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Disability Rights Section
Civil Rights Division
U.S. Department of Justice
P.O. Box 2885
Fairfax, VA 22031–0885

Re: RIN 1190-AA65 (CRT Docket ID No. 128)

Dear Ms. Bond:

On behalf of the higher education associations listed below, I write to offer comments on
the Department of Justice's (the Department) Supplemental Advance Notice of Proposed
Rulemaking (SANPRM) relating to Nondiscrimination on the Basis of Disability;
Accessibility of Web Information and Services of State and Local Government Entities and
Public Accommodations, 81 Fed. Reg. 28,658 (May 9, 2016).

We appreciate the opportunity to contribute the perspective of colleges and universities on
this important question of civil rights and opportunities for full participation by persons
with disabilities in today's online environment. We fully support the Department in its
efforts to define with clarity the Americans with Disabilities (ADA) obligations of our
public member institutions in their use of the internet and digital media.

By the very nature of our operations, colleges and universities maintain extraordinarily
large and complicated web presences. As the SANPRM recognizes, this entails serving not
just those students, faculty and staff with direct connection to an institution, but the
general public as well. As a result, any regulations concerning how campuses manage their
websites will necessarily require thoughtful detail and careful consideration of potential
impact. Such regulations can also offer the opportunity to provide valuable guidance in an
area of great importance to higher education.

We were pleased to see that the importance of this issue, and the unique challenges it may
pose for higher education, are recognized by the Department. We share the Department's
aim of using this process to make sure that the benefits of advances in online technology
are employed to provide equal educational opportunity to students and the public.

Doing so will require careful attention to balancing the need of colleges and universities to
be ahead of the technological curve with the necessity of being as accessible as reasonably
possible to all current and potential students. We offer the following comments with the
goal of striking that balance, and recognizing that higher education must always strive for
continuous improvement in all forms of accessibility, including web accessibility.

Overview

Our comments demonstrate clear support for the incorporation of a recognized standard for web accessibility, while also identifying key differences between higher education and other governmental entities. We believe that consideration of these differences will improve the resulting regulations, and meaningfully enhance their impact.

To that end we highlight:

- Developing a recognized standard for web accessibility is an important step forward but must be accomplished with a recognition of the differing mission of public higher education from other state and local government entities and the difference in the scope and control that universities have over what is on their websites;

- The importance of recognizing the many sources of content that colleges and universities have on their websites;

- The challenges that would be presented under the proposed timeline and some modifications both in the timeline and in the standards of compliance that could make accessibility a more achievable goal; and

- Areas of specific concern to colleges and universities:
  - Conforming Alternate Versions
  - Captioning and Descriptions for Live Audio Content in Synchronized Media
  - Third Party Content
  - Password Protected Content
  - Mobile Applications

Overall Framework

Our members are strongly supportive of the establishment of a recognized standard for web accessibility as outlined in the SANPRM, and we well understand the Department's preference for adopting the World Wide Web Consortium's Web Content Accessibility Guidelines (WCAG) 2.0 AA as the governing accessibility standard for informational and transactional websites of state and local government agencies. Although imperfect — no standard can anticipate and manageably account for all prospective online content — WCAG 2.0 AA is the prevailing and most adaptable standard yet devised for web accessibility.

The Department itself recognizes in its notice that WCAG 2.0 AA may not be effectively applied in some areas (such as for live audio captioning or mobile applications) and we will offer suggestions on how best to address those circumstances below. With these exceptions, we expect that state and local agencies will largely be able to conform their websites to these standards without compromising the functionality of those sites, which are directed principally toward the provision of services to constituents.

Public institutions of higher education present a different picture, however. There are significant variations between the web presences of colleges and universities and the other types of public entities covered under Title II of the ADA. We urge the Department to take account in its rulemaking of the many ways in which colleges and universities stand apart from other entities subject to Title II. These differences lie primarily in the nature of the organization, the degree of control the entity has over what is hosted on its website and the size and scope of an entity's web presence.

Differences Between Higher Education Institutions and Other Public Entities

The first point is easily articulated. A university has an altogether different mission, range of activity, community, and governance structure than a motor vehicles registry or department of public works, and the scope, scale, purpose, and target audience(s) of its web presence will differ accordingly.

Fundamentally, the mission of colleges and universities is to gather, develop and disseminate knowledge. Schools pursue this mission principally through teaching and research, but also through other means: for example, they maintain libraries, archives, and museums and host artistic performances and exhibitions. Universities generate incalculable amounts of data in support of scholarly inquiry. The breadth, scope and complexity of the higher education mission is reflected in individual and institutional activities that reach well beyond providing instructional services to students or selling seats to athletic or performing arts events. Thus, while colleges and universities indeed host and maintain public information and services-oriented websites that are analogous to those of state and local agencies serving their constituents — websites through which prospective students might apply to a degree program, current students might register for courses or arrange for financial aid, or members of the public might purchase tickets for football games or on-campus performances — a university's online presence is far more than just transactional. To take just a few examples, content posted on university websites includes scholarly works posted directly by authors or hosted in open-access repositories; research data; instructional material with a limited target audience; library resources licensed from third parties; archival material; multimedia recordings of nonpublic hosted events; and faculty blogs.

Institutional Control of Content

This has a direct bearing on the degree to which an institution can be said to control the content it makes available. Campuses provide space on their websites for a myriad of services, programs or activities related to operational aspects of their educational mission: general university information pages; student admissions and registration sites; library research catalogues; websites for major university offices and administrative units; and so on. While this scope can be daunting to administer, there is reasonable expectation that an institution's leadership can develop and implement policies ensuring relative consistency in the display of this information, and these sites and others like them are reasonably subject to the WCAG 2.0 AA standards.

Beyond this centrally controlled web content, though, colleges and universities provide web and digital resources to students and faculty in furtherance of their core missions of education and research. Although the resulting content may reside on a university-supported server, there is no direct university control over such individual and often experimental scholarly, research, instructional or creative content. An institution of higher education can typically have tens of thousands of web pages and sites connected to its domain, and still thousands more that are hosted on its servers or posted elsewhere in connection with its mission. Yet not all of these convey the core "utilities" for which public access is essential under Title II.

What's more, unlike most state and local agency websites, colleges and universities maintain no single entry point, nor even manageably few entry points, for posting mission-related content to the Internet. Our smaller member institutions have dozens of administrative offices, departments, labs and centers. A large research university will have hundreds. In most cases, our institutions devolve online posting authority to these individual units, in furtherance of their core missions of research and education. A university's academic websites will carry content posted at all levels of the organization, ranging from the university level through schools and departments to individual faculty.

As a result, web content posted in connection with an institution's mission, or for that matter content posted for any purpose on institution-owned web servers and/or within the institution's web domain, may be posted there by individual faculty and staff through hundreds of channels. A great many of those channels consist of third-party platforms and facilities — YouTube, Amazon Web Services, iOS and Android podcast apps, Facebook, Twitter, Tumblr, WordPress, Blogger — that the SANPRM notes are not presently regulated for accessibility or within schools' control. Any member of a university community may create a YouTube account and post content to it that relates to his or her work at the school and advances its mission. Conversely, colleges and universities often provide means by which third parties, including students and members of the general public, may post content to sites hosted by the schools or on their web domains. It is difficult to overstate the complexity and sprawl of university websites, or the extent of their decentralization. Our member institutions are therefore quite concerned that if the Department were to adopt a WCAG 2.0 AA accessibility standard broadly applicable to all public college and university websites, compliance would be an enormous and arguably impossible undertaking.

The control issue is still more problematic in cases of scholarly content posted online. Although specific policies and practices may vary, the norm in the academic community is to allow scholars free right of access to communicate online. Although colleges and universities commonly adopt policies about responsible and civil computer use, and they may develop, license, or host platforms and software for members of their communities to use, schools do not assert the authority to preview content their scholars propose to post online, to approve the method of posting, or to edit the content once it is posted. Doing so would be inimical to academic freedom — and would impair the very sharing of research data and early-stage scholarly communications (often of interest only to limited numbers

of specialists) that other governmental policies of transparency and research integrity are seeking to promote. Our institutions guarantee to their scholars the unfettered right to communicate their ideas without interference from administration. And indeed, even if an institution "locked down" its online platforms, web servers, and web domain against any content that it had not prescreened for accessibility, its scholars would still have recourse to communicate online via the many third-party hosted content platforms that the school does not control. If the Department requires all of a university's web content to comply with WCAG 2.0 AA, and if (as the SANPRM seems to infer) all content posted online by scholars of the university in connection with their work is content attributable to the university,[1] the ensuing push for compliance would call for a fundamental reframing and reorientation of the relationship between scholar and university.

As a result, institutions currently have little direct or immediate authority over when, how or in what format scholarly content is posted by researchers. Reviewing all relevant webpages for compliance under such circumstances with even the best-defined institutional policies would be an enormous, and continuously overwhelming, obligation. Given these conditions, we urge the Department to adopt an approach that does not make a college or university liable for a violation whenever a member of its community uses online resources to post standards-noncompliant content. We suggest instead, an approach that (1) requires schools to adopt an accessibility policy that applies to software and technology it affirmatively offers as an institution to its community and to certain, but not all of its websites (see below), and (2) subjects a school to Departmental enforcement only when it fails to enforce the policy reasonably.

Scale and Scope of Content

As referenced above, because of the expansive scope of the subjects they cover, institutional websites are massive relative to those of other public entities. At any one time, a college or university may be offering hundreds of educational programs at the certificate, undergraduate and post-graduate levels, as well as additional non-credit courses in areas ranging from anthropology to zoology. Faculty, staff and students will be performing thousands of individual scientific and academic research projects, many with online components, while other institutional sub-sites are hosting events in the arts, athletics, politics and other areas of public interest. All of these activities are dynamic, changing every few months, as semesters end, or more commonly, on a weekly or daily basis.

The extremely wide variety of areas an institutional website must support, as well as the relative openness of institutional sites to posting by students, faculty, staff and related

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[1] We note that the SANPRM proposes to apply the WCAG 2.0 AA accessibility standards to content on "public entities' Web sites and Web pages." The reach of this language seems obvious enough, as applied to most public entities. But as we have noted, colleges and universities present a more complicated case. Would the Department interpret the rule to apply to any content that resides on a public institution's web server, or within its "[NAME].edu" web domain, whether or not the content is posted there by the institution's agents or employees or in connection with the institutional mission? Conversely, members of a college or university community may look to third-party platforms to post content that relates to their work, under conditions that sit entirely outside of the institution's control. Are these websites and web pages "the school's websites and web pages" for purposes of the regulation?

stakeholders, makes for a very broad range of content types, well beyond what state and local government websites generally sustain. From the "conventional electronic documents" cited in the Department's notice to virtual reality simulations for which no technology-based means of achieving general accessibility currently exists, college and university web presences may often exhibit any and all forms of web content, presenting unique accessibility challenges rarely, if ever, found in the realm of state and local governments.

Finally, students and the public expect institutions to remain on the cutting-edge of technology. It is central to what colleges and universities do. Indeed, the bulk of technological innovation derives from research performed on campuses. Students come to campus expecting to learn using the latest methods and tools, and to then employ that knowledge for further advancement. This is particularly true for large R-1 research institutions that are dependent on the incorporation of emerging technologies to fulfill critical pieces of their public mission.

Effects on the Dissemination of Knowledge

By now it is commonplace to observe that the internet and digital media have revolutionized communication and democratized publication. Given today's environment of near-universal connectivity and proliferating web-based content platforms, any person anywhere with a mobile phone or computer may publish text-based, audio, image, or video content to the entire world, without delay and at essentially no cost. This change is powerful, and as a result, the public's access to information is orders of magnitude greater than at any point in history. The marketplace of ideas is also richer, more populated and more diverse than ever before.

Our member institutions recognize that a person with a disability has the same interest in accessing this rich trove of online content as anyone else. Indeed, for a number of reasons, the internet holds out the promise of greater participation and empowerment for individuals with disabilities than the physical world might. And in a technology landscape where market conditions cause for-profit software and service providers to leave accessibility issues unaddressed in favor of other functionalities, colleges and universities are often at the forefront of efforts to advance online accessibility and universal design principles, whether through technology and platform R&D, the formulation and promotion of content best practices, or even the establishment of standards.[2] However, at this moment in time the technology that supports the free, immediate communication of ideas and information online does not support WCAG 2.0 AA-compliant communication with the same ease, immediacy and minimal cost. Given these conditions, regulatory efforts to eliminate barriers to accessing and receiving web content are necessarily balanced against the creation of new barriers for those who would post and provide it.

By way of example, any individual with a smartphone and YouTube account can upload a video for the public to view, straightaway and free of charge to the poster and the viewer.

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[2] The World Wide Web Consortium, the international community that issued and maintains the WCAG, is hosted and supported in large part by the Massachusetts Institute of Technology.

A person can as easily upload an image or an audio file — such as a podcast. Captioning the video or podcast for the deaf/hard of hearing necessarily means that the video or podcast will be delayed and will require the expenditure of greater effort and/or resources to post. Providing appropriate audio description of the video or image also entails an additional, meaningful expenditure of time, effort, and resources on the margin — and, depending on the nature of the content, recourse to subject-matter expertise and technical training.

Indeed, in some cases, appending audio description of video content may be impractical or unmanageable, as it conflicts with the existing audio track. In still others, where the content posted is highly technical and offered for a limited audience, an ex ante standards compliance requirement may require the would-be poster to incur substantial costs (and possibly alter the content) in anticipation of users who may never seek access to it. A poster faced with the burden of strict standards compliance may in many cases forgo sharing his or her content entirely. Or at the least, cost considerations may compel a poster to scale back his or her online ambitions, either by reducing, simplifying, or delaying what he or she publishes.

We recognize and appreciate that the Department does not propose an ironclad rule requiring 100% standards compliance for all content. To this end, in crafting any regulations applicable to colleges and universities, the Department should give real, specific content to the ADA concepts of fundamental alteration and undue burden, so that institutions have clear notice of when standards compliance is and is not required. One effective way to do this is to identify categories of web content for which, based on their purpose or intended audience, fundamental alteration and undue burden per se apply.

We note that the implications of required standards compliance are less significant in cases where the affected expression is incidental to an agency's discharge of its functions and transactions with the public. Here, too, the rights of individuals with disabilities weigh more heavily in the balance, given Title II's primary directive, which is to ensure that individuals with disabilities can access state and local government services on the same footing as anyone else.

On these grounds, we agree that the Department's regulations should apply to websites that conduct transactions or provide information incidental to the provision of public services, including those maintained by colleges and universities. In addition, however, as applied to colleges and universities, the regulations should expressly carve out from their scope (1) informational websites and applications offered to a limited internal audience and (2) other web content by which members of college and university communities communicate their ideas, scholarship, and research broadly to the public, other than in connection with centrally administered programs of instruction.

Compliance Timeframes

The SANPRM proposes a two-year window for all public entities to be in full compliance with the WCAG 2.0 AA standard. The Department indicates that this was an attempt to

address the timeframes proposed in earlier comments, which ranged from immediate full compliance to full compliance within five years.

For multiple reasons, we would propose an alternative way for higher education institutions (with certain exceptions noted) to meet the WCAG 2.0 AA standard. Our proposal is based on both existing practice as well as a more complete understanding of the ways in which campuses operate.

Since the SANPRM was published, we have communicated extensively with our member campuses, soliciting the feedback of institutional leadership, campus IT professionals and other constituencies responsible for posting content, implementing accessibility policies and other areas of campus operations that would be impacted by the proposed regulations.

Uniformly, what we have heard across institutions of all types is that there is no simple or readily available way to calculate the resources (including time) necessary to bring every aspect of an institution's website into full compliance with WCAG 2.0 AA.

Colleges and universities are highly dependent on developing their own talent in information technology. Many chief information officers (CIOs) and other senior IT leaders have indicated that they often develop staff to advanced levels of expertise, only to see that talent hired away to more lucrative positions in the private sector. Thus, higher education IT organizations rely on a continuous cycle of internal staff development to renew themselves and sustain their capacity to meet institutional needs. This dependence on "growing your own" internal capacity is particularly relevant in the field of IT accessibility. The limited availability of IT accessibility professionals makes "train the trainer" models the primary pathways for increasing the ability of institutions to meet IT accessibility objectives. Such models enable colleges and universities to maximize the value and reach of IT accessibility professionals by increasing faculty and staff capacity to address web content issues.

The SANPRM asks respondents to address the availability of external consultants to support potential compliance efforts, which raises unique concerns given the higher education context just described. Institutions might use external consultants for planning or policy development purposes, for example, but it is unlikely that third-party contractors could or would play a significant role in achieving institutional compliance with the rules the Department is considering. A recent survey completed by 133 senior higher education IT representatives nationwide[3] found that over 70% either did not know whether a sufficient number of external consultants or contractors would be available for that purpose, or they rated such availability as "little to no" or "modest."

Institutional ability to procure outside contractors to perform assessments and upgrades is limited by declining state support for public higher education, which is now at a thirty-year

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[3] Please note that the survey presents a snapshot of institutional IT leader views. Given the SANPRM comment period, it was not designed to research the full institutional knowledge base on these questions. Its results, however, highlight the need for regulations that support comprehensive institutional planning to achieve compliance.

low in terms of spending per student. Nearly half of survey respondents either did not know whether their institutions' web development staff had sufficient WCAG 2.0 AA expertise to support a transition to that standard, or they indicated that less than 5% did. (Another 7% placed the level at "5-9%.") Thus, many institutions might reasonably have concerns about their internal capacity to address compliance requirements even as they face significant uncertainty about the use and availability of outside contractors.

These challenges are likely to be exacerbated by a universal two-year compliance window. With a hard deadline for full compliance, institutions of varying resources will be compelled to compete against themselves and the private sector for access to outside support that most already find lacking or unknown; that will be increasingly difficult to obtain as demand increases; and that will likely become substantially more expensive if secured. Simultaneously, they could easily find themselves facing a rapid loss of qualified staff to opportunities for more lucrative employment meeting this demand in the private sector.

Finally, considering the scale and complexity of institutional websites, two years is a very short window of time in which to properly assess which parts of a website are in compliance and which are not, and then to remedy those areas requiring attention. For example, over half of respondents to the survey indicated either that they didn't know the extent to which their institutions' publicly available web pages and content currently conform to WCAG 2.0 AA, or that the extent of conformance was 25% or less.

Given this context, we are concerned that such an aggressive timeframe for full compliance will result not in widespread adherence to the standard, but rather in a series of circumstances that would push compliance with the regulations past the threshold of an undue burden, effectively undermining a broader acceptance, and implementation of the standard.

As an alternative, we would propose that colleges and universities be given three years from the effective date to do a full assessment of the current accessibility of their websites and have produced a good faith, comprehensive plan for achieving accessibility within five years of the effective date. Specifically, we propose that the Department require colleges and universities to adopt and reasonably enforce a web accessibility policy providing as follows:

1. If not already underway, the institution must immediately provide training to the relevant members of the full institutional community on accessibility generally and WCAG 2.0 AA compliance, specifically.

2. A plan must be in place within three years to guarantee that all software, platforms and technologies centrally sourced or developed for the college or university community to use to post web content are WCAG 2.0 AA-compliant within the five-year compliance deadline.

3. A plan must be in place within three years to guarantee that all centrally controlled web content that is transactional in nature or that provides information incident to the provision of services is WCAG 2.0 AA-compliant within the five-year deadline. "Services" here does not include the communication of scholarship or research or communications made by individual members of the school's community outside of formal, centrally managed instructional programs.

Nothing in this plan or the final regulations should be construed to lessen the institution's current obligation to ensure that it is providing accessible content to disabled students consistent with the customary individualized process that is used under the ADA.

This proposal would allow institutions to thoughtfully assess what steps are needed to reach full compliance; the resources available to do so; where in the refresh cycle existing technologies and vendor contracts stand; and what areas require immediate attention.

Moreover, this approach is consistent with the approach taken by the Department in recent years when negotiating settlement agreements with institutions. The general approach of the Department is to immediately address areas where institutions are not conforming to existing law, and then provide a period of years for an institution to do comprehensive self-assessment, draft relevant policies, and then implement those policies to ensure the needs of students, staff and faculty with disabilities are met.

We would also ask that given the resource limitations of those public institutions that are defined as "small" or "very small" entities, this compliance window be extended by an additional two years, with five years from the effective date of the regulations to have produced a plan and seven years from the effective date to be in full compliance (except as noted below). This not only provides additional time for these entities to marshal the necessary resources for their efforts, but also limits the period in which these institutions would need to compete with their better-resourced peers for external support.

Small Entities

The SANPRM seeks comment on ways to define small public entities, as well as thoughts on ways to minimize the economic impact on small public entities.

Colleges and universities use the Carnegie Classifications (http://carnegieclassifications.iu.edu/) as universal identifiers of institutional demographics. Those classifications define institutional size based on a calculation called Full Time Enrollment (FTE), which incorporates the number of students enrolled full-time and part time at an institution for an accurate gauge of an institution's relative size. This is a long-standing measure that is well-understood within higher education.

The Carnegie Classifications define two-year institutions with FTE enrollments of less than 500 as "very small" and those with FTEs between 500 and 2,000 as "small." Four-year institutions with an FTE of less than 1,000 students are classified as "very small," and those with FTEs between 1,000 and 3,000 are classified as "small."

If one reviews degree-granting public institutions (according to the Department of Education data) that are eligible to participate in federal financial aid programs (under Title IV of the Higher Education Act), 460 two- and four-year institutions are classified as either "small" or "very small." This represents roughly 28% of all public institutions. Comparatively, if one were to look at Census Bureau data on the population size of sub-county level municipalities, over 69% of all municipalities serve populations of less than 2,500 citizens.

Based on this, we would recommend that the Department include differential treatment (as outlined in the "compliance" section below) for institutions with Carnegie Classifications of "small" or "very small."

Assessment of Compliance

The Department asks in the SANPRM how it should assess compliance once potential rules take effect. We appreciate the Department's interest in this important question and propose that any approach to assessing compliance prioritize new and significantly upgraded web sites and content, as well as related learning management and content systems in the case of educational entities.

The application of the proposed rules to learning management systems and other systems related to web-based delivery of academic content creates unique challenges for higher education institutions. Over half of survey respondents would have significant concerns about the conformance of their existing systems with WCAG 2.0 AA. Institutions would also have to evaluate carefully the remediation demands of course and program content itself, even given the Department's proposal that such content would only have to be brought into compliance when a student with relevant needs enrolls. Nearly half of survey respondents reported not knowing the extent to which current online courses and instructional resources conform with WCAG 2.0 AA, while another third indicated that 25% or less are known to fit the proposed standard.

Given the scope of the rules and the resulting challenges we have outlined, institutions must be able to focus their limited resources first on addressing conformance with the potential standards as they develop new web sites and content or implement new systems, or as they make substantive upgrades to such sites, content, and systems. This proposal aligns with the Department's established compliance approach for other areas addressed by the ADA, where it makes sense to do so.

It also makes sense to balance a compliance emphasis on new and/or significantly upgraded sites and content with consideration of the extent to which given pages or content are used. Institutional assessment of web accessibility needs under the potential regulations can and should account for highly utilized pages, sites and content. Prioritizing compliance on this criterion, too, will enable users of all types to have roughly similar experiences with the aspects of the institutional web presence they are most likely to encounter. Determination of what constitutes a highly used page, site or resource, though,

is context-specific, often driven by the size and mission of the institution and the scope of the geographic and academic areas it serves. With that in mind, the Department should not consider a rigid threshold for assessing which elements of the institutional web presence are highly used, but rather allow for flexible metrics under which institutions can make that determination.

We agree with the Department's concern that assessment approaches designed for the physical environment "may not be practical in the Web context." As the Department notes, the expectation that physical facilities will be "100-percent compliant at all times with all of the applicable provisions of the ADA Standards, subject to a few applicable compliance limitations—may not work well in the Web context." With that in mind, we appreciate the Department's acknowledgement that the dynamic nature of the web and institutional web presences makes identifying an appropriate compliance threshold very difficult. We are reasonably sure that specifying an arbitrary percentage of criteria met will not ensure effective compliance, given the diversity of disabilities and content types that the potential rules must bridge. Instead, the compliance model that the Department adopts should reflect this reality and stress whether essential features and functions are accessible to affected parties, noting the continuing obligation institutions will face to meet individualized needs when necessary via reasonable accommodation.

Compliance Limitations

The Department thoughtfully invites feedback on possible challenges to implementation and what limitations may exist for public entities in reaching compliance. The approach outlined in the SANPRM sensibly recognizes that determinations regarding fundamental alteration or undue burden are most appropriately made by those individuals with the closest direct administrative authority. It would be functionally impossible for a university president to make the thousands of determinations necessary across a campus in anything resembling a timely or comprehensive manner.

Similarly, the SANPRM acknowledges that the resources available for calculating whether making content compliant constitutes an undue burden are most appropriately tied to the direct administrative entity overseeing it. Furthermore, the varied revenue streams employed by public institutions operate under a wide range of restrictions and often cannot be employed for purposes other than those with which they are designated.

More importantly, the request for a written statement by the relevant designee identifying the reasons for reaching a determination that compliance would result in a fundamental alteration or undue burden is simply unnecessary and burdensome. Nothing about such a statement changes the criteria an institution must meet to assert such a determination, and it in no way alters the obligations institutions have under the law. It simply adds cost and burden to institutions already operating under complicated and expansive regulatory environments for no public benefit. We would ask that this requirement be removed from any proposed regulations.

Conforming Alternate Versions

We support the SANPRM's formulation of a two-prong test for the use of conforming alternate versions in the cases of materials with technical or legal limitations and in the case of conventional electronic documents. Institutions are heavily dependent on materials that were created under copyright protection or other existing legal restrictions on their usage, and we appreciate the SANPRM's recognition of the differing standards by which those materials should be treated. Similarly, the inclusion of technical standards recognizes the necessity of providing for innovation and not stifling the development of new materials and modes of delivery.

We are concerned that the emphasis on not providing conforming alternate versions in the SANPRM, while well-intentioned, may limit the options an institution could employ to meet the needs of persons with disabilities. We agree with the Department that the ideal is a sole, compliant website providing the same information, but would expand the circumstances under which a conforming alternate version could be developed to encompass those circumstances in which a purpose-built alternative better addresses the needs of specific individuals with disabilities. Restricting the creation of such materials only to cases in which the institution faces undue financial or administrative burden may result in less accessible web presences for individuals with disabilities.

Captioning and Descriptions for Live Audio Content in Synchronized Media

As the SANPRM notes, the availability of this technology is limited at best, and other countries have chosen not to incorporate the WCAG 2.0 AA standard for live-audio captioning and live-audio descriptions. We would recommend that the Department follow that example and exclude captioning and descriptions for live audio content in synchronized media from the proposed regulations.

Colleges and universities would be disproportionately impacted by an incorporation of a requirement for live-audio captioning or descriptions, due to the degree to which we make live events available online. Between class lectures, sporting events, performances and campus events such as invocation, award and commencement ceremonies, colleges and universities provide a substantial amount of live content to the campus community as well as the general public.

The volume of content that would be covered under such a requirement, when combined with the currently limited and developing nature of the relevant technology, would likely result in institutions being unable to comply with the requirement through no fault of their own, and thus being forced to curtail the range of content made available on their websites.

Third-Party Content

As envisioned in the SANPRM, the usage of third-party content poses specific challenges for higher education institutions. Broadly, we agree that it is reasonable to require public entities to only publish compliant content on their websites to the extent possible. For many public entities, this may be easily achievable, as they may have centralized and

absolute control over the types of content published and the means by which it is published.

As previously, discussed, colleges and universities lack that level of centralized authority, and the multiplicity of ways in which they serve disparate groups (students, staff and the public) results in a system of diffused authority to publish to institutional websites and pages, as well as a proliferation of materials being posted without direct administrative oversight.

Institutional policies can limit the issues with accessibility that arise from this situation, but they most likely cannot eliminate it. Establishing an absolute limitation on the use of noncompliant third-party content is very likely to result in a significant chilling effect on the types and amount of educational resources campuses make available to the public. Meanwhile, appropriate flexibility in this area would not vacate institutional responsibility for reasonably meeting the needs of a person with a disability as they arise.

Again, we would ask that any final regulations recognize a distinction between that content which an institution produces and distributes under direct institutional authority, and third-party content that is produced, posted or shared by an institution and allow for a reasonable time period for institutions to address such content after being notified of its noncompliance.

Password-Protected Web Content of Public Educational Institutions

We support the distinction the SANPRM draws between materials made publicly available and those restricted to a "discrete and targeted audience of individuals." The SANPRM proposes that the underlying systems for providing access to course content and related resources would have to comply with the potential rules by their effective date. The content or resources made available through those systems, however, would not have to meet the WCAG 2.0 AA standard unless and until a student with a disability enrolls in a given class.

We understand the SANPRM text to mean that an institution would have to make the content of a course compliant in a timely manner once a student provides notice of the need for accommodation, consistent with current legal and regulatory requirements. We do not believe that the Department intends to mandate that institutions intrusively require students to declare any disability at the time they enroll in a given course. We also do not think that the Department intends to require institutions to make all content for a course universally accessible when an individual student with a given disability enrolls in the course or notifies the institution of his or her needs. Finally, any definition of "a timely manner" for making course content accessible should relate to a student's academic progress in a given course, not to an arbitrary timeframe. We ask that any regulations make these points explicit.

We would also note that, particularly as it relates to educational materials produced under copyright, institutions have limited authority to make accessible versions available to the public at large. The copyright exceptions we operate under as they relate to the needs of

individual students with disabilities pose unique challenges given the model proposed in the SANPRM, where materials made broadly available to the public must be compliant upon being posted. The likely outcome of such an interpretation would likely be a sharp reduction in the amount of materials made publicly available by institutions, to the overall detriment of the public. We would encourage the Department to consider an exception for the public use of materials protected by copyrights held by other entities when no alternative, accessible version may reasonably be posted.

Mobile Applications

Mobile applications are an emerging area of technology, and one increasingly employed by colleges and universities for a variety of purposes. As the SANPRM notes though, there is little consensus on technical standards for mobile applications, and while much of the content on mobile applications could be interpreted to align with WCAG 2.0, it was "not intended to apply to software including mobile apps."

Given that the other alternative standards lack widespread acceptance, we would ask that proposed regulations set aside any technical standards for mobile applications until there is broader consensus on standards for such applications.

We appreciate your attention to our comments and offer them in the hopes of producing final regulations that will be widely accepted and implemented. Colleges and universities are committed to ensuring that people with disabilities receive equal educational opportunity, and we welcome the opportunity the SANPRM presents to inform and strengthen any final rulemaking.

Sincerely,

Molly Corbett Broad
President

MCB/ldw

On behalf of:

American Association of Community Colleges
American Association of State Colleges and Universities
American Council on Education
Association of American Universities
Association of Jesuit Colleges and Universities

Association of Public and Land-grant Universities
Council for Christian Colleges and Universities
EDUCAUSE
Hispanic Association of Colleges and Universities
NASPA - Student Affairs Administrators in Higher Education
National Association for Equal Opportunity in Higher Education
National Association of College and University Business Officers
National Association of Independent Colleges and Universities