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ARTICLE

DISABILITY AND TECHNOLOGY

Edward L. Myers III*

A. INTRODUCTION

Congress passed its first legislation dealing with disability discrimination with Section 504 of the Rehabilitation Act of 1973, but at the same time gave little thought to how technology impacted the lives of persons with disabilities.¹ When the Individuals with Disabilities Education Act (IDEA) was initially passed in 1975, Congress failed to mention “assistive technology” or even “technology” in general in the act.² Twenty-nine years later, with the development of the personal computer, augmentative communication devices, and other technologies,

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1. 20 U.S.C. § 794 (1973).

2. 20 U.S.C. §§ 1400-1491 (1975) (formerly known as the “Education for All Handicapped Children Act of 1975”).

persons with disabilities use technology to enhance their abilities and potential to live independently. Congress, recognizing the importance of technology in the lives of persons with disabilities, has enacted several pieces of legislation over the years to increase access to technological information and devices. These laws rarely receive the attention they deserve considering their impact on not only people with disabilities, but business, governmental entities, and private citizens. This article will review the current state of federal legislation regarding information technology and disability and identify problems with existing legislation or regulation that Congress and the Executive Branch should address. In addition, this article will review state initiatives relating to accessible information technology, including initiatives in Montana.

B. HEARING AID COMPATIBILITY ACT OF 1988

Congress passed the Hearing Aid Compatibility Act of 1988 (HAC Act) to ensure reasonable access to telephone services by persons with hearing disabilities.³ As of August 16, 1989, all telephones manufactured or imported for use in the U.S. have been required to be hearing aid compatible.⁴ Cordless telephones manufactured or imported for use in the U.S. have been required to be hearing aid compatible since August 16, 1991.⁵ Secure telephones are exempt, as are telephones used with public mobile services (cell phones) or private radio services.⁶

C. TELEVISION DECODER CIRCUITRY ACT OF 1990

Another Federal law that increases accessibility for persons with disabilities is the Television Decoder Circuitry Act of 1990.⁷ As of July of 1993, all television sets sold in the United States with screens 13 inches or larger (measured diagonally) have to built-in decoder circuitry for closed captioning.⁸ Closed

3. 47 U.S.C. § 610 (2004).

4. *Id.* § 610(b)(1)(B).

5. *Id.* § 610(b)(2)(B).

6. Consumer Advisory, Federal Communications Commission, FCC Acts to Promote Accessibility of Digital Wireless Phones to Individuals with Hearing Disabilities (July 10, 2003). The FCC modified the exemption for wireless phones under the HAC Act of 1988.

7. Pub. L. No. 101-431, 104 Stat. 960 (1990) (codified at 47 U.S.C. §§ 303(u), 330(b)).

8. *Id.*; see also 47 U.S.C. § 303(u) (2004). 47 U.S.C. § 330(b) (2004) requires

captioning is a technology which enables a person to read what is being said on TV or video. In addition, under Section 613 of the Telecommunications Act of 1996, the Federal Communication Commission (FCC) has adopted regulations requiring closed captioning of most, though not all, television programming.⁹ The regulations became effective January 1, 1998, and create transition periods during which the amount of closed-captioned programming will gradually increase. Under the rules, there are two categories of programming: new programming and pre-rule programming.¹⁰ Hours of captioning increases until January 1, 2006, when one hundred percent of the new non-exempt programming will be required to be captioned for the English language.¹¹ Certain exemptions from the captioning requirements apply to both categories of programming.¹²

The exemption that receives most attention is the FCC's ability to waive the captioning requirement when it comes an undue burden.¹³ To qualify for the exemption, a video programming provider must submit a petition with sufficient evidence that captioning would result in significant difficulty or expense.¹⁴ The FCC considers four factors when making the undue burden determination:

imported television sets must have closed captioning ability.

9. 47 U.S.C. § 613 (2004).

10. New programming is video programming that is first published or published or exhibited on or after January 1, 1998. 47 C.F.R. § 79.1(a)(5) (2004). Pre-rule programming is video programming that was first published or exhibited before January 1, 1998. 47 C.F.R. § 79.1(a)(6).

11. 47 C.F.R. § 79.1(a)(7)(iv).

12. The exemption list is lengthy but include the following: 1) Programs subjected to contract limitations to closed captioning that went into effect prior to February 8, 1996 but does not include extensions or renewals; 2) Video captioning that has been waived by the FCC i.e. whether or not it imposes an undue burden; 3) Programming that is not in English or Spanish; 4) Primarily textual programming such as community bulletin boards; 5) Programming between 2 a.m. and 6 a.m. local time; 6) Interstitials, promotional announcements and public service announcements that are 10 minutes or less; 7) Video programming transmitted by an Instructional Television Fixed Service licensee pursuant to 74.931 C.F.R. (a)(b) or (c) of the rules; 8) Locally produced and distributed non-news programming with no repeat value; 9) Programming on a video programming network during its first four years after it begins operation except those that were in existence less than four years on January 1, 1998 for which the new network has until January 1, 2002; 10) Primarily non-vocal music programming; 11) If captioning exceeds two percent of gross revenues; 12) Channels producing revenues of under \$3,000,000 during the previous calendar year; 13) Locally produced educational programming for grades K-12 and post-secondary schools. 47 C.F.R. § 79.1(d)(1)-(13) (2004).

13. 47 C.F.R. § 79.1(d)(2) (2004).

14. 47 C.F.R. § 79.1(f)(2).

- (i) The nature and cost of the closed captions for the programming;
- (ii) The impact on the operation of the provider or program owner;
- (iii) The financial resources of the provider or program owner; and
- (iv) The type of operation of the provider or program owner.¹⁵

These criteria are based upon the same factors used to determine undue hardship and undue burden under the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act, and Section 508 of the Rehabilitation Act. At the time of publication of this policy paper, the FCC has not granted any exemptions for closed captioning of video programming under this rule.

D. VIDEO DESCRIPTION SERVICES

Video description is defined to include “the insertion of audio-narrated descriptions of a television program’s key visual elements into natural pauses between the program’s dialogue.”¹⁶ It is different from closed captioning in that closed captioning is a straight translation of dialogue into text, whereas video description “significantly impacts program content”¹⁷ by describing the scene and the actors, while utilizing style and pace.¹⁸ The Telecommunications Act of 1996 (Act) covers both closed captioning and video description services, but treats each technology differently. While the Act grants authority to the FCC to adopt rules relating to closed captioning,¹⁹ the Act allows for the FCC only to conduct an inquiry and to prepare a video description report for Congress.²⁰ The FCC recently attempted to adopt video description regulations but the 8th Circuit Court of Appeals in *Motion Pictures of America, Inc. v. FCC (2002)* ruled that the agency did not have the Congressional authority to do so.²¹ Absent Congressional authority, the FCC cannot require video description.

E. SECTION 255 OF THE TELECOMMUNICATIONS ACT OF 1996

Section 255 of the Telecommunications Act requires that a

15. 47 C.F.R. § 79.1(f)(2)(i-iv); 2 U.S.C. §135a (2004).

16. 47 U.S.C. § 613(g) (2004).

17. *Motion Pictures of America, Inc. v. FCC*, No. 01-1149 (8th Cir. 2002).

18. Video description is very similar to reading a book out loud with very detailed descriptions of the scenery and the actors in a style that projects the mood of the scene.

19. 47 U.S.C. § 613 (2004).

20. *Motion Pictures of America, Inc. v. FCC*, No. 01-1149 (8th Cir. 2002).

21. *Id.*

manufacturer of telecommunications equipment or customer premises equipment must ensure that the equipment is designed, developed, and fabricated to be accessible to and usable by individuals with disabilities, if readily achievable.²² The term “readily achievable” is to have the same meaning as used in the Americans with Disabilities Act (ADA).²³

The “readily achievable” standard requires companies to incorporate access features that are accomplished without much difficulty or expense.²⁴ Companies must balance the costs and nature of the access required with their available resources to determine if access is readily achievable. Companies with larger resources must achieve greater access than smaller ones. The FCC makes determinations on the “readily achievable” standard on a case-by-case basis.²⁵ A company may not provide access if the access feature would so fundamentally alter the product that it would substantially reduce the functionality of the product, make some features unusable, substantially impede or deter use of the product by other individuals, or substantially and materially alter the shape, size or weight of the product.²⁶ Similarly, a company does not have to incorporate technically unfeasible access features. Companies must provide evidence to utilize these defenses.²⁷

Those required to comply with Section 255 include manufacturers of equipment telecom networks, providers of telecommunications services, both local or long distance, telecommunications carriers and providers and manufacturers of voicemail and interactive menu services and equipment.²⁸ Section 255(e) of the Telecommunications Act requires that the Architectural and Transportation Barriers Compliance Board (Access Board) to develop guidelines in conjunction with the FCC with a mandate to review and update periodically.²⁹ It is the responsibility of the FCC to issue regulations consistent with the Access Board’s guidelines.³⁰

22. 47 U.S.C. § 255(c) (2004).

23. *Id.* § 255(a)(2).

24. 47 C.F.R. § 6.3(g) (2004).

25. Consumer Fact Sheet, FCC, Section 255: Telecommunications Access for People with Disabilities (December 16, 2002).

26. *Id.*

27. *Id.*

28. 47 C.F.R. §6.1 (2004).

29. 47 U.S.C. § 255(e) (2004); 36 C.F.R. § 1193 (2004).

30. 47 U.S.C. § 255(e); 36 C.F.R. §§ 1193.1-1193.51.

The FCC's rules cover all hardware and software telephone network equipment and customer premises equipment (CPE).³¹ CPE is telecommunications equipment used in the home or office (or other premises) to originate, route, or terminate telecommunications. Examples of CPE are telephones, fax machines, answering machines, and pagers. CPE that serves both telecommunications and non-telecommunications functions are covered only to the extent it provides telecommunications functions. The FCC's rules also cover basic and special telecommunications services, including regular telephone calls, call waiting, speed dialing, call forwarding, computer-provided directory assistance, call monitoring, caller identification, call tracing, and repeat dialing. In addition, the rules cover interactive voice response (IVR) systems and voice mail. IVR systems are phone systems that provide callers with a menu of choices. The Commission's rules require network architecture be designed so that it does not hinder access. Network architecture covers the public switched network, and includes hardware or software databases associated with routing telecommunications services across the United States.³²

Section 255 does not permit individuals to file complaints in the Federal court. The FCC has exclusive jurisdiction to handle Section 255 complaints.³³ Persons with disabilities may file informal or formal Section 255 complaints with the FCC.³⁴ In addition to sending a letter, informal complaints may be submitted to the FCC by any reasonable means, including fax, telephone, voice, TTY, e-mail, or the Internet.³⁵ Although there is no time limit for filing complaints, individuals should try to file shortly after they discover an access problem.³⁶

F. SECTION 508 OF THE REHABILITATION ACT OF 1998

Accessibility mandates of Section 508 of the Rehabilitation Act of 1998 to information technology apply only to federal agencies when they develop, procure, maintain, or use electronic and information technology (E&IT).³⁷ The law requires access to

31. 47 C.F.R. § 7.1 (2004).

32. 47 C.F.R. § 6.5(c) (2004).

33. 47 U.S.C. § 255(f) (2004).

34. 47 C.F.R. § 6.16 (2004).

35. 47 C.F.R. § 6.17(a) (2004).

36. *Id.*

37. 29 U.S.C. § 794d(a)(1)(A) (2004); *see also* Ron Hager & Steve Mendelsohn, *Access*

electronic and information technology for federal employees or disabled members of the public.³⁸ Electronic information technology is defined to include:

. . . information technology and any equipment or interconnected system or subsystem of equipment, that is used in the creation, conversion, or duplication of data or information. Electronic information technology includes, but is not limited to, telecommunications products (such as telephones), information kiosks and transaction machines, World Wide Web sites, multimedia, and office equipment such as copiers and fax machines. The term does not include any equipment that contains embedded information technology that is used as an integral part of the product, but the principal function of which is not the acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information.³⁹

Federal agencies must ensure that this technology is accessible to employees and members of the public with disabilities to the extent it does not pose an “undue burden.”⁴⁰ Undue burden is defined as meaning without significant difficulty or expense, which is the same definition as the ADA and in Section 504 of the Rehabilitation Act.⁴¹ When determining undue burden, the agency must consider all of its available resources.⁴²

Section 508 requires that federal agencies consider accessibility issues:

When developing, procuring, maintaining, or using electronic and information technology, each Federal department or agency, including the United States Postal Service, shall ensure, unless an undue burden would be imposed on the department or agency, that the electronic and information technology allows, regardless of the type of medium of the technology.⁴³

If a federal agency finds that complying with Section 508

to *Information and Electronic Technology Offered by the Federal Government*, AT ADVOCATE (National Assistive Technology Advocacy Project, Buffalo, New York) (January/March 2001).

38. 29 U.S.C. §794d(a)(1)(A)(i)-(ii).

39. 36 C.F.R. § 1194.4 (2004).

40. 29 U.S.C. § 794d(a)(1)(A) (2004).

41. 36 C.F.R. § 1194.4 (2004). “Factors that define undue burden to a federal agency revolve around fiscal constraints but may also include security issues, the overall feasibility of making certain functional capabilities accessible, training, priorities and availability of products” Beth Archibald Tang, *The Web, Accessibility and Undue Burden*, Federal Computer Week, (June 15, 2000). <http://www.fcw.com/fcw/articles/2000/0612/web-dotgov-06-15-00.asp>.

42. 36 C.F.R. § 1194.4.

43. 29 U.S.C. § 794d(a)(1)(A) (2004).

standards creates an undue burden, it still must provide the employee with an alternative means of access to use the information or data.⁴⁴ Nothing prevents a federal agency from using technologies or designs which would provide the person with a disability with substantially equivalent or greater access.⁴⁵

Section 508 speaks to various means of disseminating information, including computers, software, telecommunication products, and electronic office equipment.⁴⁶ It also requires accessibility of federal website pages on the Internet.⁴⁷ Section 508 does not specifically cover private industries unless they are manufacturing products to sell to the federal government, developing websites, or applications for the federal government under contract.⁴⁸

When procuring E&IT, a federal agency is not required to purchase a product that is not commercially available. A federal agency is prohibited from refusing to procure an accessible product that does not meet all of its standards. Instead, if a product meets some standards but not all, the federal agency must purchase the product.⁴⁹

Section 508 contains a specific exemption for national security systems, as that term is defined in section 5142 of the Clinger-Cohen Act of 1996.⁵⁰ This would include any electronic and information technology operated by agencies or use of which involves intelligence activities, crypto-logic activities related to national security, command and control of military forces, equipment that is an integral part of a weapon or weapons system, or systems critical to the direct fulfillment of military or intelligence missions.⁵¹ This exemption does not include a system that is to be used for routine administrative and business applications such as payroll, finance, logistics, and personnel management applications.⁵²

Section 508 standards also do not apply to electronic and information technology acquired by a contractor incidental to a

44. 29 U.S.C. § 794d(a)(1)(B).

45. 36 C.F.R. § 1194.5 (2004).

46. 36 C.F.R. §§ 1194.23-26.

47. 36 C.F.R. § 1194.22.

48. 36 C.F.R. § 1194.2(c).

49. 36 C.F.R. § 1194.2(b).

50. 40 U.S.C. § 1452 (2002).

51. 36 C.F.R. § 1194.3(a) (2004).

52. *Id.*

contract.⁵³ The standards do not require the installation of specific accessibility-related software or the attachment of an assistive technology device at a workstation of a non-disabled federal employee.⁵⁴ E&IT systems located in spaces frequented only by service personnel for maintenance, repair, or occasional monitoring of equipment are also not required to comply.⁵⁵ The standards do not require a fundamental alteration in the nature of a product or its components.⁵⁶ The Federal Agency Acquisition Regulations (FAR) also identify an exemption for micro-purchases of \$2,500 or less of E&IT made prior to October 1, 2004.⁵⁷

Congress delegated the Architectural and Transportation Barriers Compliance Board (Access Board) with authority to adopt Section 508 Standards.⁵⁸ The Access Board developed the standards with several major information technology industry leaders, governmental officials, advocates, and Association of Tech Act Projects (ATAP). In general, the technical standards developed by the Access-Board cover software applications and operating systems, web-based intranet and internet information and applications, telecommunications products, video and multimedia products, self contained and closed products, and desktop and portable computers.⁵⁹ The final standards were issued on December 21, 2000, and went into effect on June 21, 2001.⁶⁰

G. AMERICANS WITH DISABILITIES ACT AND SECTION 504

Because the ADA and Section 504 were passed prior to the advent of the information technology boom of the 1990's, neither specifically addresses access to information technology nor do the laws require states to conform to specific accessibility standards. Unlike Section 508, Section 504 applies more

53. 36 C.F.R. § 1194.3(b).

54. 36 C.F.R. § 1194.3(c).

55. 36 C.F.R. § 1194.3(f).

56. 36 C.F.R. § 1194.3(e).

57. 48 C.F.R. § 39.204(a) (2004).

58. 29 U.S.C. § 794d(a)(2) (2004).

59. 36 C.F.R. §§ 1194.21-1194.26 (2004). "Self-contained and Closed Products" can include but are not limited to information kiosks and information transaction machines, copiers, printers, calculators, fax machines, and other similar types of products. 36 C.F.R. § 1194.25.

60. Electronic and Information Technology Accessibility Standards, 65 Fed. Reg. 80,499 (December 21, 2000) See also 29 U.S.C. § 794d(f)(1)(A).

broadly to federally funded agencies and programs.⁶¹ States that receive federal financial assistance must comply with Section 504.⁶² Further complicating the issue is that the ADA does not specifically address access to online resources and other electronic and information technology. Even with these difficulties, the Department of Justice (DOJ) and the Department of Education's Office of Civil Rights (OCR) as well as applicable case law have given some guidance approaching the issue.

A 1996 DOJ opinion letter to Senator Harkin stated:

"Covered entities under the ADA are required to provide effective communication, regardless of whether they generally communicate through print media, audio media, or computerized media such as the Internet. Covered entities that use the Internet for communications regarding their programs, goods, or services must be prepared to offer those communications through accessible means as well."⁶³

The DOJ went on to list examples of accommodations such as Web page information in text format, and offer alternative accessible formats such as Braille, large print, and/or audio materials. Since the issuance of this opinion, the DOJ focuses more on website accessibility rather than just providing an alternative format. In 2003, the DOJ issued a fact sheet on how state and local governments can make their Websites accessible and comply with the ADA.⁶⁴

In the education realm, OCR, which is responsible for enforcement of Section 504 and Title II of the ADA, issued several letters clarifying effective communication. There are three components to determine effective communication. The OCR considers the timeliness of the delivery, accuracy of the translation, and provision in a manner and medium appropriate to the significance of the message and the abilities of the individual with a disability.⁶⁵ OCR and the courts mandate that a college or university must not rely on ad hoc accommodations, but must have established policies that include input from the disabled community who would be most likely to request

61. 29 U.S.C §794(a).

62. *Id.*

63. Letter from the Assistant Attorney-General for Civil Rights to Senator Tom Harkin, (September 9, 1996) 10 NDLR 240 available at <http://www.usdoj.gov/crt/foia/cltr204.txt>.

64. Accessibility of State and Local Government Websites to People with Disabilities, (June, 2003) available at <http://www.usdoj.gov/crt/ada/pu-blicat.htm#anchor-website>.

65. OCR Settlement Letter, Docket No. 09-99-2041, (April 20, 1999).

accommodations.⁶⁶ OCR went further when discussing the likelihood of success of raising the undue burden defense if it failed to acquire accessible software and/or hardware at the time of purchase:

“When a public institution selects software programs and/or hardware equipment that are not adaptable for access by persons with disabilities, the subsequent substantial expense of providing access is not generally regarded as an undue burden when such cost could have been significantly reduced by considering the issue of accessibility at the time of the initial selection.”⁶⁷

Only recently have the courts entered into the discussion of the applicability of the ADA and Section 504 and accessible information technology. In *Martin et al. v. MARTA*, several individuals with disabilities filed a federal lawsuit against the Atlanta public transit agency alleging various violations of the ADA and Section 504, including non-accessible information technology.⁶⁸ MARTA made its schedule and route information freely available to the general public.⁶⁹ It was contained in maps and brochures located at MARTA stations, as well as on its admittedly inaccessible website.⁷⁰ The only way a person with blindness or low vision could obtain the information from MARTA was by speaking on the phone with an unknowledgeable representative or through waiting long periods for Braille schedules to be sent.⁷¹

The court granted a preliminary injunction ruling that MARTA violated the ADA mandate of “making adequate communications capacity available, through accessible formats and technology, to enable users to obtain information and schedule services.”⁷² The court ordered MARTA to make its website accessible and provide other alternative access in a timely and equal manner (i.e. reduce the time for sending Braille schedules, and reduce telephone wait times and provide access to a knowledgeable MARTA representative).⁷³ The court recognized that a transit customer with disabilities could not

66. OCR Settlement Letter, Docket No. 09-97-2002, (April 7, 1997).

67. *Id.*

68. *Martin et. al v. MARTA*, Atlanta Rapid Transit Auth., 225 F. Supp. 2d. 1362, 1377 (N.D. Ga. 2002).

69. *Id.* at 1365-66

70. *Id.*

71. *Id.*

72. *Id.* at 1375.

73. *Id.* at 1377

adequately use the bus system if schedule and route information is not available in a usable format.⁷⁴

Another federal court came to a different conclusion relating to accessible websites for a Title III ADA entity. In *Access Now, Inc. v. Southwest Airlines Co.*, the district court ruled that Southwest's website did not violate Title III of the ADA even though it was not accessible to blind persons' screen readers.⁷⁵ The court's rationale rested on three premises. The first was that the "place of public accommodation" described in Title III only includes physical structures, not cyberspace.⁷⁶ Secondly, the court ruled that the plaintiffs had failed to show that there was a "nexus" or connection to a physical concrete place of public accommodation.⁷⁷ Thirdly, the court, in footnotes 12 and 13, noted that Title III of the ADA explicitly exempts aircrafts.⁷⁸ Had the case been brought under the Air Carrier Access Act of 1986, a different result may have occurred.

The last significant case dealing with information technology and accessibility and Title III entities dealt not with websites but with automated answering systems. *Renden v. Valleycrest Productions, Inc.*, concerned the selection process of contestants for "Who Wants to Be a Millionaire?," a popular TV show.⁷⁹ In that case, aspiring contestants called a toll-free number on which a recorded message prompted them to answer a series of questions.⁸⁰ Callers recorded their answers by pressing the appropriate keys on their telephone keypads.⁸¹ Callers who answered all of the questions correctly in the first round of competition were then subject to a random drawing to narrow the field.⁸² The plaintiffs were persons with hearing and upper-body mobility impairments who sought to compete by calling the automated hotline.⁸³ One individual had difficulty with finger motions and the other could not hear the pre-

74. *Id.* at 1378.

75. *Access Now, Inc., v. Southwest Airlines Co.*, 227 F. Supp. 2d. 1312 (S.D. Fla. 2002).

76. *Id.* at 1318.

77. *Id.* at 1319-20.

78. *Id.* at 1321.

79. *Rendon v. Valleycrest Productions*, 294 F. 3d 1279 (11th Cir. 2002), *reh'g denied en banc*, 2002 U.S. App. LEXIS 27593 (October 25, 2002).

80. *Id.* at 1280

81. *Id.*

82. *Id.*

83. *Id.*

recorded questions. No TTD services were available.⁸⁴

While the district court ruled against the plaintiffs, explaining that there did not exist a “nexus” between the phone system and a physical place of business, the 11th Circuit Court of Appeals overturned the decision.⁸⁵ The 11th Circuit ruled that Title III of the ADA made no distinction between on-site discrimination and offsite discrimination, and that the “fast finger” automated telephone system tended to screen out persons with mobility and hearing impairments.⁸⁶ The defendants were required to make modifications to their automated phone system to ensure access.⁸⁷

Litigation at the state level has been infrequent primarily due to the relative recent interest in the issue and the lack of state legislation requiring access to information technology for the disabled. One lawsuit in Arkansas demonstrates the problems when information technology issues are ignored. In that state, the National Federation of the Blind (NFB) filed suit on July 18, 2001, against the state of Arkansas in *Donna Hartzell, et al. v. Huckabee et al.*⁸⁸ The plaintiffs, who were blind, claimed that a \$19 million computer system recently purchased by the State of Arkansas for use by all state employees is inaccessible to them and, therefore, in violation of both Arkansas state law regarding information technology and the Americans with Disabilities Act (ADA).⁸⁹ In February of 2004, the Pulaski County Circuit Court issued an injunction and ordered the state to make the system accessible by July 1, 2004.⁹⁰

Arkansas’ lawsuit demonstrates the importance of each state having its own accessible information technology act. *Hartzell*, was filed under both the ADA and Arkansas accessible information technology law.

It is important to understand that as the case law stands in

84. *Id.* at 1281.

85. *Rendon*, 294 F.3d. at 1286.

86. *Id.*

87. For a more complete analysis on the applicability of Title III of the ADA, see NATIONAL COUNCIL ON DISABILITY, POSITION PAPER, WHEN THE AMERICANS WITH DISABILITIES ACT GOES ONLINE: APPLICATION OF THE ADA TO THE INTERNET AND WORLDWIDE WEB (2003).

88. Case No. (2001-3700) (July 18, 2001).

89. Gail Jackson, *System Doesn’t Provide Needed Access*, THE BRAILLE MONITOR, July 2002 available at <http://www.nfb.org/bm/bm02/bmo0207/bm020705.htm>; ARK. CODE ANN. § 25-26-201 to 206 (1999).

90. Michael R. Wickline, *Daniels Buys Software to Bypass AASIS Use \$60 Million Computer System Still Under Fire*, ARKANSAS DEMOCRAT-GAZETTE, Feb. 29, 2004.

the spring of 2004, Title II of the ADA and Section 504 of the Rehabilitation Act require both local and state governments to conform their websites and other information technology systems to accessibility standards.⁹¹ While state agencies are not bound by Section 508 standards, state Chief Information Officers should be aware that regardless of Section 508's applicability, Title II of the Americans with Disabilities Act prohibits state and local governments from discriminating against persons with disabilities when accessing programs and services. Section 504 prohibits recipients of federal funding, including state agencies, from discriminating against persons with disabilities. Section 508 standards can be used as a yardstick for accessibility and compliance with the Americans with Disabilities Act and Section 504 in the state's technology infrastructure.

However, as accessible information technology relates to Title III entities, the law is not as clear at this time and the best approach for Assistive Technology Act Projects to encourage local businesses that do business over websites is to make them accessible so as to increase access to customers and limit any potential liabilities. Again, the larger the enterprise, the less likely the Title III entity can rely on the "undue burden" or "readily achievable" defense.

H. STATE INFORMATION TECHNOLOGY ACCESSIBILITY INITIATIVES

Although Section 508 does not specifically apply to the states, as a requirement of receiving grants under the Assistive Technology Acts of 1988, 1994 and 1998, states did give written assurances that they would comply with Section 508.⁹² These assurances, however, are not enforceable. Many states signed the assurances with the expectation that they would develop their own policies and procedures for accessible information technology rather than comply with any federal guidelines.⁹³ At

91. 29 U.S.C. § 794(d) (2000).

92. National Institute on Disability Rehabilitation and Research, Letter on Assurances, Judith Heumann, Assistant Secretary, OSERS; Kathrine D. Seelman, Director NIDRR (July 30, 1999).

93. Judith Herman, Assistant Secretary, Office of Special Education and Rehabilitative Services, National Institute on Disability Research and Rehabilitation (NIDRR), NIDRR Letter on Assurances to the States' Assistive Technology Projects, (Date omitted).

the time the initial assurances were given in 1988, Section 508 existed but no standards were developed.⁹⁴ As a result, levels of accessibility varied greatly from state to state or did not exist. Compounding the problem is the sunset provision of the Assistive Technology Act of 1998 that seems to indicate that once the funding for the Assistive Technology Act Projects ceases, any assurance regarding compliance to Section 508 ends as well. To alleviate this problem, many Assistive Technology Act Projects have developed state initiatives regarding information accessibility.

At the time of this writing, there are twelve states that have accessible information technology laws.⁹⁵ These statutes range from solely covering blind and visual impairment issues and setting their own state accessibility standards, as Arkansas has done,⁹⁶ to dealing, as in states such as California, with all disabilities and requiring compliance with Section 508.⁹⁷ Almost all of the states have developed accessible web based policies or standards.

Montana adopted its own version of accessible information technology law in 2001.⁹⁸ The Montana Legislature found that although interactive visual display terminals are used by state employees and members of the public, those who use other non-visual access, have not been systematically incorporated into the state information technology procurement process. Using only visual access remains a barrier to the blind and low vision impaired in education and employment.⁹⁹ As public policy, the Legislature emphatically stated:

Individuals who are blind or visually impaired have the right to full participation in the life of the state, including the use of information technology that is provided by the state for use by employees, program participants, and the public. Technology purchased in whole or in part with funds provided by the state that is to be used for the creation, storage, retrieval, or dissemination of information and that is intended for use by employees, program participants, and the public must be accessible to and usable by individuals who are blind or visually

94. *Id.*

95. *Overview of State Accessibility Laws, Policies, Standards and Other Resources Available On-line*, Information Technology Technical Assistance and Training Center, available at <http://www.ittatc.org/laws/stateLawAtGlance.cfm> (last visited June 9, 2004).

96. ARK. CODE ANN. § 25-26-201 (1999).

97. 2003 Cal. Stat. 11135-11139.8.

98. MONT. CODE ANN. §§ 18-5-601 to -605 (2003).

99. MONT. CODE ANN. § 18-5-601(b)-(c).

impaired.¹⁰⁰

All state procurement contracts relating to information technology must include a technology accessibility clause and require minimum specifications for non-visual access.¹⁰¹

While the efforts of the Montana Legislature are commendable, problems with the legislation and the procurement contract language remain. In emphasizing only accessibility for one particular disability, state agencies leave themselves vulnerable to litigation for not including other disabilities, such as the hearing impaired or deaf, when making purchasing decisions relating to information technology. The hearing impaired and deaf community need access to phone systems that are TTY compatible or have a one button voice access rather than an automated system. Purchasing televisions with closed captioning TV and ensuring that employee training is video-taped closed captioned helps to encourage the hearing impaired and deaf to become more active participants in their government.

I. ACCESSIBLE INFORMATION TECHNOLOGY AND VOTING

While many do not consider voting an accessible information technology issue, laws enacted since the 2000 presidential election deal with accessible information as a means of providing greater access to persons with disabilities. The Voting Accessibility for the Elderly and Handicapped Act of 1984 provides that all polling places for federal elections must be accessible to persons with disabilities and the elderly.¹⁰² If it is determined by the chief election official (usually the Secretary of State) that an accessible polling place is not available, upon advance request of the voter, the chief election official may reassign the voter to an accessible voting place or provide an alternative means for casting a ballot on the day of election.¹⁰³

Each state is required to provide registration and voting aids in the form of instructions in large print, conspicuously displayed at each permanent registration facility and each polling place, and provide information by telecommunications devices for the deaf.¹⁰⁴ No medical certification is required for

100. MONT. CODE ANN. § 18-5-601(2)(a)-(b).

101. MONT. CODE ANN. § 18-5-604(1).

102. 42 U.S.C. § 1973ee (2004)

103. 42 U.S.C. § 1973ee-1(a)-(b).

104. 42 U.S.C. § 1973ee-3(a)(1)-(2).

absentee ballot or for an application for one unless the state either requires one for automatically receiving an absentee ballot on a continuing basis or if the voter is requesting an absentee ballot after the deadline has passed.¹⁰⁵ The United States Department of Justice or a private right of action may be used to enforce the provisions of the Act.¹⁰⁶

The Help America Vote Act of 2002, (HAVA) requires that each voting system used in federal elections must be accessible for persons with disabilities, including those who are blind or have low vision.¹⁰⁷ Each polling place can satisfy the requirement through the use of at least one direct recording electronic voting system or other voting system equipped to allow disabled voters the same opportunity for access and participation as other voters, including the ability to vote independently and privately.¹⁰⁸ HAVA goes far beyond the physical accessibility of polling places required under the Voting Accessibility for the Elderly and Handicapped Act and includes having voting machines that “talk”, large print or Braille ballots, materials or interpretation for voters who are deaf or hearing impaired, and simplifying the voting process for the elderly and those who have intellectual disabilities. In April of 2003, the Federal Elections Commission (FEC) developed voluntary voting standards for accessibility for vendors under FEC’s Voting System Standards 2.2.7.¹⁰⁹

The Access Board, which is responsible for adopting Section 508 accessible information technology standards, assisted in the preparation of the document.¹¹⁰ Disability advocates should recommend that their state’s chief election official adopt the FEC voting system standards to ensure that the technology used in their state’s voting process is accessible. Assistive Technology Act Projects should be aware that HAVA has several important timelines for states to complete over the next four years.¹¹¹

105. 42 U.S.C. § 1973ee-3(b)(1)-(2).

106. 42 U.S.C. § 1973ee-4(a).

107. 42 U.S.C. § 15301 (2004).

108. 42 U.S.C. § 15421(b)(1).

109. Proposed Voting System Standards 2.7.7, Federal Elections Commission (December 13, 2001).

110. *Id.* at 1-3.

111. Reprinted with permission from Information Technology Technical Assistance and Training Center (ITTAC) at http://www.ittatc.org/-training/hava_resources.cfm.

DATE	REQUIREMENT
1/1/03	States must accept materials from individuals registering to vote by mail.
1/27/03	Chief state election officials are required to give the Federal Election Commission the names of the state election official selected to serve on the Standards Board.
4/29/03	States submit certification to the U.S. General Services Administration to be eligible for funding to improve the administration of federal elections.
1/1/04	Effective date for HAVA-mandated provisional voting and voter verification rules. Last day for States to qualify for a waiver of computerized statewide voter registration databases. If States do not qualify for a waiver, they will be required to comply with requirements set up for computerized statewide voter registration lists and first-time time voters who register by mail. Last day for States to apply for a waiver to replace punch card or lever voting machines. States that don't participate in the grant program must certify they have established a complaint procedure or submitted a plan to the U.S. Attorney General.
11/2/04	Unless States qualify for a waiver, all punch-card and lever voting machines must be replaced in States accepting federal machine buy-out funds. If the machines are not replaced then funds paid to the states for replacement must be repaid.
1/1/06	States are required to comply with voting systems standards and implement a computerized statewide voter registration database. One accessible voting machine must be in place in each polling place.
1/1/07	All voting machines purchased using HAVA funds must meet disability access standards

The United States Department of Justice has enforcement authority through declaratory and injunctive relief for the uniform and nondiscriminatory election technology and administration requirements that apply to States under HAVA.¹¹²

112. 42 U.S.C. §15551 (2004).

J. RECOMMENDATIONS FOR FUTURE POLICY CHANGE

The impact of information technology in American society cannot be understated. The impact on persons with disabilities has been equally, if not more dramatic. Congress and other institutions need to make necessary changes to existing laws and regulations to ensure that persons with disabilities are not left behind.

The most glaring discrepancy in existing law is the omission of technology from the statutory framework of the ADA. Cases such as *Southwest Airlines* will continue to plague the disability community with inconsistent application of Title III to the Web in the Federal Courts. Amending the ADA to include references to technology and the World Wide Web can best solve this problem, however, the most practical approach is one recommended by the National Council on Disability (NCD). The NCD recommends that the Department of Justice (DOJ) incorporate either the W3C¹¹³ or 508 standards into the Americans with Disabilities Act Accessibility Guidelines (ADAAG). NCD further recommends that the adoption be prospective so that a business entity could come into compliance through an upgrade or add-on cost after a grace period. This approach would ensure a smooth and easy transition.¹¹⁴

Another area in need of attention is Section 255 of the Telecommunications Act. Congress should amend Section 255 to include visual descriptive services so that the blind may have more complete access to television programming. The problems the FCC has had in enforcing accessibility in voicemail and interactive menus¹¹⁵ and obtaining accessibility for wireless cell phones from manufacturers¹¹⁶ may warrant a re-examination of

113. The World Wide Web Consortium was created in October 1994 to develop the World Wide Web to its full potential through the development of common protocols that promote the Web's evolution and ensure its interoperability. W3C has approximately 350 Member organizations from all over the world and has earned international recognition for its contributions to the growth of the Web and developing accessible website standards, available at <http://www.w3c.org/wai/#resources>.

114. National Council on Disability Position Paper, *supra* note 87; see also Settlement Agreement, National Federation of the Blind v. America Online, Inc., 99-CV-12303-EFH (D. Mass. July 26, 2000).

115. Reminder to Manufacturers and Providers of Voice Mail and Interactive Menu Products and Services of their Accessibility Obligations Under New Part 7 of the Commission's Rules, Public Notice (September 22, 2000).

116. FCC Acts to Promote Accessibility of Digital Wireless Phones to Individuals with Hearing Disabilities, FCC Consumer Alert, (July 10, 2003). The FCC modified the exemption for wireless phones under the HAC Act of 1988.

the exclusive jurisdiction of the FCC. Section 255 should include a private right of action and appropriate remedies for enforcement by persons with disabilities.¹¹⁷

Difficulties in implementing Section 508 at the state level remain problematic. Continued constitutional challenges relating to the viability of Title II of the ADA hinders any attempt at including Section 508 language.¹¹⁸ Allowing each state to adopt its own accessible information technology legislation or policy potentially creates fifty different standards. State Assistive Technology Act projects should continue to work on individual legislation and policy efforts, but should argue for the incorporation of Section 508 as the standard in order to avoid confusion for businesses and persons with disabilities. While not perfect, Section 508 remains the one standard that continues to allow input from all affected constituencies.

As Montana and the rest of the country enter into the twenty-first century, persons with disabilities are becoming more integrated into society. While physical and employment access remain as critical components of integration, accessible information technology is now the linchpin for maintaining that access. Our society uses information technology in a variety of ways such as securing employment, making holiday arrangements and accessing our legal system. Information technology changes rapidly from year to year and Congress and state legislatures must recognize these changes and adopt and modify information technology legislation as needed to ensure that the rights of persons with disabilities remain intact and expanded.

117. Separate Statement of Commissioner Kathleen Abernathy regarding Notice of Proposed Rule Making, In the Matter of Section 68.4 of the Commission's Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01-309, RM-8658 (November 14, 2001). Commissioner Abernathy recognized that the FCC failed in its legal duties to ensure that wireless digital phones would be accessible to persons with disabilities.

118. *Tennessee v. Lane et al.*, 541 U.S. ___, No 20-1667 slip op. at 19-20 (May 17, 2004) (limiting the Constitutionality of Title II of the ADA to the protection of denial of fundamental rights such as access to the courts). *But see* Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001); *See also Tennessee v. Lane: The Legal Issues and Implications for Persons with Disabilities*, Policy Paper, NCD, (September 4, 2003).