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Via E-mail

Legends of Learning, Inc.

Re: Accessibility of Legends of Learning, Inc.'s Platform

Dear Legends of Learning, Inc.:

I. INTRODUCTION

You have asked us to provide an opinion on whether the Legends of Learning, Inc. ("Legends of Learning" or "Legends") platform of innovative, educational video games offered to public school districts complies with the Americans with Disabilities Act ("ADA"), Section 504 of the Rehabilitation Act of 1973 ("Section 504"), and the Web Content Accessibility Guidelines ("WCAG") 2.0, where the nature of the video games may preclude incorporation of accessible features, and equivalent educational content is provided in an alternative digital format.

The ADA and Section 504 prohibit public school districts from discriminating against students with disabilities. The U.S. Departments of Education and Justice have interpreted this prohibition to extend to digital content on websites, learning management systems, and with regard to other electronic and information technology. The plain language of the ADA, Section 504, and applicable regulations does not address accessibility of online content or mention WCAG 2.0. However, through enforcement actions, the regulatory process, and litigation, the government has taken the position that where applicable, conformance with the WCAG 2.0 guidelines at Levels A and AA is expected for ADA and Section 504 compliance.

Notably, *Dear Colleague Letters* issued by the Departments of Education and Justice make clear that schools are not always required to provide students with disabilities with the same technology used by students without disabilities. The government recognizes that in some instances, such as with respect to students who are blind or have low vision, accessible technology may not exist. When this occurs, schools are permitted to offer students an alternative that provides access in a timely, equally effective, and equally integrated manner. Schools also are not required to make accommodations that would constitute a fundamental alteration of the nature of a product or that would create an undue financial or administrative burden.

Here, Legends of Learning distributes to public school districts educational video games that have a number of embedded accessibility features, such as text alternatives for audio content and

navigability through use of iPads and other tablets. As such, many students with sensory impairments, particularly students who are deaf or hard of hearing and students with mobility impairments that prevent them from using a mouse, may participate in a substantially equivalent manner when compared to their peers without disabilities. For a small number of students with disabilities, specifically students who are blind or have low vision, fully accessible video games, such as those distributed by Legends of Learning, do not exist or could be created only at significant expense and by fundamentally altering the nature of existing games. The government has not interpreted Section 504 and the ADA to require the creation of a new, substantially equivalent digital product where one does not exist, and where it may not be technologically feasible to do. The ADA also is clear that covered entities are not required to fundamentally alter the nature of products or make accommodations that would create undue financial or administrative burdens. Despite this, Legends of Learning makes available to school districts engaging, educational podcasts that provide timely, equivalent content in a digital format that provides similar access for students who are blind or have low vision. The podcasts may be enjoyed by all students, including auditory learners and others who may benefit from additional reinforcement of content.

Ultimately, we believe based upon our review of court cases, enforcement actions, and regulatory guidance, and our experience with the statute, including Olabisi L. Okubadejo's experience as a supervisory attorney at the U.S. Department of Education's Office for Civil Rights where she enforced the ADA and Section 504 for over six and one half years[1], that Legends of Learning's platform of online video games is consistent with existing guidance under Section 504 of the Rehabilitation Act and Title II of the ADA, which the government has interpreted to include the WCAG 2.0 Level AA conformance standards.

Below is a more detailed discussion of Legends of Learning and its products, applicable legal and regulatory standards, significant agency actions and court cases, and our analysis of the applicability of Section 504 and the ADA to the video games at issue.

II. BACKGROUND

Legends of Learning creates online educational video games (the "Games") that provide schools with grade-appropriate content designed based upon state and national curriculum standards. The games are created for children in grades K-12, with content in subjects such as English, mathematics, social studies, and science. As of the date of this memorandum, content is available in a variety of science subjects for middle school students. The Games utilize characters and other game mechanics to illustrate and convey educational principles, and are designed to enhance student engagement, retention, and comprehension. The Games are made available on a platform from which teachers

[1] As a supervisory attorney at OCR, Ms. Okubadejo directly investigated and oversaw investigations of disability discrimination under the ADA and Section 504 involving school districts and postsecondary institutions. Ms. Okubadejo also oversaw ADA and Section 504 investigations involving emerging technology such as the Kindle and Nook, which are referenced in the *Dear Colleague Letters* below.

select the games most appropriate for individual students. Once the teachers' selections are made, the games are made available to students.

Many of the Games incorporate accessible features that facilitate use with a range of student populations. For instance, Games generally include text equivalents for audio content, which would make Games accessible to deaf and hard of hearing student populations. Games also are designed to work with iPads and similar devices, many of which provide built-in accessible features to users. Legends has also made available as an accommodation, equivalent content through podcasts. The podcasts may be accessed on tablet devices that have accessible menus and navigation tools. The podcasts provide flexibility for students with different learning styles and ensure that all students have access to similar educational content, regardless of disability status.

III. RELEVANT LEGAL, AGENCY, AND OTHER STANDARDS

The ADA and Section 504

Local educational agencies are covered by Title II of the ADA and Section 504 of the Rehabilitation Act. These laws are enforced by the Office for Civil Rights (OCR) within the U.S. Department of Education; the U.S. Department of Justice also has jurisdiction over Title II of the ADA. Title II of the ADA applies to public entities, in particular state and local entities, while Section 504 applies to recipients of federal financial assistance. Both laws prohibit public school districts from discriminating against students with disabilities in educational programs and activities. OCR and the DOJ interpret in a consistent manner the prohibition against disability discrimination under Title II and Section 504.

Title II of the ADA prohibits discrimination against individuals with disabilities *by state and local entities*, including school districts, and states at 42 U.S.C. § 12132:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Section 504 prohibits discrimination against individuals with disabilities *by entities receiving federal funding*, and states at 29 U.S.C. § 794:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance

Applicability of the ADA and Section 504 to Digital Content

The plain language of the ADA and Section 504 does not state that either statute applies to the websites or electronic and information technology of covered entities. Nevertheless, OCR and the DOJ have taken the position, through enforcement actions, that the ADA and Section 504 apply to websites, online course materials, and other electronic and information technology. Some of the most significant of these governmental actions are discussed in Section IV below.

In June 2010, the DOJ issued an advance notice of proposed rulemaking, stating that it was considering revising the federal regulations implementing the ADA to include internet websites as places of public accommodation under Titles II (covering public entities) and III (covering private entities). The DOJ issued the advance notice of proposed rulemaking[2] to receive public comment and feedback on the issue.

Aside from pointing to the ubiquitous explosion of the internet after the enactment of the ADA, the DOJ focused on the goods and services offered over the internet in educational settings, ranging from online courses to online registration. It noted that even in the elementary and middle school settings teachers are increasingly using the internet for day to day functions. Because of the internet's constant presence in daily life, the DOJ is considering amending the ADA regulations to require that private and public entities providing goods and services over the internet make their websites accessible to individuals with disabilities under the ADA's legal framework.

The DOJ noted that the circuits are split on the applicability of the ADA to websites. Some courts like the First Circuit hold that a physical structure is not required to trigger Title III public accommodations protections, while others like the Ninth Circuit require a connection between the service offered and a physical location. Because of the inconsistent judicial authority on the matter, the DOJ found it necessary to seek public comment on what regulatory standards would be appropriate under Titles II and III to ensure web access to individuals with disabilities while at the same time not hampering technological advancement.

After years of delay, the DOJ issued a supplemental advance notice of rulemaking (SANPRM) on May 9, 2016, requesting public comment on over a hundred questions relating to its proposed website accessibility regulations.[3] Although the proposed regulations in the SANPRM only relate to Title II (public entities), any regulations thereunder would have a direct impact on future Title III regulations. The SANPRM indicated that the standard under the proposed regulations will likely be conformance to the WCAG 2.0 AA standard. The SANPRM states that the DOJ is also considering issuing regulations regarding the accessibility of mobile applications, which currently would not be covered under the definition of "web content" because they are software based. The SANPRM

[2] https://www.gpo.gov/fdsys/pkg/FR-2010-07-26/pdf/2010-18334.pdf

[3] https://www.gpo.gov/fdsys/pkg/FR-2016-05-09/pdf/2016-10464.pdf

discussed the difference between web content and software and solicited several comments on what accessibility standard should apply to the latter.

The Web Content Accessibility Guidelines (WCAG), developed by the World Wide Web Consortium (WC3), are the leading accessibility guidance and standards for digital content. The WCAG 2.0 consists of twelve guidelines grouped into four categories of ensuring that digital content is perceivable, operable, understandable, and robust. There are 61 testable criteria relating to the guidelines to determine compliance.

In July 2016, the DOJ issued a supplemental notice on the proposed regulations, stating that the comment period for Title II website accessibility would be extended two months until October 2016, which as a result, will further delay the timeline for Title III website accessibility rulemaking proposals into 2018.[4] Therefore, regulations relating to Title II or III online content accessibility are still in the early stages but are reportedly forthcoming. As of the date of this memorandum, it is unclear where this issue will fall on the DOJ's list of regulatory priorities for the new administration.

Affirmative Defenses

A covered entity is not required to provide a desired accommodation to an individual with a disability where the accommodation would "fundamentally alter the nature of the good or service" or that it would "result in an undue burden." 42 U.S.C. § 12182(b)(2)(A)(iii). In a 2015 resolution agreement with the University of Phoenix, OCR stated that when fundamental alteration or undue burden defenses apply, the educational institution is required to provide equally effective alternative access that "do not result in a fundamental alteration or undue financial and administrative burdens, but nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the same benefits or services as their nondisabled peers. To provide equally effective alternate access, alternates are not required to produce the identical result or level of achievement for persons with and without disabilities, but must afford persons with disabilities equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs."

A. Fundamental Alteration

The federal regulations implementing Title II provide that a public entity is not required to take action to make a good or service accessible if the entity "can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. § 35.164. Under this standard, a "modification to 'an essential aspect' of the program constitutes a 'fundamental alteration' and, therefore, is an unreasonable accommodation." *Halpern v. Wake Forest Univ. Health Sciences*, 669 F.3d 454, 464 (4th Cir. 2012) (citing *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 682–83 (2001)).

[4] https://www.gpo.gov/fdsys/pkg/FR-2016-07-29/pdf/2016-18003.pdf

The case law analyzing the "fundamental alteration" defense regarding websites is limited, though the Supreme Court took occasion to analyze the defense in analyzing whether a disabled professional golf player using a golf cart would fundamentally alter the nature of the tournament. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 665 (2001). The Court assessed whether using a golf cart would be inconsistent with the character of the game, cause an unfair competitive advantage, or alter an essential aspect of the game in finding for the plaintiff. *Id.* at 683.

B. Undue Burden

With regard to the undue burden defense, there is little case law guidance relating to website and internet accessibility, there are cases that provide instructive guidance on factors used in analyzing this defense.

Courts have looked at factors such as the difficulty and expenses of the modification, whether the modification would affect the nature of the theater or any defining characteristics, and how the modification would impact its competitiveness. *Gathright-Dietrich v. Atlanta Landmarks, Inc.*, 452 F.3d 1269, 1275 (11th Cir. 2006) (finding it would be an undue burden on defendant-theater to add accessible seating in addition to the accessible seating it already provided).

When the burden asserted is financial, courts look at the nature and cost of the modification, the financial resources of the defendant, the number of persons employed by the defendant, and the effect the modification would have on expenses and resources. *Roberts By & Through Rodenberg-Roberts v. KinderCare Learning Centers, Inc.*, 896 F. Supp. 921, 926 (D. Minn. 1995), *aff'd*, 86 F.3d 844 (8th Cir. 1996) (finding it would be an undue burden on daycare service to provide one-on-one care for disabled child). If the requested modification would economically endanger the violability of the business, it is an undue burden. *Emery v. Caravan of Dreams, Inc.*, 879 F. Supp. 640, 644 (N.D. Tex. 1995) (citing *New Mexico Ass'n For Retarded Citizens v. New Mexico*, 678 F.2d 847 (10th Cir.1982)).

Although these cases do not relate to the undue burden defense being used relating to website accessibility, they highlight the type of factors courts will use in assessing whether a defendant would in fact be unduly burdened by the accessibility modification sought.

IV. ADMINISTRATIVE ACTIONS ON ONLINE AND DIGITAL CONTENT ACCESSIBILITY

Significant Regulatory Guidance Documents

With the increasing use of technology in schools, OCR and the DOJ have focused on the applicability of the ADA and Section 504 to emerging and other technology in schools. In 2010, OCR and the DOJ issued a joint *Dear Colleague Letter*[5] regarding the emerging use of electronic book readers in classrooms, many of which lacked accessible test-to-speech functions such that

[5] https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100629.html

individuals who are blind or have low vision could not use them. Following national interagency complaints filed by disability rights advocacy groups, OCR and the DOJ issued the 2010 *Dear College Letter* in which the agencies took the position that requiring the use of these inaccessible devices in the classroom would constitute discrimination under the ADA and Section 504 unless the individuals with disabilities are provided a modification that allows them to equally enjoy the benefits of the technology.

The *Dear College Letter* discusses settlements that the government entered into with certain postsecondary educational institutions that used the Kindle DX, an inaccessible electronic book reader, in the classroom. The schools agreed not to purchase, require, or recommend use of the device, or any similar device, unless it is fully accessible to visually impaired individuals or a reasonable accommodation is provided so that individuals with disabilities can enjoy the same services with substantially equivalent ease of use. The *Dear Colleague Letter* states that it is unacceptable for schools to use emerging technology without insisting that it is accessible to all students. Given technological advances, the *Dear Colleague Letter* took the position that procuring electronic book readers that are accessible should not be costly or difficult to accomplish.

The next year, OCR clarified in a 2011 *Dear Colleague Letter*[6] that schools at all levels must ensure equal access to the educational benefits afforded by technology in the classroom and explained that compliance does not always mean that students with disabilities receive access to the same technology. In conjunction with the 2011 *Dear Colleague Letter*, OCR issued a Frequently Asked Questions document that answered some of the questions raised by educational institutions following the 2010 *Dear Colleague Letter*.

The government recognizes in its guidance documents special considerations with regard to the accessibility of emerging technology to students who are blind or have low vision. OCR explains in its 2011 clarification that students who are blind or have low vision "must be afforded the opportunity to acquire the same information, engage in the same interactions, and enjoy the same services as sighted students" though "this might not result in identical ease of use." Notably, OCR provides the following information in its 2011 guidance document, at page 8 (emphasis in original):

> Q: **Must a school always provide the same form of emerging technology to a student who is blind or has low vision as it provides to all other students?**
>
> A: **No.** The legal duty imposed by Section 504 and Title II is to provide equal opportunity – that is, to provide the student who has a disability with access to the educational benefit at issue in an equally effective and equally integrated manner…

The guidance, on page 6, then explains that in determining whether an educational benefit is provided in an "equally effective and equally integrated manner," schools should consider the following:

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[6] https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201105-ese.html

- The educational opportunities and benefits provided through the use of the technology at issue;

- What the school can do to provide students with disabilities equal access to the educational benefits or opportunities;

- How the educational opportunities and benefits provided to students with disabilities compare with those provided to students without disabilities, specifically:

    - Whether all the educational opportunities and benefits available through use of the technology are equally available to students with disabilities through provision of accommodations or modifications;

    - Whether the educational opportunities and benefits are provided in as timely a manner as those provided to students without disabilities; and

    - Whether it will be more difficult for students with disabilities to obtain the educational opportunities and benefits than it would for students without disabilities.

OCR's guidance also explicitly acknowledges the possibility that accessible technology may not exist. OCR explains on page 5 of its guidance that in situations where accessible technology may not be available, schools should consider the following:

- The educational opportunities and benefits provided through the use of the technology;

- How the technology provides the opportunities and benefits;

- Whether the technology exists in an accessible format;

- Whether inaccessible technology can be modified and, if not, if "a different technological device" is available that would provide "the educational opportunities and benefits in a timely, equally effective, and equally integrated manner."

Selected Enforcement Actions

Over the last few years, OCR has initiated investigations of educational institutions across the country, including virtual educational entities, with regard to the accessibility of websites and digital educational content. OCR generally has concluded these investigations by entering into resolution agreements with educational institutions that require the institutions to comply with WCAG 2.0 or a comparable standard, and to take a number of steps to ensure that digital content is accessible to individuals with disabilities. OCR's requirements in these agreements apply to websites, online learning environments, course management systems, and other electronic and information technology. In these agreements, OCR recognizes that institutions may choose to provide information and services in a different manner, as long as the alternative is equally effective, equally integrated, and provides substantial equivalent ease of use.

The DOJ has taken a similar interest in enforcement of websites and online content of educational institutions, and has entered into a number of settlement agreements and filed statements of interest in civil cases brought by disability rights advocacy groups.

A selection of these enforcement actions are described below.

Virtual Public Charter School Resolution (OCR Resolution Agreement, 2013)[7]

The Virtual Community School of Ohio, an internet-based public charter school serving 1,200 students, entered into a resolution in November 2013 with OCR to ensure compliance with Title II of the ADA and Section 504. OCR found that the school's website and online learning environment was inaccessible to students with disabilities, particularly those who are blind or with low vision. Under the resolution agreement, the school agreed to makes changes to its website and online learning environment so that they are accessible to students with disabilities, including those with visual, hearing, or print disabilities. The agreement does not specifically require WCAG compliance but states that the school must "identify and adopt the specific technical standard(s) it will use to determine whether electronic and information technologies are accessible (e.g., Section 508 of the Rehabilitation Act (Section 508), 29 U.S.C. § 794d, W3C's Web Content Accessibility Guidelines (WCAG), or other standard or combination of standards which will render EIT accessible)."

Harvard and MIT cases (DOJ Statement of Interest, 2016)

The National Association of the Deaf filed two separate civil actions against Harvard University and the Massachusetts Institute of Technology alleging that by not captioning online audio and audiovisual content on their websites, the educational institutions failed to provide equal access to this content in violation of the ADA. *See Nat'l Ass'n of the Deaf v. Harvard Univ.*, 2016 WL 3561622, at *10 (D. Mass. Feb. 9, 2016) (denying Harvard's motion to dismiss plaintiffs' ADA claim because places of public accommodation are not limited to physical locations); *Nat'l Ass'n of the Deaf v. Massachusetts Inst. of Tech.*, No. CV 15-30024-MGM, 2016 WL 6652471, at *1 (D. Mass. Nov. 4, 2016) (denying MIT's motion to dismiss for the same reasons as the court in the Harvard case). The DOJ filed a statement in this case in which it took the position that there is a present obligation under the ADA and Section 504 to provide individuals with disabilities with access to such content.

Both institutions moved to dismiss, arguing that the ADA does not apply to websites or in the alternative, that the action should be stayed until the DOJ issues its final regulations on website accessibility under the ADA. *Id.* The court denied the schools' motions and found that the plaintiffs had sufficiently pled their case that Harvard and MIT discriminated against the deaf and hard of hearing by failing to provide auxiliary aids and services, specifically captioning, to ensure equal access to its online audiovisual content. *Id.* at *10. The court specifically stated that the institutions would still have the chance to prove issues of fact at a later point, such as that providing the desired

[7] http://www2.ed.gov/documents/press-releases/virtual-community-ohio-agreement.doc

auxiliary aids (captioning) would fundamentally alter the nature of the service or serve as an undue burden. *Id.* at *12. (citing 42 U.S.C. § 12182(b)(2)(A)(iii)).

University of California at Berkeley (DOJ Letter of Findings, 2016)[8]

The Civil Rights Division of the DOJ investigated UC-Berkeley for allegations that it violated Title II in offering inaccessible audio and video content to the public, through its YouTube channel, Massive Open Online Courses (MOOCs) and edX learning platform (collectively referred to as the "Online Content"). The DOJ concluded that the university did violate Title II because a significant portion of the Online Content was not accessible to individuals with hearing, vision, or manual disabilities.

Examples of the violations included videos without captions (inaccessible to individuals with hearing disabilities), videos without alternative text (inaccessible to individuals with vision disabilities), documents improperly formatted for screen readers (inaccessible to individuals with vision disabilities), and links that were not keyboard accessible (inaccessible to individuals with vision disabilities). The University's accessibility policy had adopted WCAG 2.0 as its conformance standard for websites and digital content.

The letter summarized the applicable law by stating:

> UC Berkeley is required to take appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others. 28 C.F.R. § 35.160(a)(1). UC Berkeley is also required to furnish appropriate auxiliary aids and services where necessary to afford qualified individuals with disabilities an equal opportunity to participate in, and enjoy the benefits of its services programs, or activities. 28 C.F.R. § 35.160(b)(1). UC Berkeley is not, however, required to take any action that it can demonstrate would result in a fundamental alteration in the nature of its service, program or activity or in undue financial and administrative burdens. 28 C.F.R. § 35.164.

As the report notes in the above, entities are not required to make modifications that would fundamentally alter the nature of the service or program or cause an undue burden. These defenses to having to implement a reasonable modification are further discussed below. Because of the issues discovered by the DOJ investigation, the University agreed to develop and implement procedures to ensure that all of the Online Content was in compliance with the WCAG 2.0 AA standards.

Miami University (Consent Decree, 2016)[9]

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[8] https://news.berkeley.edu/wp-content/uploads/2016/09/2016-08-30-UC-Berkeley-LOF.pdf

[9] https://www.ada.gov/miami_university_cd.html

The plaintiff alleged that Miami University violated Title II and Section 504 by using web content, technology, and software that was inaccessible to individuals with hearing and vision disabilities. The DOJ intervened in the civil action, which was filed by a student. To avoid further litigation, the parties entered into a consent decree that required the University to ensure that all web-content and applications conform to WCAG 2.0 AA standards.

With respect to software and technology procurement, the consent decree requires that the University independently test products obtained from a vendor to ensure compliance with WCAG 2.0 AA standards as best as possible. The University agreed to procure technology and software that is accessible where commercially available and if the purchase would not cause an undue financial and administrative burden or a fundamental alteration. To assert these defenses, the consent decree requires that the President of the University or a designee make the assertion in a written statement after considering the resources available and costs of implementing the modification.

University of Cincinnati (OCR Resolution Agreement, 2014)[10]

OCR investigated the University of Cincinnati for violating Title II and Section 504 by not making its online web content accessible. The parties entered into a resolution to avoid a protracted investigation. The resolution cited to the May 26, 2011 and June 29, 2010 Dear Colleague Letters that addressed these particular issues of emerging technology in the classroom as it relates to the ADA and Section 504.

Examples of inaccessible issues discovered during the investigation include lack of alternative text on images, documents not posted in accessible format, lack of captions on videos, improperly structured data tables, and improper contrast between background and foreground colors. These issues affected individuals with vision and hearing disabilities and denied them the opportunity to benefit from the online learning content as others did.

The University agreed to adopt technical standards for managing its electronic and information technologies online that are accessible and adhere to the standards such as WCAG or similar guidelines.

Youngstown State University (OCR Resolution Agreement, 2014)[11]

OCR investigated Youngstown State University for violating Title II and Section 504 by not making its website content accessible to individuals with sensory impairment disabilities. The resolution letter discussed information technology that the University purchased from outside vendors and used without modification, such as the course registration software, transcript access software, and grading access software. The investigation found that a number of online content was inaccessible, including images that lacked alternative text, documents posted in inaccessible formats, videos without captions, data tables improperly structured, and form fields improperly formatted.

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[10] https://www2.ed.gov/documents/press-releases/university-cincinnati-letter.pdf

[11] https://www2.ed.gov/documents/press-releases/youngstown-state-university-letter.pdf

It is important to emphasize that even though some online content was purchased from a third-party vendor, the University was nevertheless responsible for ensuring that the content it then made available to students on its website was compliant with Title II and Section 504. As part of the resolution agreement, the University agreed to implement procedures to ensure that its online content is accessible.

V. ANALYSIS

As described above, public school districts are subject to Title II of the ADA and Section 504 of the Rehabilitation Act. The plain language of Title II, Section 504, and their implementing regulations does not explicitly refer to the accessibility of websites and online content. The government, through enforcement actions and guidance documents issued by the U.S. Departments of Education and Justice, nevertheless has taken the position that websites and online content are covered by Title II and Section 504. Though some courts have been reluctant to extend to websites the protections of disability discrimination laws, other courts have sided with the government's position, even in the absence of clear regulatory guidance. Based on this information, websites and online content of public educational institutions should be accessible to students with disabilities.

OCR and the DOJ have taken the position that implementation of the WCAG 2.0 guidelines, at Levels A and AA, is a standard to which schools should ensure that their websites and online digital content conform. OCR and the DOJ also acknowledge through the *Dear Colleague Letters* discussed above that all technology will not be able to provide accessibility to all students with disabilities in the same manner. OCR's guidance explicitly contemplates the possibility that a school district may remain compliant with Section 504 and Title II while providing some students, particularly students who are blind or have low vision, with an alternative manner of accessing educational content. Specifically, OCR OCR's 2011 FAQ document includes the question: "**Must a school always provide the same form of emerging technology to a student who is blind or has low vision as it provides to all other students?**" The short answer that OCR provided is: "**No.**" OCR permits schools to provide access in a different manner to students who are blind or have low vision as long as the students receive "access to the educational benefit at issue in an equally effective and equally integrated manner."

In this case, the Legends of Learning platform of innovative, educational video games incorporates accessible features such as on-screen text equivalents where audio is used, and compatibility with iOS platforms, which allow navigation by individuals with mobility impairments that prevent them from using a mouse. Despite the existence of accessible features, due to the nature of the games – colorful video games that incorporate motion and dynamic images – the fundamental aspects of the games would need to be altered to provide accessibility to individuals who are blind, and in many instances, it would not be feasible to retain the original purpose and structure of the game if accessible features are used.

In OCR's official presentation on "Web Accessibility and Distance Learning," OCR provides the following example of a fundamental alteration that would not be required: "Ex: US Geological

Survey's topographic maps cannot be reduced to words to make them accessible to people who use screen readers. The very essence of their 'mapness' would be destroyed in the process." Similarly, the essence of Legends' platform of educational video games would be destroyed if it were required to reduce the games to a format where they were no longer a "game," did not incorporate motion, or did not include many of the features that engage students in learning in an innovative way. Moreover, the expense of attempting to convert video games to a format usable by blind individuals would require significant financial resources, beyond those required by federal disability law. Such an undertaking may be technically impossible and, at a minimum, would require such a substantial financial investment as to render the project economically infeasible.

However, Legends has created a series of podcasts that provide students with vision disabilities, auditory learners, and others, with access to educational content that is equivalent to that provided through the Games. Like the video games, podcasts are provided on a digital platform that would allow students who are blind or have low vision to experience similar interactions and access the same educational benefits as their peers without disabilities. Like the video games, podcasts provide engaging lessons narrated by characters and include quizzes to test mastery of content. OCR recognizes that students who are blind or have low vision may not always have "identical" ease of use; however, through podcasts, Legends is able to offer students who are blind or have low vision "the opportunity to acquire the same information, engage in the same interactions, and enjoy the same services as sighted students," consistent with guidance from the federal government.

VI. CONCLUSION

Given that (1) Legends of Learning's platform of online video games incorporates a number of accessible features; (2) it does not appear feasible to make the games accessible to individuals who are blind or have low vision without fundamentally altering the nature of the games or creating an undue financial burden; (3) Legends of Learning has created engaging, digital podcasts that provide equivalent content, access, and a similar experience for students who are blind or have low vision; and (4) the government has failed to issue clear regulatory guidance or standards regarding the applicability of Title II and Section 504 to websites and online digital content, we conclude that Legends of Learning's platform of online video games is consistent with existing guidance under Section 504 of the Rehabilitation Act and Title II of the ADA, which the government has interpreted to include the WCAG 2.0 Level AA conformance standards.

Very truly yours,

Olabisi L. Okubadejo, Esq.

OLO/pla