

**LETTER OPINION  
2004-L-01**

January 2, 2004

Mr. Mike Ressler  
Information Technology Department  
600 East Boulevard Avenue  
Bismarck, ND 58505

Dear Mr. Ressler:

Thank you for your letter requesting my opinion regarding state and federal requirements governing web site accessibility. You also ask to what extent ITD may waive the accessibility standards found in current Information Technology Department (ITD) policy DP005-01, which incorporates W3C Web Content Guidelines.<sup>1</sup>

The State, in both its capacity as an employer and as a provider of public services, is subject to the Americans with Disabilities Act (ADA). Under Title I of the ADA, the State, as an employer must make reasonable accommodations necessary to enable a qualified individual with a disability to perform the essential functions of a position unless doing so poses an undue hardship. See 42 U.S.C. § 12112. Under Title I, the term “undue hardship” means an action requiring significant difficulty or expense, when considered in light of the following factors: (i) the nature and cost of the accommodation needed; (ii) the overall financial resources of the facility or facilities involved in providing the reasonable accommodation; the number of persons employed at the facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the facility’s operation; (iii) the covered entity’s overall financial resources; the overall size of the covered entity’s business with respect to the number of its employees; the number, type, and location of its facilities; and (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the entity’s workforce; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity. 42 U.S.C. §12111(10). Employers need not analyze the costs and benefits of proposed accommodations with

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<sup>1</sup> The World Wide Web Consortium (“W3C”) is the international body of industry-leading corporations, individuals, and organizations that set the standards by which the World Wide Web operates. The W3C guidelines explain how to make Web content accessible to people with disabilities. A full copy of the guidelines may be found at <http://www.w3.org/TR/WAIWEBCONTENT/>.

mathematical precision. Borkowski v. Valley Cent. School Dist., 63 F.3d 131, 140 (2d Cir. 1995). “A common-sense balancing of the costs and benefits in light of the factors listed in the regulations is all that is expected.” Id.

Thus, under Title I, if an employee needs to utilize an employer maintained internet or intranet site to perform the job, reasonable accommodations to allow the use of the site would be required absent an undue hardship. What specifically would be required would depend on the specific limitations faced by the employee.

Under Title II, a public entity must make reasonable modifications to its services or programs (which may include changes to policies or practices) to enable qualified individuals with disabilities to participate unless the modification would fundamentally alter the nature of the public program, service or activity. See 28 C.F.R. §35.130(a) and (b)(7). Also under Title II, a public entity must take appropriate steps to ensure that communications, including internet communications,<sup>2</sup> with people with disabilities<sup>3</sup> are as effective as communications with others unless those steps would fundamentally alter the nature of the public activity or pose undue financial or administrative burdens. See 28 C.F.R. §35.150(b)(1), 28 C.F.R. §35.150(a)(3), and 28 C.F.R. §35.160(a). The determination that a proposed modification necessary for compliance would fundamentally change the nature of the public activity or create an undue burden must be made by the head of the public entity or his or her designee and must be accompanied by a written statement of the reasons for reaching that conclusion. See 28 C.F.R. § 35.150(a)(3) and 28 C.F.R. § 35.164. The determination that undue burden would result must be based on all resources available for use in the program. Id. If an action would result in an alteration or burden, the public entity must take other action to ensure that individuals with disabilities receive the benefits and services of the program

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<sup>2</sup> The United States Department of Justice (“DOJ”) has taken the position that Title II applies to the Internet. In a letter to Senator Tom Harkin, the U.S. Department of Justice 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.

(Emphasis added.) Asst. Atty. Gen. Deval L. Patrick, U.S. Dept. of Justice, letter to Sen. Tom Harkin, Sept. 9, 1996.

<sup>3</sup> This includes “applicants, participants, and members of the public.” 28 C.F.R. § 35.160(a).

or activity. Id. If the State offers another accommodation or modification that meets the non-discrimination provisions of the ADA, it has satisfied its legal obligations. Thus, while Title II applies to State websites, the purpose of the web site, what information is conveyed or requested, and what communicative alternatives exist would affect what, if any, specific features would be required on the site.

The North Dakota Human Rights Act also addresses discrimination on the basis of disability both for employers and public entities providing public services. See N.D.C.C. ch. 14-02.4. Although there are some differences, the standards that apply under the ADA and the Human Rights Act are substantially the same. Neither requires any accommodation or modification that would impose an undue burden on the agency or fundamentally alter the nature of the public activity.

No specific accommodations or modifications are required by the ADA. Thus, complying with any defined set of accessibility standards is neither strictly required nor necessarily sufficient to meet the ADA obligations in any given circumstance. However, the W3C accessibility standards and those standards recently adopted by the Access Board for federal agencies under Section 508 of the Rehabilitation Act (29 U.S.C. § 794d) undoubtedly remain an important source for evaluating a state agency's obligations under ADA. Additionally, as ITD notes on its "Web Accessibility Frequently Asked Questions Sheet," addressing accessibility issues during initial development will usually be far more cost effective and efficient than later ad hoc modifications to an application or web site. Ultimately, determining what accommodations or modifications are required in a given situation is a fact specific question that must be addressed on a case-by-case basis.

You also asked about Section 508 standards. As mentioned, the Access Board, pursuant to Section 508 of the Rehabilitation Act, has promulgated accessibility standards for information technology, including web development. See 36 C.F.R. § 1194.22. These standards apply to and are binding on federal departments and agencies.<sup>4</sup> However, as a condition for receipt of federal grant monies under the 1988 Technology-Related Assistance for Individuals with Disabilities Act and the 1998 Assistive Technology Act, officials from the Division of Vocational Rehabilitation and the Office of Management and Budget have made certain Section 508 assurances to the federal granting agency. According to the director of the Interagency Program for Assistive Technology, part of the Division of Vocational Rehabilitation, the most recent Section 508 assurances were made in 1999. Under the 1998 Assistive Technology Act, states receiving grant monies were expected to continue abiding by the assurances

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<sup>4</sup> Prior to the 1998 Workforce Investment Act, Section 508 established nonbinding guidelines on federal agencies.

made under the Technology-Related Assistance for Individuals with Disabilities Act of 1988, which included Section 508 assurances. See 29 U.S.C. § 3011(e)(3).

Under current Section 508, when federal agencies develop, procure, maintain, or use electronic and information technology, the agency must ensure that federal employees and members of the public requesting information or services have access to and use of information and data that is comparable to the access for individuals who are not disabled, unless doing so would impose an undue burden on the agency. See 36 C.F.R. § 1194.1. The obligations are substantially similar to and parallel the obligations under the ADA. Thus, in meeting any Section 508 assurances, the extent to which any particular standard may result in an undue burden on the agency is a proper focus of inquiry.<sup>5</sup>

As mentioned above, you asked to what extent ITD could waive its accessibility standards. Pursuant to N.D.C.C. § 54-59-09, ITD and the Office of Management and Budget are required to adopt statewide information technology policies, standards, and guidelines. The Chief Information Officer may exempt an agency from compliance with the policies. However, the agency must still comply with the requirements of state and federal law.

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<sup>5</sup> The Electronic and Information Technology Accessibility Standards (“Standards”) define “undue burden” as:

Undue burden means significant difficulty or expense. In determining whether an action would result in an undue burden, an agency shall consider all agency resources available to the program or component for which the product is being developed, procured, maintained, or used.

36 C.F.R. § 1194.4. The commentary to the Standards elaborates, stating:

Because available financial resources vary greatly from one agency to another, what constitutes an undue burden for a smaller agency may not be an undue burden for another, larger agency having more resources to commit to a particular procurement. Each procurement would necessarily be determined on a case-by-case basis. Because a determination of whether an action would constitute an undue burden is made on a case-by-case basis, it would be inappropriate for the [Access] Board to assess a set percentage for the increased cost of a product that would be considered an undue burden in every case.

65 Fed. Reg. 80500, 80506 (Dec. 21, 2000) (commentary to 36 C.F.R. § 1194.4).

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In my opinion, in order for the State to ensure that it is meeting its obligations under the ADA, the Human Rights Act and in fulfilling the assurances that have been made as part of the assistive technology grants, ITD should require all agencies to comply with generally accepted accessibility standards as outlined in ITD policy unless doing so would impose an undue burden on the agency. Whether the application of the accessibility standards would cause an undue burden is largely a factual question that must be addressed by the head of the agency (as opposed to ITD) on a case-by-case basis.

Sincerely,

Wayne Stenehjem  
Attorney General

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