August 2024

ACCESS FOR ALL: NEW ACCESSIBILITY RULES FOR PUBLIC ENTITIES

Overview of New Accessibility Requirements for Web and Mobile Applications for Public Entities, Including Colleges and Universities

Judith Sebesta

Sebesta Education Consulting

A publication of:

wcet

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EXECUTIVE SUMMARY

Public entities (including public colleges and universities) will be subject to strict regulatory requirements where none currently exist for serving individuals with disabilities using web or mobile content. This brief updates you on the coming requirements and the compliance timeline.

The Department of Justice recently issued its final rule revising the regulation implementing Title II of the Americans with Disabilities Act. The new regulation establishes specific requirements, including the adoption of specific technical standards, for making accessible the services, programs, and activities offered by state and local government entities to the public through the web and mobile applications. This rule, which at this time covers only **public** universities and colleges, went into effect on June 24, 2024, with compliance expected in the next two to three years, depending on the size of the total population the institution serves.

WCET has prepared this brief, *Access for All: New Accessibility Rules for Public Entities,* to assist institutions in their compliance efforts. This brief summarizes the rule and highlights key takeaways applicable to institutions of higher education, including:

- Nearly all digital material hosted by a public college or university will need to be compliant, including course content that is password protected.
- Public colleges and universities are responsible for ensuring that all contractual, licensed, or third-party services meet the accessibility requirement.
- Although there are five exceptions outlined in the rule, they are extremely narrow and likely require a significant amount of effort to implement.
- Institutions have until either April 24, 2026, or April 26, 2027, to comply, depending on the size of the total population they serve ("population" refers to the residents of the state or district that the public entity serves. For colleges and universities, this does *not* refer to the enrollment of the institution).
- Although this rule applies only to public institutions, additional regulations governing private colleges and universities may be forthcoming. For example, the Department of Education may issue additional web accessibility regulations under Section 504 of the Rehabilitation Act, which would apply to all higher education institutions that receive federal funds and likely align with these Title II regulations.

Additionally, we created a flowchart highlighting key questions to guide an institution's processes to ensure compliance. WCET will continue to provide resources, like this brief, to member institutions to support understanding of and compliance with these new regulations.

About the Author

Judith Sebesta is the founder and principal at Sebesta Education Consulting LLC, assisting higher education institutions, organizations, and agencies with innovation and transformation to support student success. She currently supports projects related to accessibility, transfer, artificial intelligence, and open education/zero textbook cost degrees. Judith has spent over 25 years in higher education as a faculty member, academic administrator, policymaker, analyst, and researcher and is based in Austin, TX.

Acknowledgments

WCET and SAN would like to thank the following people for their assistance with this report:

- **Emilie Cook,** Manager, Digital Marketing & Communications, Every Learner Everywhere, WCET
- **Van L. Davis**, Chief Strategy Officer, WCET
- **Lindsey Downs**, Assistant. Director, Content & Community, WCET
- **Cheryl Dowd**, Senior Director, SAN & WCET Policy Innovations
- **Joseph Garcia,** Graphic Designer, WICHE
- **Russ Poulin,** Executive Director of WCET & Vice President for Technology-Enhanced Education, WICHE
- The staff of WebAIM:
  - **Rob Carr, Jr**., Strategic Accessibility Coordinator, WebAIM
  - **Cynthia Curry**, Associate Director, Institute for Disability Research, Policy, and Practice, Utah State University
  - **Jared Smith**, Executive Director, WebAIM

About WCET

WCET is the leader in the practice, policy, & advocacy of digital learning in higher education. We are a member-driven organization that brings together colleges, universities, higher education organizations, and companies to collectively improve the quality and reach of digital learning programs.

About SAN

Since 2011, SAN, a division of WCET, has been the leader for guidance and support for navigating regulatory compliance for out-of-state activities of post-secondary institutions. SAN (the State Authorization Network) serves institutions and organizations nationwide through training, support, and other opportunities.

Access for All: New Accessibility Rules for Public Entities

Overview of new accessibility requirements for web and mobile applications for public entities, including colleges and universities

OVERVIEW

On June 24, 2024, the Department of Justice (DOJ) issued its final rule revising the regulation implementing Title II of the Americans with Disabilities Act (ADA). The new regulation establishes specific requirements, including the adoption of specific technical standards, for making accessible the services, programs, and activities offered by state and local government entities to the public through the web and mobile applications.

What is included: Nearly all digital material hosted by a university or college will need to be compliant, including web content that is password protected.

Some exceptions include:

- archived web content for recordkeeping or reference that has not been updated since the compliance date,
- pre-existing social media posts, and,
- content posted to an institution's website or mobile app by third parties, unless those parties have a contract, license, or arrangement to post to institutional websites.

These exceptions are, in reality, extremely narrow and would likely require a significant amount of effort to implement.

Effective date: This rule became effective June 24, 2024.

Compliance dates: A public entity, other than a special district government, with a total population of 50,000 or more shall begin complying with this rule April 24, 2026. A public entity with a total population of less than 50,000 or any public entity that is a special district government shall begin complying with this rule April 26, 2027. Note: "Population" refers to the residents of the state or district that the public entity serves. For colleges and universities, this does not refer to student enrollment of the institution. Instead, it refers to those the institution supports. For example, a community college would count the number of people in its district or community.

WHO

This revised regulation was issued by the Civil Rights Division of the DOJ. It covers any public (state and local government) entity that offers "services, programs, and activities . . . through the web and mobile applications." Although currently the rule only applies to **public** universities and colleges, we anticipate further regulations by the DOJ under Title III of the ADA. Title III prohibits discrimination against people with disabilities in places of public accommodation, including any privately operated entity that affects commerce, which would then extend to private higher education institutions.

Although this rule applies only to public institutions, additional regulations governing private colleges and universities may be forthcoming soon.

Entities still have their existing obligations under Title III. Both the DOJ and the Department of Education have stated clearly that they believe web accessibility falls under Title III (see Guidance on Web Accessibility and the ADA for more information). Additionally, the Department of Education may issue web accessibility regulations under Section 504 of the Rehabilitation Act, which would apply to all higher education institutions that receive federal funds. These will likely align with the Title II regulations.

WHAT

Overview & Background

This rule adds a new subpart (H) to the Title II ADA regulation, 28 CFR part 35, that sets forth technical requirements for ensuring that web content and mobile apps that state and local government entities, including public universities and colleges, provide or make available, directly or through contractual, licensing, or other arrangements, are readily accessible to and usable by individuals with disabilities. The rule applies one consistent standard to both web content and mobile apps (including social media platforms) to ensure clarity and reduce confusion. Additionally, the rule preempts state laws affecting entities subject to the ADA only to the extent that those laws provide less protection for the rights of individuals with disabilities.

The rule emphasizes that public entities have a responsibility to comply with their ADA obligations even when their services, programs, or activities are being offered through contractors (e.g., LMS, institution mobile app, content from publishers, YouTube videos, social media). The expectation is that entities can choose to work with providers who can ensure accessibility. Public entities can also include contract stipulations that ensure accessibility in third-party services.

See Appendix for a flowchart to make decisions on whether action is needed on each instance of web or mobile app content.

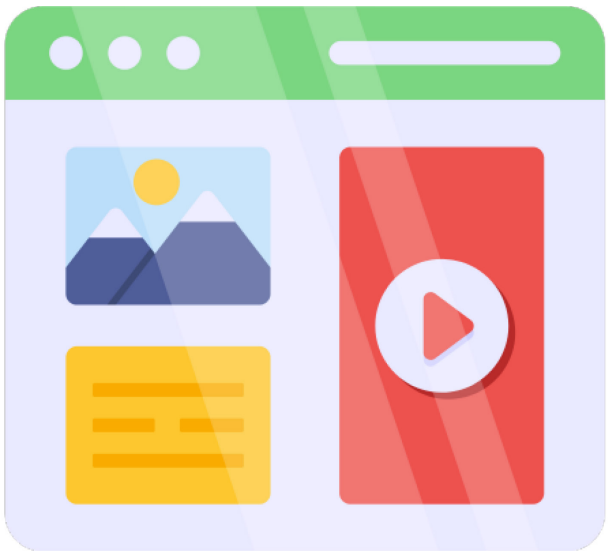
The rule came about, in part, as a recognition of the increasing reliance on web and mobile content as well as the challenges, such as lack of independence and privacy, that can stem from accessibility barriers to this content. Additionally, the rule recognizes that accessible digital spaces benefit everyone. Finally, voluntary compliance with accessibility guidelines has not resulted in equal access for individuals with disabilities; accordingly, organizations urged the Department to take regulatory action to ensure web content and mobile app accessibility. According to the Department of Justice, this rule is necessary to help public entities understand how to ensure that individuals with disabilities will have equal access to the services, programs, and activities that public entities provide or make available through their web content and mobile apps.

Web content is defined as the information and sensory experience to be communicated to the user by means of a user agent (e.g., a web browser). This includes text, images, sounds, videos, controls, animations, and conventional electronic documents, as well as code or markup that defines the content's structure, presentation, and interactions. Subpart H also sets forth technical requirements for ensuring the accessibility of mobile apps that a public entity provides or makes available, directly or through contractual, licensing, or other arrangements.

> Web content includes information and sensory experiences meant to be communicated to a user by means of a user agent (e.g., a web browser)

This rule also covers mobile apps because public entities often use these to offer their services, programs, or activities to the public.

The Department adopts an internationally recognized accessibility standard for web access; thus, this rule requires that public entities comply with the standard WCAG 2.1 Level AA success criteria and conformance requirements (including for captioning). Public entities could choose to comply by conforming their web content to WCAG 2.2 Level AA instead because WCAG 2.2 Level AA provides substantially equivalent or greater accessibility and usability as compared to WCAG 2.1 Level AA.



Costs

Requiring state and local government entity (including public colleges and universities) web content and mobile apps to conform to WCAG 2.1 Level AA will result in costs to remediate and maintain their web content and mobile apps to meet this standard. The Department predicts that these costs include one-time costs for familiarization with the requirements of the rule; testing, remediation, and operating and maintenance ("O&M") costs for websites; testing, remediation, and O&M costs for mobile apps; and course content remediation costs. The remediation costs include both time and software components.

The costs for each government entity type and size are generally estimated to be below 1 percent of revenues (the one exception is small independent community colleges, for which the cost-to-revenue ratio is estimated to be slightly higher at 1.05 percent - 1.10 percent). The rule states that "Comparing annualized costs and benefits, monetized benefits to society outweigh the costs" (34). However, it is our opinion that the actual costs likely will exceed these estimates. For more information on estimated costs for higher education, see the relevant column in Tables 3-8 in the rule on pp. 36-28. Community college costs are disaggregated in Tables 13-15 on pp. 42-43 of the rule.

Education

The rule specifically discusses some aspects related to educational contexts. For example, it recognizes that educational entities have obligations to comply with other laws imposing affirmative obligations regarding individuals with disabilities, including the Department of Education's regulations implementing the Individuals with Disabilities Education Act ("IDEA") and section 504 of the Rehabilitation Act. This final rule builds on and does not supplant those preexisting requirements. A public entity must continue to meet all of its existing obligations under other laws.

It also recognizes that public entities use websites as an integral part of public education. Public schools at all levels, including colleges and universities, offer programs, reading material, and classroom instruction through websites, including learning management systems. Most postsecondary institutions rely heavily on websites and other online technologies in the application process for prospective students; for housing eligibility and on-campus living assignments; for course registration and assignments; and for a wide variety of administrative and logistical functions in which students must participate.

Public colleges and universities are responsible for contractual, licensed, or third party services meeting the accessibility requirement.

When public entities act through third parties using contractual, licensing, or other arrangements, they are not relieved of their obligations under this rule. When public educational institutions arrange for third parties to post educational content on their behalf, public entities will still be responsible for the accessibility of that content under the ADA.

A few examples of third-party services include, but are not limited to:

- learning management systems,
- social media platforms, and,
- textbook/resource publishers.

The rule treats digital textbooks, including ePUBs, the same as all other educational course materials. The rule is *not* intended to interpret or clarify issues related to intellectual property law.

In addition to the exceptions listed below, see pp. 191-215 of the rule for a discussion, including public comments, of proposed and final exceptions for accessibility of course content at public educational entities. In general, the Department does not believe it is appropriate to be overly prescriptive with respect to the procedures that institutions must follow to comply with this rule.

Exceptions

The DOJ aimed to craft these regulations with an eye toward providing exceptions for content that would be less commonly used by members of the public and would be particularly difficult for public entities to make accessible quickly. However, it is important to understand that these exceptions are extremely narrow in scope. Where potentially applicable, they likely would require substantial work (particularly for archived web content, including course content) to be covered by the following exceptions.

There are five exceptions from compliance with the technical standard:

1. **Archived web content** that is not currently used. Information may be outdated, not needed, or repeated somewhere else. Web content that meets **all four** of the following would not need to meet WCAG 2.1, Level AA:
    - The content was created before the date the state or local government must comply with this rule, or reproduces paper documents or the contents of other physical media (audiotapes, film negatives, and CD-ROMs for example) that were created before the government must comply with this rule; **and**,
    - the content is kept only for reference, research, or recordkeeping; **and**,
    - the content is kept in a special area for archived content; **and**,
    - the content has not been changed since it was archived.
2. **Pre-existing conventional electronic documents**, such as word processing, presentation, PDF, or spreadsheet files, unless such documents are currently used to apply for, gain access to, or participate in the public entity's services, programs, or activities.
3. **Content posted by a third party**, unless the third-party posts due to contractual, licensing, or other arrangements with the public entity. If the third party is not controlled by, or acting for, state or local governments, content posted by the party on a state or local government's website or mobile app would not need to meet WCAG 2.1, Level AA. Additionally, where a public entity *links* to third-party content but the third-party content is truly unaffiliated with the public entity and not provided on behalf of the public entity due to contractual, licensing, or other arrangements, the linked content falls outside the scope of this rule. The public entity would still need to ensure the links *themselves* are accessible, but not the unaffiliated linked third-party content.
4. **Individualized documents that are password-protected**, i.e., conventional electronic documents that are word processing, presentation, PDF, or spreadsheet file; about a specific individual, their property, or their account; and that are password-protected or otherwise secured (there may be some overlap between the content covered by the archived web content exception and this exception).
5. **Preexisting social media posts** made by an institution before the date the institution must comply with this rule, do not need to meet the WCAG 2.1, Level AA standard.

With one limited special case, password-protected content is no longer covered as an exception under this rule.

Note that authoring tools, embedded content, and other similar functions provided by the public entity that facilitate third-party postings are not covered by the third-party exception above (which the Department emphasizes is extremely narrow) and must be made accessible.

If **one** of these exceptions applies, then the public entity's web content or content in mobile apps that is covered by an exception would not need to comply with the rule's technical standard. However, even if certain content does not have to conform to the technical standard, public entities still need to ensure that their services, programs, and activities offered using web content and mobile apps are accessible to individuals with disabilities on a case-by-case basis in accordance with their existing obligations under Title II of the ADA.

The Department declined to include an exception to this rule for password-protected course content, except for the limited exception described above. Password-protected course content will be treated like any other content and public educational institutions will generally need to ensure that that content complies with WCAG 2.1 Level AA starting two to three years after the publication of the final rule depending on the total population (see definition below).

Conforming Alternate Versions

The rule contains a series of other mechanisms designed to make it feasible for public entities to comply with the rule. The rule makes clear the limited circumstances in which “conforming alternate versions” of web content, as defined in WCAG 2.1, can be used as a means of achieving accessibility. As WCAG 2.1 defines it, a conforming alternate version is a separate version of web content that is accessible, up to date, contains the same information and functionality as the inaccessible web content, and can be reached in particular ways, such as through a conforming page or an accessibility-supported mechanism.

Conforming alternate versions are permissible only when it is not possible to make web content directly accessible due to technical or legal limitations. The Department reiterates that although public educational institutions, like all other public entities, will only be able to provide conforming alternate versions in lieu of directly accessible versions of web content under the circumstances specified in the rule, nothing prevents a public educational institution from providing a conforming alternate version in addition to the accessible main version of its web content. However, these can be *very* challenging to maintain.

The rule also allows a public entity flexibility to show that its use of other designs, methods, or techniques as alternatives to WCAG 2.1 Level AA provides substantially equivalent or greater accessibility and usability of the web content or mobile app. Nothing in the rule prohibits an entity from going above and beyond the minimum accessibility standards this rule sets out. And nothing prevents a public entity from using designs, methods, or techniques as alternatives to those prescribed in the regulation, provided that such alternatives result in substantially equivalent or greater accessibility and usability.

WHEN

This rule is effective June 24, 2024.

In recognition of the challenges that small public entities may face with respect to resources for implementing the new requirements, the DOJ has staggered the compliance dates for public entities according to their *total population*.

Total population means the population estimate for that public entity as calculated by the United States Census Bureau in the most recent census. (See p. 51 of the rule for more information.)

ENTITY DEFINITIONS

Large Entities (by total population, not entity population) - Beginning **April 24, 2026**, a public entity, other than a special district government, with a total population of 50,000 or more must ensure compliance with this regulation.

Small Entities (by total population, not entity population) - Beginning **April 26, 2027**, a public entity with a total population of less than 50,000 or any public entity that is a special district government must ensure compliance.

Depending on your state, a community college may or may not be considered a special district government. For both, the college or university must comply unless the public entity can demonstrate that compliance with this section would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.

The Department recognizes that some public entities, like libraries or public colleges and universities, do not have population data associated with them in the most recent decennial Census conducted by the United States Census Bureau. Therefore, if a public entity, other than a special district government or an independent school district, does not have a population calculated by the United States Census Bureau in the most recent decennial Census, but is an instrumentality or a commuter authority of one or more state or local governments that do have such a population estimate, the population of the entity is determined by the **combined population of any state or local governments of which the public entity is an instrumentality or commuter authority.**

Population for educational entities is determined not by the size of those entities' student bodies, but rather by Census-calculated total population of the jurisdiction in which the institution is located and that it serves.

Note that the total population of a public entity is *not* defined by the population that is eligible for or that takes advantage of the specific services of the public entity.

For example, a public state university located in a town of 20,000 within a state with a population of 5 million would be considered a large public entity because it is an instrumentality of the state. However, a county community college in the same state where the county entity that oversees the college has a population of 35,000 would be considered a small public entity because the community college is an instrumentality of the county.

In public comments, some public educational entities seemed to mistakenly believe that their populations would be calculated based on the size of their student bodies. These institutions suggested that it would be difficult for them to calculate their population size under that approach because they have multiple campuses in different locations. To clarify, population size for educational entities is determined *not* by the size of those entities' student bodies, but rather by reference to the Census-calculated total population of the jurisdiction in which the educational entity is an instrumentality.

COMPLIANCE

As explained in the rule, there are limited circumstances in which a public entity that is not in full compliance with the technical standard will be deemed to have met the requirements. A public entity will be deemed to have satisfied its obligations if the public entity can demonstrate that any non-conformance to the technical standard has a minimal impact on access and would not affect the ability of individuals with disabilities to use the public entity's web content or mobile app to:

- access the same information; and
- engage in the same interactions; and
- conduct the same transactions; and
- otherwise participate in or benefit from the same services, programs, and activities as individuals without disabilities, in a manner that provides substantially equivalent timeliness, privacy, independence, and ease of use.

Additionally, conformance to WCAG 2.1 Level AA is not required under Title II of the ADA to the extent that such conformance would result in a fundamental alteration in the nature of a service, program, or activity of the public entity or in undue financial and administrative burdens.

If a public entity believes that a proposed action would fundamentally alter a service, program, or activity or would result in undue financial and administrative burdens, the public entity has the burden of proving that compliance would result in such an alteration or burden.

The decision that compliance would result in such an alteration or burden must be made by the head of the public entity or their designee after considering all resources available for use in the funding and operation of the service, program, or activity.

The decision must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with the accessibility standard would result in such an alteration or burden, a public entity must take any other action that would not result in such an alteration or burden but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity.

After the compliance date, ongoing compliance is required. The consequences for non-compliance are currently unclear within the rule; however, potential consequences could be included in additional regulations anticipated from the Department of Education. The Department has issued a small entity compliance guide, which should help some public educational institutions better understand their obligations under this rule. The DOJ also has an ADA Information Line through which it answers questions callers may have about the new rule.

Resources

WCET Accessibility Rule Decision-Making Flowchart

Accessibility of Web Content and Mobile Apps Provided by State and Local Government Entities: A Small Entity Compliance Guide

ADA Fact Sheet: New Rule on the Accessibility of Web Content and Mobile Apps Provided by State and Local Governments

ADA Information Line

Guidance on Web Accessibility and the ADA

Definitions

Archived web content: Web content that was created before the date the public entity is required to comply with this rule, reproduces paper documents created before the date the public entity is required to comply, or reproduces the contents of other physical media created before the date the public entity is required to comply. Second, the web content is retained exclusively for reference, research, or recordkeeping. Third, the web content is not altered or updated after the date of archiving. Fourth, the web content is organized and stored in a dedicated area, or areas clearly identified as being archived.

Conventional electronic documents: Web content or content in mobile apps that is in the following electronic file formats: portable document formats, word processor file formats, presentation file formats, and spreadsheet file formats.

Mobile apps: Software applications that are downloaded and designed to run on mobile devices, such as smartphones and tablets.

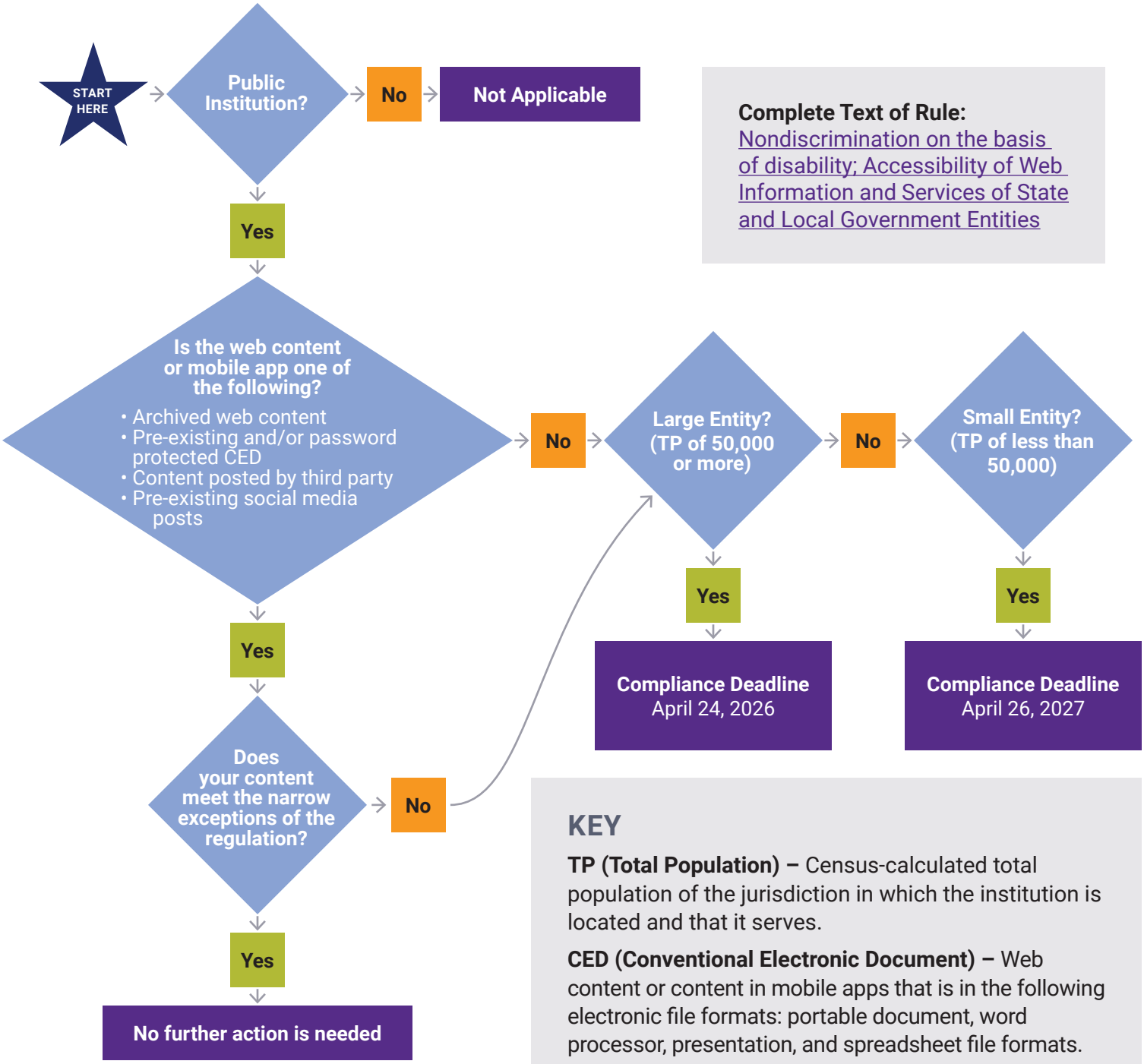
Special district government: A public entity—other than a county, municipality, township, or independent school district—authorized by State law to provide one function or a limited number of designated functions with sufficient administrative and fiscal autonomy to qualify as a separate government and whose population is not calculated by the United States Census Bureau in the most recent decennial Census or Small Area Income and Poverty Estimates.

Total population: If a public entity has a population calculated by the United States Census Bureau in the most recent decennial Census, the public entity's total population as defined in this part is the population estimate for that public entity as calculated by the United States Census Bureau in the most recent decennial Census.

Web content: The information and sensory experience to be communicated to the user by means of a user agent (web browsers, media players, plug-ins, and other programs—including assistive technologies—that help in retrieving, rendering, and interacting with web content) including code or markup that defines the content's structure, presentation, and interactions.

Accessibility of Web Information and Service of State and Local Government Entities

DECISIONS TO BE MADE FOR EACH WEB OR MOBILE APP CONTENT



Complete Text of Rule:
Nondiscrimination on the basis of disability; Accessibility of Web Information and Services of State and Local Government Entities

KEY

TP (Total Population) – Census-calculated total population of the jurisdiction in which the institution is located and that it serves.

CED (Conventional Electronic Document) – Web content or content in mobile apps that is in the following electronic file formats: portable document, word processor, presentation, and spreadsheet file formats.

Text Version of Flowchart: Accessibility of Web Information and Service of State and Local Government Entities Decisions to Be Made for Each Web Or Mobile App Content

Start Here

I. Public Institution?
   a. No – Not Applicable
   b. Yes – Is the web content or mobile app one of the following?
      i. Archived web content
      ii. Pre-existing and/or password protected CED
      iii. Content posted by third party
      iv. Pre-existing social media posts
         - Yes – Does the content meet the narrow exceptions of the regulation?
            - Yes – No further action is needed.
            - No – Large Entity? (TP of 50,000 or more)
               i. Yes – Compliance Deadline April 24, 2026
               ii. No – Small Entity?
                  1. Yes – Compliance Deadline April 26, 2027.
         - No - – Large Entity? (TP of 50,000 or more)
            - Yes – Compliance Deadline April 24, 2026
            - No – Small Entity?
               i. Yes – Compliance Deadline April 26, 2027.

Key

TP (Total Population) – Census-calculated total population of the jurisdiction in which the institution is located and that it serves.

CED (Conventional Electronic Document) – Web content or content in mobile apps that is in the following electronic file formats: portable document, word processor, presentation, and spreadsheet file formats.

Complete Text of Rule: Nondiscrimination on the basis of disability; Accessibility of Web Information and Services of State and Local Government Entities