly, grievance, petition, protest, jury duty, and the franchise.
- As a matter of right and necessity, individuals who require AAC must be afforded equally effective access to and use of state and local government websites and apps that all others are afforded. Simple justice demands it.

Summary of Recommendations

- The Department should adopt the most current WCAG standards, which will be WCAG 2.2 when the proposed rule is finalized and takes effect.
- The Department should pair the WCAG standards with a functional definition of accessibility.
- The rule's compliance timeline should be shortened, especially for new content and large special government districts.
- The undue burden and fundamental alterations defenses obviate the need for exceptions from the rule, which undermine the goal of the regulation and overlook that accessibility is usually achievable.
- States and localities and the disability community should be offered ample technical assistance to assure the effective implementation of the rule.

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I. Introduction

CommunicationFIRST is our nation's only organization led by and for and dedicated to protecting and advancing the rights of the estimated five million people of all ages in the United States who need communication tools and supports to be heard and understood due to speech-related disabilities and conditions.

We thank the U.S. Department of Justice (DOJ) for issuing this Notice of Proposed Rulemaking (NPRM) implementing Title II of the Americans with Disabilities Act (ADA) to assure the accessibility and usability of web- and mobile-app-based information and services. The NPRM is **long overdue and a good starting point** for ensuring that all state and local governmental entities meet their obligations under Title II to create, maintain,



and update web and app-based information and services to be accessible and usable by all people with disabilities.

The focus of these comments is to point out specific reasons and ways the proposed provisions must be changed and strengthened in the final rule in order to ensure people with speech-related disabilities in particular are free from discrimination and exclusion in our ubiquitously digitalized community, nation, and form of government.

The self-evident truth of the ADA is that all people with disabilities have the right to belong to and be treated as equals in American society. Assuring digital access and inclusion is paramount to achieving this vital national goal.

CommunicationFIRST is a signatory to and strenuously endorses the comments and recommendations submitted on the NPRM by members of the Consortium for Constituents with Disabilities (CCD) and other disability organizations. The comments and recommendations we make below amplify and elaborate on those comments from the particular perspective of our members.¹ We begin by providing a description of our organization, our members, and the widespread bias and discrimination we face.

II. About CommunicationFIRST

CommunicationFIRST is a cross-disability, cross-generational, multi-racial, and multicultural disability-led civil rights organization. We do our work as a civil rights and disability justice organization not because it is a silver bullet. We know more must be done. But we also know that until progress is made on the civil rights front, people with little to no understandable speech who need augmentative and alternative communication (AAC) will continue to be marginalized.

III. This Is Us

CommunicationFIRST seeks to represent all children, young people, working-age persons, and older adults who have little to no understandable speech and must use one or more modes of AAC to express ourselves and be heard and understood. Our diverse members include those who have had disabilities either since birth – such as Down syndrome, rare genetic syndromes, cerebral palsy, and autism – as well as those who acquire speech loss at other points in life, including due to ALS, Parkinson’s disease, stroke, traumatic brain injury, and other conditions or injuries. **Similarly, we focus our work on issues where**

¹ We use the term “members” to refer to those whom we seek to represent: All people in our country who require augmentative and alternative communication to express ourselves, be heard, and live our lives.



disability, race, ethnicity, and gender, as well as class, culture, and language intersect. We do so because such people who need AAC endure multiple forms of discrimination and oppression throughout life that must be recognized and eradicated.

Specifically, our members have disabilities that make it impossible to produce or use spoken words or sign language that is understandable to others. Instead, we must rely on what is referred to as augmentative and alternative communication (AAC). Broadly speaking, AAC is any tool, method, or support used by a person with a speech disability who cannot rely on speech alone to be heard and understood by others.

In addition to having disabilities that limit or make it impossible to physically produce any understandable speech, most of us who need AAC have other disabilities. These can include a range of often misdiagnosed behavioral, cognitive, expressive, health-related, independent living, mental health, motoric, receptive, sensory, and traumatic disabilities and conditions. People may use AAC all the time, most of the time, or episodically. AAC includes gesturing; pointing to or looking at letters, words, and images; relying on a personal assistant to repeat one's speech; using assistive commercially available digital devices and apps; brain computer interface technology; and a growing number of emerging technologies.

IV. A Continued Pattern of Pervasive Discrimination and Social Exclusion

Despite the proliferation of digital, mobile, and other technologies in AAC, however, the National Academies of Sciences, Engineering, and Medicine have found that, "Individuals who communicate with AAC experience significant barriers to obtaining and learning to use AAC technology."² Many factors contribute to this. By far the oldest and most virulent and persistent of these are the unwarranted assumptions, stereotypes, and discrimination we still experience based on both individual actions as well as the outdated and hard-wired policies and practices of federal, state, and governmental entities.

Even today, it is the norm for our members to be ostracized and perceived and treated as less than: As having less intellect, less to say, and no need or right to do so – all, ironically, because others cannot understand them.

² National Academies of Sciences, Engineering, and Medicine, Committee on the Use of Selected Assistive Products and Technologies in Eliminating or Reducing the Effects of Impairments; Flaubert, J.L., Spicer, C.M., Jette, A.M., eds., "Chapter 6: Augmentative and Alternative Communication and Voice Products and Technologies," in *The Promise of Assistive Technology to Enhance Activity and Work Participation*, National Academies Press (2017), at <https://www.ncbi.nlm.nih.gov/books/NBK453284/>.



Consequently, our members are disproportionately denied the tools and support to effectively communicate; wrongfully assessed and stigmatized for life;³ deprived of an inclusive, equally effective education; segregated and institutionalized;⁴ isolated and excluded from everyday life, including digital life;⁵ subjected to inferior health care;⁶ abused and victimized;⁷ and far worse. Moreover, research and lived experience suggest that Black, brown, multilingual, and other multiply marginalized individuals are both more likely to need AAC at some point in life and to experience harsh and compounding forms of societal oppression and discrimination as a result.⁸

V. Life, Liberty, and Happiness in the Digital Age

Some might wonder what any of this has to do with access to websites and apps deployed by state and local governmental entities. Simply put, it has everything to do with it. Due to advances in law, technology, and related factors, more of us now have effective access to AAC to express ourselves and live our lives. The harsh reality, however, is that the vast majority of us still lack access to it. For example, one fifth of the respondents to the 2020-2021 National Core Indicators-IDD survey reported using a primary means of

³ See, e.g., Marilyn Brookwood, *The Orphans of Davenport: Eugenics, the Great Depression, and the War over Children's Intelligence* (W. W. Norton & Company, 2021); CommunicationFIRST, [CommunicationFIRST to DC Council: Eliminate IQ Requirement to Qualify for Services](#), 2021.

⁴ See, e.g., Ne'eman, A., Stein, M., & Grabowski, D.C. (2022). Nursing Home Residents Younger Than Age Sixty-Five Are Unique And Would Benefit From Targeted Policy Making. *Health Affairs*, 41:10, 1449-1459. <https://doi.org/10.1377/hlthaff.2022.00548>.

⁵ See, e.g., Kasnitz, D., & Block, P. (2012). Participation, Time, Effort, and Speech Disability Justice, Ch. 14, in *Politics of Occupation-Centred Practice: Reflections on Occupational Engagement across Cultures*. DOI:10.1002/9781118702819.CH14.

⁶ See, e.g., Morris, M. A., Dudgeon, B. J., & Yorkston, K. (2013). A qualitative study of adult AAC users' experiences communicating with medical providers. *Disability and rehabilitation. Assistive technology*, 8(6), 472-481. <https://doi.org/10.3109/17483107.2012.746398>.

⁷ See, e.g., Bryen, D. N., Carey, A., & Frantz, B. (2003). Ending the silence: Adults who use augmentative communication and their experiences as victims of crimes. *AAC: Augmentative and Alternative Communication*, 19(2), 125-134. <https://doi.org/10.1080/0743461031000080265>.

⁸ See, e.g., Meryl Alper, *Giving Voice: Mobile Communication, Disability, and Inequality* (MIT Press, 2017); Ellis, C., Jacobs, M., Keene, K.L., & Grubaugh, A.L. (2020), The Impact of COVID-19 on Racial-Ethnic Health Disparities in the US: Now Is the Time To Address the Problem. *The Journal of the National Medical Association*; Kulkarni, S.K., & Parmar, J. (2017). Culturally and linguistically diverse student and family perspectives on AAC devices. *Augmentative and Alternative Communication International*. DOI:10.1080/07434618.2017.1346706; De Leon, M., Solomon-Rice, P., & Soto, G. (2023). Perspectives and experiences of eight Latina mothers of young children with augmentative and alternative communication needs. *Perspectives of ASHA Special Interest Groups*, 1-10. https://doi.org/10.1044/2023_PERSP-23-00074.



communication other than speech.⁹ Two-thirds of these used gestures and body language as a primary means of expression. Only one percent said they used any type of communication device to do so. This reflects the biased, century-old practice of expecting such individuals should “make do” with what limited means they have to communicate what little they can and to be content with that. The same is true with respect to the complete or largely ineffective access that our members have to all modes of information and communication technology, including websites and apps.

The pandemic reinforces just how dependent we are as individuals, a nation, and humanity on becoming and staying connected to and with each other and our government via the Internet. Our education, physical and mental health, sense of self, safety, security, life, liberties, and pursuit of happiness will increasingly be determined by whether or not we have ready, ubiquitous access to all digital content. **If our members are effectively barred from accessing websites and apps, and exercising the personal agency that comes from doing so, their lives, opportunities, and futures will be even more limited, segregated, and marginalized.**

VI. Ensuring Effective Communication Requires Digital Accessibility at the State and Local Levels

Issuing clear, strong, and forward-looking final rules to ensure the accessibility of state and local government digital content is of paramount importance to our members, to other people with disabilities, and to simple justice. Individuals who require AAC rely heavily on states and localities in every aspect of life – education, community living services, employment support, health care, mental health services, transportation, emergency preparedness and response, economic security, and more.

Like all individuals, our members must have ready access and use of such entities’ digital content and capabilities. Like everyone else, they need to obtain up-to-the-minute, lifesaving information about a hurricane, pandemic, or an active shooter crisis; taking an online elementary, high school, or college course; borrowing and downloading an e-book or audiobook from the library; engaging in genealogical or archival research; catching up on neighborhood news and developments; and other information retrieval activities.

But such websites and apps are far more than universal repositories of information. **State and local government websites and apps are the new millennium’s ubiquitous version of the public square.** They are places of government where every person regardless of

⁹ See HSRI and NASDDDS, [2020-2021 National Core Indicators-IDD: Demographics](#), p. 26, Tbl. 22.



characteristic or circumstance should have the unquestioned and unabridged liberty to access public content at any time, 365 days a year. They are places of government where We the People go to carry out two sets of purposes.

The first is to do business with and to receive the benefits of government to which we are entitled by law: by applying for Medicaid, food stamps, energy assistance, a government issued ID or license; scheduling paratransit; paying taxes; and more.

The second is that **government websites and apps are a central portal and lever for exercising our civic and constitutionally grounded rights and responsibilities of freedom of expression, assembly, grievance, petition, protest, jury duty, and the franchise. As a matter of right and necessity, individuals who require AAC must be afforded equally effective access to and use of state and local government websites and apps that all others are afforded.**

VII. Tear Down the Digital Walls of Exclusion

Upon signing the ADA into law, President George H.W. Bush declared to the nation that it was well past time for the “shameful wall of exclusion (to) finally come tumbling down.” Over a generation later, much progress has been made in achieving this aim. But far more remains to be done. **The walls of digital exclusion are just as high, impenetrable, and life-robbing as those that existed in 1990.** This is true for millions of people with and without disabilities, and we believe it is particularly true with respect to our members.

For the extremely few of us who can use both speech generating devices as well as the Internet, websites, email, and platforms like Zoom, the results often are positively transformative. But most people who need AAC – regardless of whether they have access to it – have no or meager access to websites, apps, digital content, or other information and communications technology (ICT). **As a direct consequence, our members are not only “detached” from community, from what is taking place, and being made possible online. They will also increasingly be made even more invisible, personally and politically powerless, and disposed of by society than is the norm today.** This status quo must be upended. The federal, state, and local governments all have a responsibility to disrupt it in ways that bring about greater digital accessibility, inclusion, and equity for all people with disabilities, including those who need AAC.

Not everything is known about the digital experiences and accessibility needs of our members or how best to address them. With funding from the Ford Foundation, CommunicationFIRST is working to fill this gap by developing a white paper that examines



the unique barriers and obstacles people who need AAC face in accessing digital technologies and the web. However, CommunicationFIRST wants to make it clear that a sufficient amount is known on this front to take immediate and continued action to ensure significantly improved access by our members to state and local government websites and apps. It is vital that this begins now.

For the privileged few of us who both use AAC and can access websites, the access we have is limited, precarious, and unpredictable. A predominant reason for this is that there are two ways to navigate websites: (1) with a mouse; and (2) with voice commands. Both are difficult or completely impossible for most of us with speech and motor disabilities to use. We type each word we say, often with one finger or through eye movements. It is a very time- and labor-intensive process.

This said, typing by whatever means we can use is our major and frequently only means of navigating the web. This form of access must remain a federally mandated means of access for accessing and navigating the web and apps. **We fear that without such an explicit requirement, state and local government websites and apps will migrate to a voice command only or dominant navigation scheme, functionally barring AAC users from accessing websites, apps and digital content.**

Another digital design flaw we routinely are thwarted by are websites and apps that have passwords, chat features, and online forms that “time out” and/or erase everything we type after an arbitrary and ableist time period expires.

These are just two examples of some of the myriad frustrating and insurmountable barriers that prevent or substantially limit millions of children, youth, working age persons, and older adults from accessing not simply the Internet but much of 21st century life, rendering the promises and protections of laws like the ADA, Section 504, IDEA, and the Civil Rights Act of 1964 moot.

For these reasons, CommunicationFIRST calls on the U.S. Department of Justice to ensure that the final ADA Title II rules requiring states and local governments create, maintain, and update web/app-based information and services to be accessible and usable by all people with disabilities incorporate the following key elements.

VIII. Specific Recommendations

A. The Department should adopt the most current WCAG standards, which will be WCAG 2.2 when the final rule takes effect.



States and localities should be expected to comply with the most up-to-date version of the WCAG standards, which are used to ensure all facets of web accessibility and inclusion throughout the world. CommunicationFIRST further recommends the regulations make clear that the accessibility of websites and apps necessarily will evolve over time as ICT evolves. The WCAG standards are revised periodically in recognition of the fact that the innovation of technology, as well as access strategies and tools, impacts how different people may access websites and apps, by creating both new barriers and greater ease of use. The final regulations should build in the expectation that web accessibility changes over time and that the standards will be revised. Covered entities should be expected to meet revised standards within a reasonable amount of time.

In CommunicationFIRST's view, such a provision should be added for the following major reasons. The most important of these is that **web accessibility is a more dynamic process than designing and installing a sidewalk curb cut or an audible sidewalk crossing signal.** As noted previously, this proposed rule is long overdue. The Internet first became part of the country's DNA in the mid-1990s, soon after the enactment of the ADA. Over the three decades since, millions have been prevented from accessing the Internet, the greatest invention for bringing people together since the wheel.

It should not be onerous for most state and local governments to comply with WCAG standards. CommunicationFIRST, a startup nonprofit with almost no budget, was able to design its website according to WCAG 2.1 (AA) standards back in 2019. It was neither difficult nor expensive to do so.

We cannot afford or allow disability-based digital discrimination and exclusion to keep repeating itself. As we have noted, precious little is known about the digital experiences and accessibility needs of our members or how best to address them. Individuals who require AAC to communicate and live our lives, including on the web, most often have a range of co-occurring disabilities that compound our digital access needs. The WCAG 2.2 standards will offer a robust set of strategies and guidance with regard to how web access and use needs can be effectively accommodated. The Internet and its associated "parts" are like living organisms, changing and evolving constantly. The challenges and solutions for making such tools accessible, fully functional, and usable must adapt over time.

B. The Department should pair the WCAG standards with a functional definition of accessibility.

Including a functional definition in the final regulation would provide covered entities and individuals with disabilities with the shared understanding that functional access means



websites or mobile apps should enable individuals with disabilities to access the same information as, to engage in the same interactions as, to communicate and to be understood as effectively as, and to enjoy the same services as are offered to, other individuals with the same privacy, same independence, and same ease of use as, individuals without disabilities. It also should make clear that the website and app accessibility for those needing AAC and others who currently have little such access will improve with innovation and time.

C. The final rule's compliance timeline should be shortened, especially for new content and large special government districts.

In our view, this regulation is some 30 years late in coming. We strongly endorse the comments and recommendations submitted by members of CCD, including CommunicationFIRST, on this subject. Unduly prolonging the implementation and enforcement of the final rules would exacerbate a problem that could and should have been addressed decades ago. The central role websites and apps play in the functioning of states and localities and the rapidity with which websites and apps are updated demand urgency. Any delays in implementation will send the message that inaccessible websites and apps are simply a glitch to be fixed. It is anything but that.

D. The undue burden and fundamental alterations defenses obviate the need for exceptions, which undermine the goal of the regulation and overlook that accessibility is usually achievable.

Accessing states' and localities' websites and apps are as essential civil rights as entering a government building, school, and public transit. The undue burden and fundamental alteration defenses under Title II of the ADA are well-established and understood by state and local governments. Creating new and arbitrary exclusions to the regulations as proposed in NPRM would only sow confusion, needless litigation, and further delay. We strongly urge that no exclusions be included in the final regulations.

E. States and localities and the disability community should be offered ample technical assistance to assure the effective implementation of the regulation.

Following the release of both the 1977 HEW Section 504 rule and later the ADA rules, several federal agencies funded efforts to provide technical assistance to individuals with disabilities, their families, and covered entities on the regulations and ways to implement them. This was done in recognition of the tremendous good these rules do for people with disabilities and the entire country and the importance of getting their implementation right. These efforts also were instrumental in fostering collaborative problem-solving and



implementation efforts among all parties. We believe that these along with other pending efforts by the Department, the Federal Communications Commission, and Congress centered on making all ICT readily accessible and useful to all people with disabilities give rise to yet another series of teachable moments. We, therefore, urge the Department to meet these opportunities by ramping up technical assistance efforts similar to those that occurred in the 1980s and 1990s.

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We appreciate this opportunity to comment. If you have any questions, please do not hesitate to reach out to CommunicationFIRST Policy Director Bob Williams or Executive Director Tauna Szymanski at info@communicationfirst.org. More information about CommunicationFIRST can be found at <https://communicationfirst.org/>.