NATIONAL ASSOCIATION OF THE DEAF
www.nad.org

TEL 301.587.1788 V
TEL 301.587.1789 TTY
FAX 301.587.1791

January 24, 2011

By electronic filing:

Disability Rights Section
Civil Rights Division
U.S. Department of Justice

**Comments on the 2010 Advance Notice of Proposed Rulemaking on web accessibility ("Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations"). 28 C.F.R. Parts 35 and 36; CRT Docket No. 110; AG Order No. RIN 1190-AA61**

The National Association of the Deaf (NAD) submits these comments in response to the Advance Notice of Proposed Rulemaking ("ANPRM"), RIN 1190-AA61 (Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations) released by the U.S. Department of Justice ("DOJ") to amend regulations implementing Titles II and III of the Americans with Disabilities Act ("ADA").

Established in 1880, the National Association of the Deaf ("NAD") is the nation's oldest and largest consumer-based national advocacy organization safeguarding the civil and accessibility rights of deaf and hard of hearing individuals in the United States of America. The advocacy scope of the NAD is broad, covering the breadth of al lifetime and impacting future generations in the areas of early intervention, education, employment, health care, technology, telecommunications, youth leadership and more. For more information, please visit www.nad.org.

The NAD commends the Department of Justice for recognizing the need to ensure that deaf and hard of hearing individuals are given equal access to the World Wide Web by creating new regulations regarding the Internet. We also appreciate the opportunity to submit comments on the Department's proposed rules.

The creation of the Internet came as a great promise for deaf and hard of hearing individuals. Given how communication barriers are often an inevitable reality in the daily lives of deaf and hard of hearing people, they saw the potential of going online to learn, work, be entertained, purchase goods, research health information, interact with community, and receive other public and private services and information without dealing with spoken communication. In the early days of the Internet, most of the information online was written, finally putting deaf and hard of hearing people on equal footing with those who were hearing.

However, this door to unlimited possibilities of opportunities is rapidly closing for people who are deaf and hard of hearing. With the advancement of technology comes increased dependence of websites on aurally delivered material – either through video or audio recording. Videos, streaming movies, webinars, online tutorials, online courses, and webisodes often are presented without captions, leaving the deaf and hard of hearing community in the dark. Likewise, deaf and hard of hearing people are unable to understand materials presented through aural mediums. For example, websites that provide education services, both private and public, and for people of all ages, typically includes videos. The entertainment industry has also turned increasingly to streaming videos. Health information websites have audio and video material discussing various health ailments and conditions.

This exclusion is especially disturbing in light of the Web's growing prevalence in our lives. More and more business and government activities are conducted through the Web. The Web is often the only option for obtaining certain information, goods, and services. The Internet is already an indispensable part of all aspects of our lives: from providing health care information, education, and shopping opportunities; to renewing one's driver's license, registering to vote, and researching online libraries. The Web provides people with the ability to receive educational services, apply for employment, and engage in civic participation – but only if the information, communication, and services provided through the Web are accessible.

Today, the ability to use the Internet is essential to get, and to keep, a job.[1] Most colleges and universities require their students to have computers and are beginning to provide other technology devices.[2]

Even when a website is not the only way to access a good or service, it is often the most effective way. Goods, services and information are available online 24 hours a day, without the need to leave home. In some instances, particularly in rural areas for people who cannot easily travel, information, goods, and services are only readily available online.

---

[1] As of 2006, over half of new hires at leading employers came from the Internet, and most companies expected that percentage to grow in the following years. Booz Allen Hamilton, 2006 DirectEmployers Association Recruiting Trends Survey, http://www.jobcentral.com/pdfs/DEsurvey.pdf. Nearly 85% of employers in a 2006 Manpower survey believed IT would have a greater impact on employment, workers would have to have more skills, and working from home would be more prevalent by 2016. http://files.shareholder.com/downloads/MAN/740053096x0x63547/9f99cc2b-6ae7-44ce-b8fb-dea2e36ba5e8/UK_Manpower_world_of_work_FINAL.pdf;
Younger, J. (2008). Online job recruitment: Trends, benefits, outcomes, and implications. Larkspur, CA: Accolor.

[2] A. Altman, "Why Colleges Are Making Laptops a Must-Have" (Time) visited October 5, 2009. http://www.time.com/time/specials/packages/article/0,28804,1838709_1838713_1838817,00.html#.

In addition, as in the case of airline tickets, as well as other products and services, discounts are often offered if purchases are made online.[3]

As mentioned above, most of the audio and audiovisual material that exists on the Web today is not accessible to people who are deaf or hard of hearing. To make it accessible, transcripts of audio material must be provided, and captions must be provided for audiovisual material. Our experience leads us to an unavoidable conclusion that accessibility must be mandated and enforced, or it does not happen. This is particularly true for entities engaged in commerce and providing covered services, or public accommodations. If we do not require accessibility, the deaf and hard of hearing community gets left behind, often for generations of time. We do not want to see this history repeated.

Some of our key points, as addressed in more details in the comments, include:

- Standards that ensure visual access to all aural Web content need to be adopted.
- These standards allow for scalability to future technologies and systems.
- These standards extend to all Web content, including pre-recorded and live content.
- Any business that operates solely on the Web be considered a public accommodation.
- The new regulations take effect immediately – Web accessibility can often be achieved without significant delay or expense, negating any need for a phase-in period.

Each question presented by the Department appears first in *italicized print*, followed by our response.

## COMMENTS ON QUESTIONS PRESENTED IN THE ANPRM

[3] Lazar, J., et al., "Up in the air: Are airlines following the new DOT rules on equal pricing for people with disabilities when websites are inaccessible?" Government Information Quarterly 27 (2010) 329–336.

*Question 1. Should the Department adopt the WCAG 2.0´s "Level AA Success Criteria" as its standard for website accessibility for entities covered by titles II and III of the ADA? Is there any reason why the Department should consider adopting another success criteria level of the WCAG 2.0? Please explain your answer.*

The National Association of the Deaf (NAD) encourages the Department to adopt the WCAG 2.0 Level AA Success Criteria as the standard for website accessibility for entities covered by titles II and III of the ADA, with two adjustments: (1) ensuring that captions, whenever required, are of high quality, and (2) adding a guideline to ensure accessibility for the deaf-blind community as well, as explained below.

As video and audio media become more commonplace online, it is more crucial to address the need to ensure accessibility for deaf and hard of hearing users. The WCAG 2.0 Level AA Success Criteria includes guidelines regarding making aurally delivered material accessible for the deaf and hard of hearing in Guideline 1.2. 1.2.2 explicitly requires captions for all prerecorded audio content, and 1.2.4 requires captions for all live audio content.

The NAD recommends that the Department also add language to the current WCAG 2.0 Level AA Success Criteria to ensure that captions, whenever required, are of high quality. The NAD proposes the following language:

*Captioning*. When a website provides captioning, it shall ensure that it provides –

- (1) readability through high-quality captions that do not produce choppy, blurry, or grainy images, different focal acuity from that of the film,;
- (2) captions on a high contrast background as such that they continue to be readable throughout the presentation;
- (3) captions in text size that is large enough for the viewer to read;
- (4) Speaker identification;

- (5) Characters, line length, number of lines must account for readability, including sufficient amounts of text at one time and for enough time;
- (6) contemporaneity: captions must be present at the time same information is presented aurally without lags or irregular pauses in presentation

The NAD asks the Department to go a bit further in requiring transcripts to be available in addition to captions for people who are deaf-blind. Captions are not accessible for deaf-blind individuals. Transcripts should be readily available for pre-recorded context, and available within very short time after live recording.

Compliance with these guidelines would result in captioning of all audio content presented online by covered entities, enabling deaf and hard of hearing users to understand a wide variety of materials, including but not limited to videos, streaming movies, webinars, online tutorials, online courses, and webisodes.

There are several reasons to adopt the WCAG 2.0 Level AA Success Criteria. First, the WCAG standards are flexible and outcome driven. The WCAG standards are not tied to any specific technology or system. By describing *what should be done* to ensure accessibility, *rather than mandating how it must be done*, these standards give web developers maximum flexibility and creativity. These standards are flexible enough to absorb new technologies and systems. But most importantly, these standards develop a universal set of benchmarks that must be met to ensure accessibility for individuals with disabilities.

In addition, the WCAG 2.0 Level AA Success Criteria are an internationally accepted set of standards. The Internet enables individuals worldwide to connect for social, networking, education, and business opportunities. Adopting internationally

accepted standards will likely lead to better system integrations worldwide and will be particularly beneficial for individuals and companies conducting transactions outside of U.S. borders.

The WCAG 2.0 Level AA Success Criteria were developed as part of a multi-year process that relied on feedback from government officials, individuals with disabilities, members of business and industry, and technical experts. This process ended in a detailed International Report which may be found at: http://www.w3.org/WAI/GL/WCAG20/implementation-report/.

Next, WCAG is an international – and internationally accepted – standard. Companies in the United States that do business abroad benefit from a consistent standard, adherence to which meets legal requirements wherever the Internet is accessed.

Additionally, WCAG 2.0 has extensive instructional and support materials including detailed and continually updated "How to Meet" and "Techniques" documents that provide specific information on how to satisfy the guidelines using different technologies.

Many businesses – big and small - and state are already voluntarily using WCAG standards. More information about some of the large companies who work to ensure that their websites satisfy the Web Content Accessibility Guidelines, is available on line at http://lflegal.com/2010/09/doj-anprm-web/. Examples of small businesses with WCAG-compliant sites include Jim Thatcher Consulting (http://jimthatcher.com) DeQue Systems, Inc. (http://deque.com), and the Law Office of Lainey Feingold (http://lflegal.com). The story of how one small law firm has achieved WCAG 2.0 AAA compliance is on line at http://lflegal.com/2010/10/lflegal-doj-anprm/.

State and local governments (Title II entities) also rely on WCAG. See for example http://www.dor.ca.gov/webaccessibility/default.htm ("The State of California has committed to achieving Web Content Accessibility Guidelines (WCAG) 1.0 Double A conformance on all public-facing websites.); http://www.osc.state.ny.us/retire/accessibility.htm (all pages of New York State Retirement system comply in full with WCAG 2.0 A, and in part with Success Criteria AA and AAA.); http://www.prb.state.tx.us/accessibility-policy.html (Texas Pension Review Board "striving to meet the recommendations of the World Wide Web Consortium (W3C) as shown in the Web Content Accessibility Guidelines (WCAG) 2.0"); http://coe.berkeley.edu/accessibility-info (U.C. Berkeley School of engineering "developed this web site to adhere to the international standards for accessibility in accordance with Web Content Accessibility Guidelines (WCAG v1.0)".)

Sites that already meet WCAG standards (either WCAG 2.0 or its predecessor, WCAG 1.0 (in place since 1999)) remind us that while web accessibility regulations may be new under the ADA, web accessibility itself is currently being provided by certain Title II and III entities. Moreover, the Department of Justice has long recognized web accessibility as a component of ADA implementation. The Department must ensure that these important new regulations recognize the landscape that currently exists and move accessibility forward. The fact that the DOJ has long recognized web accessibility as part of the ADA, and that commercial entities, large and small, as well as state and local governments, are already using WCAG, helps demonstrate why that standard is appropriate, and should be adopted by the Department. Additionally, the Department

needs to ensure accessibility for the deaf-blind community by requiring transcripts to be available for the deaf-blind community.

*Question 2. Should the Department adopt the section 508 standards instead of the WCAG guidelines as its standard for website accessibility under titles II and III of the ADA? Is there a difference in compliance burdens and costs between the two standards? Please explain your answer.*

No, the Department should not adopt the Section 508 standards that apply to federal agencies. The WCAG standards are more appropriate (see Question 1). In addition, the Section 508 standards are currently undergoing revision that likely will make them more compatible with the WCAG guidelines and criteria.

When TEITAC, the industry–consumer advisory committee assisting the Access Board with the Section 508 refresh, turned in its report on revision of the 508 standards it made its recommendation as identical to WCAG 2.0 as possible given that WCAG 2.0 was not completed as of the report date. (See April 2008 TEITAC Report to Access Board at http://www.access-board.gov/sec508/refresh/report/, stating "The Committee worked to harmonize its recommendations with the W3C Web Content Accessibility Guidelines 2.0 (WCAG 2.0) Working Group." Moreover, all of the commenters, both industry and consumer, that added supplemental comments to the final report addressing the web portions urged the access board to either adopt WCAG 2.0 for the Web portion of the new 508 standards or make the new standards as identical as possible to WCAG 2.0.

Given the importance of international harmonization, and the extensive support materials available for WCAG 2.0, the Title II and III web regulations should refer directly to WCAG, and not adopt Section 508, a U.S.-specific regulation that is not yet stable.

*Question 3. How should the Department address the ongoing changes to WCAG and section 508 standards? Should covered entities be given the option to comply with the latest requirements?*

The Department should require all public accommodations (covered by Title III) and state and local government entities (covered by Title II) to comply with the most recent set of WCAG standards. As discussed in the response to Question 1 above, WCAG 2.0 is a stable international standard adopted after a rigorous, open and transparent process. It is designed to be flexible and allow for new technologies. Moreover, as evidenced by the migration from WCAG 1.0 to WCAG 2.0 in 2008, any update to WCAG Guidelines will not inconvenience anyone or force anyone who has adopted its predecessor to engage in costly and awkward retrofitting.

The Department should avoid a scenario under which entities can jump back and forth between two standards (Section 508 and WCAG). While it is possible that the current 508 refresh will result in perfect harmony between the standards, this may not happen. If Section 508 does become identical to WCAG, there is nothing gained by adopting "a copy" of WCAG – WCAG itself should be adopted to insure international harmonization. WCAG was designed as a robust and complete standard and should be the only technical standard referenced in the new web accessibility regulations.

*Question 4. Given the ever-changing nature of many websites, should the Department adopt performance standards instead of any set of specific technical standards for website accessibility? Please explain your support for or opposition to this option. If you support performance standards, please provide specific information on how such performance standards should be framed.*

No, but a performance standard should be adopted in addition to, not in place of, adherence to the WCAG 2.0 Level AA success criteria. We recommend the following language:

> *"A website owned, operated or controlled by a covered entity shall also be accessible to and usable by persons with disabilities. The site shall ensure that persons with disabilities may access or acquire the same information, engage in the same interactions, and enjoy the same products and services the covered entity offers visitors to its website without disabilities with a substantially equivalent ease of use."*

The performance standard, as the language above suggests, should emphasize usability and equal access for people with disabilities to the full range of activities and services available through the website of a covered entity. Such a generalized performance standard, however, cannot replace technical standards, which are critical to ensuring accessibility. Those technical standards are already set forth in WCAG 2.0.

For instance, WCAG 2.0 Guideline 1.2's discussion on accessibility of audio and video illustrates how to make such content accessible to deaf and hard of hearing Internet users. Such straightforward technical standards are essential to ensuring that there are no loopholes or lesser accessibility based on individualized interpretation and subjective opinions.

The ever-changing nature of many websites does not mean that technical standards are not needed, but simply means that those sites must have appropriate content management systems and robust accessibility features, characteristics and policies that ensure continued compliance with web accessibility standards (WCAG 2.0 AA). A generalized performance standard, while important and necessary, is not on its own specific or clear enough to ensure accessibility for the multi-layered complexity of websites provided by Title II and III entities and would not provide sufficient guidance to those entities that seek to make their websites accessible to people with disabilities. On the other hand, a generalized performance standard in addition to the technical

requirements of WCAG 2.0 Level AA is needed to ensure that any new developments in the Internet or implementation approaches that are not captured by the WCAG 2.0 standards are undertaken in a manner that ensures equal accessibility and usability to people with disabilities.

The WCAG 2.0 Level AA Success Criteria are founded on principles that go to the core of accessibility in the context of the World Wide Web. The Success Criteria – which tell site developers *what* to do but not *how* to do it - are organized around four key principles: to be accessible, content on the web must be "perceivable, operable, understandable, and robust." (See WCAG 2.0 introduction at http://www.w3.org/TR/WCAG20/#intro-layers-guidance. The "how" part of the Standards is in the Techniques document, which allow developers to embrace new methods as new technologies become available.) WCAG does not specify "how" but only "what" should be accomplished. It does so in a testable fashion, an aspect of any web regulation of great importance to covered entities and developers. Because of this, WCAG 2.0 has many of the characteristics sought in performance standards. We urge the Department to adopt a generalized performance standard in addition to WCAG in part to clarify the principles underlying the technical standards.

A generalized performance standard will guide developers in designing sites that work for people with disabilities. But a generalized performance standard "instead of" a specific technical standard does not serve site owners, web developers, or people with disabilities. Mandating WCAG 2.0 Level AA as the technical standard in conjunction with a generalized performance standard will provide precise direction to web content providers about what is needed to enable people with disabilities to use a website.

WCAG 2.0 is flexible enough to embrace new technologies as they develop, is testable and stable, and is accompanied by considerable documentation and technical assistance resources. It provides a clear roadmap to all stakeholders that will be enhanced by the generalized performance standard proposed here.

This two-pronged regulatory construct (general performance and technical specifications) is currently used in the Department's new construction regulations. Section 36.401(a) of the DOJ's Title III regulations defines discrimination as including a failure to design and construct facilities that are "readily accessible to and usable by individuals with disabilities" and Section 36.406 requires that new construction "shall comply" with the technical standards set forth in the Standards for Accessible Design.

Furthermore, this two-pronged approach has already been successfully adopted and implemented in the web context by a number of commercial entities pursuant to agreements reached with disability access advocates. These entities have committed to ensure that their websites meet both a set of technical specifications derived from WCAG as well as a generalized performance standard such as that set forth above. These entities include several of the Internet's largest commercial operations such as amazon.com; target.com; and ebay.com.

For the reasons stated in response to Question 11 below there should not be a distinction between "new" and "existing" or "remodeled" web sites (except insofar as the undue burden defense will apply to content posted prior to the effective date of the regulations and not refreshed after that date): both should be required to meet this two pronged approach to compliance.

*Question 5. The Department seeks specific feedback on the limitations for coverage that it is considering. Should the Department adopt any specific parameters regarding its proposed coverage limitations? How should the Department distinguish, in the context of an online marketplace, between informal or occasional trading, selling, or bartering of goods or services by private individuals and activities that are formal and more than occasional? Are there other areas or matters regarding which the Department should consider adopting additional coverage limitations? Please provide as much detail as possible in your response*

The NAD is in full agreement with the Department that a "place" includes a "virtual place". To that end, the NAD strongly encourages the DOJ to explicitly and unequivocally state that it is not required for there to be a nexus between a website and a physical place of business for the website to be covered by Title III. The Web has made it possible for public accommodations to engage in commerce and provide covered services without maintaining a physical place for the public to visit. These public accommodations are businesses – legal "persons" – that exist in the legal and physical world, engage in commerce, and provide covered services. The ADA must cover services that public accommodations provide physically or virtually, exclusively, or in some combination. Otherwise, people with disabilities will be excluded and denied equal opportunities, just as if we had shut and locked the doors.

Since a virtual place counts as a "place," whether an entity that does business solely on the web is covered by the ADA is to determine whether it is " a place of public accommodation" as defined by 42 U.S.C. section 12181(7). 42 U.S.C. §12181(7) offers very clear definitions of what a "place of public accommodation is. The list of categories – but not the examples contained therein – is exhaustive. S. Rep. No. 101-116, at 59 (1989); H.R. Rep. No. 101-485, pt.2 at 100 (1990).

The ADA applies to public accommodations of all sizes. This clarification does not expand public accommodations to include even the YouTube poster or the person who wants to sell his possession on eBay. That is because neither of those people fit anywhere in 12181(7). Under the law, two people bartering with one another would not be a place of public accommodation, nor would a person posting to YouTube. YouTube and eBay are the covered entities, not the individuals.

Additionally, if the Department decides to limit coverage on any of the issues directly mentioned in the ANPRM, it is critical that any exemption be very narrowly tailored. An accessible website allows people with disabilities to obtain information and participate in core programs and services provided by covered entities. Any exemption creates the possibility that people with disabilities will be locked out of an aspect of those programs, services and information. Each exemption must therefore be both fully justified and extremely limited.

(i) **Links to external pages:** The ANPRM recognizes that a covered entity must be responsible for a linked website it does not operate or control "to the extent an entity requires users of its website to utilize another website in order to take part in its goods and services (e.g., payment for items on one website must be processed through another website)." If the Department creates an exemption for linked sites that a covered entity does <u>not</u> operate or control, it is crucial that a clear exception to the exemption be made for external linked sites that are needed to participate in the goods and services offered by the covered entity.

The interrelationship between sites is often hard to discern, and a member of the public with or without a disability may not even know they are leaving one site and going

to another. For example, a bank may contract with a third party to provide online banking services: the bank may not own, operate or control the online banking site but online banking is obviously an important service the bank offers to the public.

In such a situation, existing ADA regulations governing "contractual, licensing, or other arrangements" would mandate that the bank (the covered entity) would be responsible for ensuring that the online banking platform conforms to the Department's new web accessibility regulations. In other words, the planned web accessibility regulations must not in any way undermine Section 36.202 of the current Title III regulations which prevent a Title III entity from discriminating "directly or through contractual, licensing or other arrangements."

(ii) **Informal and occasional trading by private individuals**: As noted above, "informal or occasional trading, selling, or bartering of goods or services by private individuals" is not covered as public accommodations, whether in person or online. However, entities (such as eBay) offering the opportunity to engage in such transactions are covered. The NAD cautions that the Department ensures that certain (interrelated) key principles are clarified:

(a) Each page owned or controlled by a covered entity and used by private individuals for occasional trading, selling or bartering must meet WCAG 2.0 Level AA and the generalized performance standard when considering the page without the content posted by the private individual. In other words, if the format for the content supplied by the private individual is dictated, managed or created by a covered entity, then that formatting must be, and must support, accessibility;

(b) The tools and content that the Title II or III entity provide to the public to enable private individuals (non-covered entities) to post and review content must meet the web accessibility requirements (this ensures that a person with a disability can use the tools and access the content);

(c) It must be possible for a private individual to create and share accessible content (i.e., content that conforms to the web accessibility regulations) on the page owned or operated by the covered entity if they choose to. In this regard, the Department should urge covered entities to encourage private party occasional sellers or traders to make their content accessible by offering technical assistance in an economical fashion as part of the guidelines and requirements and rules they already impose; and

(d) The regulations must be cognizant that private individuals may be posting content with the very same tools on the very same covered website that other Title II or III entities are using. For example, a private individual may use eBay to sell one item, while a Title II or III entity may also use eBay. A regulatory exemption on this issue must be very narrowly tailored so as not to exclude content posted on a site by a Title II or III entity that is also used by private individuals. Just as occasionally selling one item may not transform an individual into a Title III entity, so too will using a general site to post content not shield a Title III entity from its obligations.

Language that includes these principles will ensure that people with disabilities will be able, themselves, to be the "informal and occasional seller, trader or barterer." This will also ensure that people with disabilities will have access to all content that otherwise covered entities post in a marketplace setting, and that individual occasional sellers, etc. choose to make accessible.

(iii) **Web content created or posted by website users for personal, noncommercial use:** As with casual, private sellers, web content created or posted for personal (narrowly and carefully defined) and nonpublic (again carefully defined) use must be very narrowly tailored. 42 U.S.C. §§12131(1), 12132, 12181(7) are not so broad as to include the causal Internet user sharing personal information unrelated to either "services, programs or activities of a public entity" or any of the categories listed as "public accommodation." However, the Department must ensure that the same core principles listed above be included in such language by the Department for this type of content. Without them, people with disabilities will be locked out of social, professional and educational networks and other community sites the Internet is offering today, and will offer tomorrow.

Private communications between and among individuals who are not covered entities and who are communicating in a private context is not covered by 42 U.S.C. § 12132 and 42 U.S.C. §12181(7). When communications between two individuals occur in other contexts, however, such as an academic environment, the regulatory result must be different. For example, two private individuals may use a photo-sharing site for nothing more than sharing family photos. Those individuals may chose not to share accessible content, but that site must offer tools to support accessible photo sharing for others who want it.

On the other hand, photos of a school event shared by students on a site offered by the school to encourage student interaction must be accessible so that all students, including those with disabilities, can participate in this virtual school activity. This is

because the school is a covered Title II entity. The photos in these two examples may be shared on the same site, but the accessibility obligations would be quite different.

The Department must be very wary of interpreting current language in such a way that would exclude vast swaths of the Internet made available by covered entities from much needed accessibility requirements.

It is crucial to recognize both who is creating content, the context in which it is delivered, and the purpose for which the content is intended. For example, colleges and universities using Facebook to communicate with students, or holding classes through Facebook, cannot be exempt from accessibility requirements. They remain Title II or III entities regardless of where they are conducting their educational programs and providing educational services. Content shared by fellow students in an online class in response to a class assignment or teacher request must be subject to the web accessibility regulations, even though there may not be a public purpose for the content. This is crucial as more educational institutions use the Internet to stream online lectures, post readings, and host student chat forums. Web accessibility guidelines must apply to Internet use for educational purposes so that students with disabilities are fully included in all aspects of the learning process.

The NAD maintains that the same standards given in the current regulations, that of the requirement of auxiliary aids and services absent a showing of undue burden or fundamental alteration for Title II and Title III entities apply to the websites of covered entities as well (28 C.F.R. §§ 35.160, 35.164; 28 C.F.R. § 36.303(a)). Existing Title II and III regulations already provide factors that demonstrate whether providing an auxiliary aid and service would result in an undue burden.

As for fundamental alteration, the NAD urges the Department of Justice to add language in the new regulations that movie captioning does not constitute a fundamental alteration of the nature of the services of providing captions or transcript to make any aural information accessible. Here, we base our argument on the analogous case of movie captioning in the theaters. Both movie captioning and web captioning/transcript essentially provide the same service: allowing deaf and hard of hearing individuals to access aural information. No alteration of content or fundamental alteration of presentation is required. This is especially true if the website gives the option of turning captions on or off, and presenting alternatives of webpages with and without a transcript. In fact, content is the very reason for such aural presentation on the Web.

That said, the NAD believes that various evidence indicating that movie captioning is not a fundamental alteration applies to Web access. For example, the Department itself has already concluded that captions are not a fundamental alteration. *See* Brief of the United States as Amicus Curiae Supporting Appellants and Urging Reversal at 22-24, *Arizona v. Harkins Amusement Enterprises, Inc*., 603 F.3d 666 (9th Cir. 2010) (No. 08-16705). Furthermore, no court decisions have held that captions are a fundamental alteration. *See, e.g. Ball v. AMC Entertainment, Inc.*, 246 F. Supp. 2d 17 (2003 D.D.C.) (denying defendant's motion for summary judgment by stating that defendants failed to show closed captions (rear windows) were a fundamental alteration of the service of movies).

*Question 6. What resources and services are available to public accommodations and public entities to make their websites accessible? What is the ability of covered entities to make their websites accessible with in-house staff? What technical assistance should the Department make available to public entities and public accommodations to assist them with complying with this rule?*

There are significant resources available to the public to assist in making websites comply with WCAG 2.0 Level AA and with a generalized performance standard. The Web Accessibility Initiative of the World Wide Web Consortium has abundant resources available at www.w3.org/wai. Many private and non-profit organizations also provide covered entities with resources, including training materials, direct training, site evaluation, site remediation, and site creation.

With appropriate training, or already qualified staff, even the smallest covered entities should be able to make their websites accessible with in-house staff or reasonable outside assistance. One small entity, the Law Office of Lainey Feingold, for example, has been able to maintain and update its WCAG 2.0 Level AAA website with minimal use of outside technical support. More details, including cost information on that particular site is available at http://lflegal.com/2010/10/lflegal-doj-anprm/)

DOJ Technical assistance is always a welcomed addition to available resources, and guidance on the new web accessibility regulations should be incorporated into the Department's ADA Technical Assistance services. Given extensive resources available in the private and non-profit marketplace, the Department may want to contract with an established accessibility provider in developing TA materials and programs on this subject and/or utilize the expertise of existing federally-funded centers, such as the ADA National Network offices, that provide technical assistance on disability and technology.

*Question 7. Are there distinct or specialized features used on websites that render compliance with accessibility requirements difficult or impossible?*

No. All pages and all functions of a website can be made accessible in conformance with WCAG 2.0 Level AA Success Criteria and with a generalized performance standard. The Department should not embark on the slippery slope of carving out site features to be exempt from coverage. This is particularly so given the rapidly evolving nature of the web. A feature that may require extra effort to make accessible today may be either readily accessible – or obsolete -- tomorrow.

Moreover, the "undue burden" defense should be available in connection with content posted before the effective date of the new regulations and not substantially refreshed thereafter to covered entities that meet the well-established Department of Justice undue burden criteria. There is no reason, and no empirical or statutory justification, for the Department to create new exceptions to a well-developed and effective legal framework. Additional defenses and exceptions in the web context are not needed.

*Question 8. Given that most websites today provide significant amounts of services and information in a dynamic, evolving setting that would be difficult, if not impossible, to replicate through alternative, accessible means, to what extent can accessible alternatives still be provided? Might viable accessible alternatives still exist for simple, non-dynamic websites?*

As the Department notes, most websites today provide significant amounts of services in a dynamic, evolving setting. There are no truly alternative, accessible means to services available on the web. It is almost impossible to replicate the services that are available 24 hours a day, 7 days a week, via computer, online in any other format. Most individuals, including those with disabilities, conduct their social networking, business,

and education primarily through the computer. Even for the simplest website, there is nothing that is comparable to the services available on the Web. The Department's regulations should not allow Title II and III entities to avoid accessibility with the claim that accessible alternatives are provided.

For individuals who are deaf and hard of hearing, any information that is available aurally on a website needs to be made accessible visually. WCAG 2.0 Level AA Guideline 1.2's requirement of captioning content would not be particularly difficult or impossible to comply with. Such requirement also would not compromise the dynamic, evolving nature of certain websites. Captioning requires minor additional time to do for pre-recorded video and audio material. While live captioning may require more commitment and expense, the covered entity's obligations remain absent proof of undue burden.

*Question 9. The Department seeks comment on the proposed time frames for compliance. Are the proposed effective dates for the regulations reasonable or should the Department adopt shorter or longer periods for compliance? Please provide as much detail as possible in support of your view.*

Single Implementation Date: The Department should adopt a single deadline by which a covered entity's website must meet the new web regulations. For the reasons stated here, that deadline should be six months after the Department's new rule is published in the federal register.

A staggered implementation date – with one date for "new or completely redesigned" websites, another for existing sites, and yet another for "new pages" on "existing sites," is confusing to both the general public and web designers. Unnecessary conflict and potential litigation will arise over whether a site has been "completely redesigned" or whether new pages were added to an existing site. The only exceptions

for full accessibility by the single implementation deadline discussed here should be for (i) legacy pages, addressed in Question 10 below; and (ii) situations where the entity can satisfy the undue burden defense in connection with content posted before the effective date of the regulation and not substantially refreshed thereafter.

When a member of the public goes to a web site, they don't know if it is new, wholly redesigned, or partially redesigned. The public needs to have a consistent and realistic expectation of accessibility and covered entities need a clear standard for implementation.

Effective Date: As the Department is intimately aware, the regulatory process does not happen overnight. The public is currently responding to an ANPRM on the issue of web accessibility, which will be followed by an NPRM and then the final regulation. Given the length of the process, the web accessibility requirements should be effective within six months of the publication of the new regulation.

The Department of Justice has repeatedly made clear that the ADA as currently written already applies to the websites of Title II and III entities, and that those entities are required to make their websites accessible. The current rulemaking should be seen as clarifying existing law and setting more specific standards for assessing compliance with the ADA. Any implementation delay is inconsistent with the Department's previously stated position.

A two year implementation delay as suggested by the Department rewards companies that have ignored the Department's position on this issue and have not yet brought their sites into compliance. As long as the standards adopted by the Department do not differ widely from currently accepted accessibility standards (and they would not

with a rule embracing WCAG 2.0 Level AA and a generalized performance standard) there is no reason for a significant delay.

On the other hand, a two-year implementation period will be harmful to people with disabilities because covered entities will be encouraged to delay implementing accessibility and will be empowered to implement inconsistent levels of accessibility. Such a delay will stall overall progress towards making the Internet accessible. As a result, people with disabilities will continue to be unnecessarily excluded from online goods, services, information, and communities.

Although a phase-in period may be appropriate for other types of regulations such as ADA construction standards, it does not make sense in the context of web design. Accessibility enhancements can often be made without any significant delay, pages are constantly refreshed and new content is both constant and essential to the modern Internet. Few if any websites even take two years to design from scratch, or two years to redesign. Thus, a two year waiting period following publication of the final regulations, especially in light of the publicity this matter will receive through the ANPRM and NPRM processes, is simply unwarranted.

With today's demands for fresh, current, online presence, few if any Title II or III entities would leave their websites unchanged, unupdated, unrefreshed for two years. This means that if a two year waiting period were granted, websites would be built, redesigned, refreshed and updated without reference to accessibility.

For these reasons, with the exception of legacy pages discussed below, we urge the Department to adopt a single implementation date no later than six months after the final rule is published in the federal register.

*Question 10. The Department seeks comment regarding whether such a requirement would cause some businesses to remove older material rather than change the content into an accessible format. Should the Department adopt a safe harbor for such content so long as it is not updated or modified?*

As with the exemptions discussed in response to Question 5 above, an exemption (or "safe harbor") for older online content that has not been updated or modified must be very narrowly tailored. This exemption should be limited to pre-existing website pages that are no longer actively viewed or used. The Department must be careful not to exempt all existing content as supposed "legacy" content. Existing content (posted prior to the effective date of the new regulations and not substantially refreshed thereafter) should be subject to the undue burden defense. There is too much "old" information on the Web that is crucial for education, for research, and for business. Not having access to that information puts students, professionals, and other individuals with disabilities on an uneven footing with others.

The reason to exempt a narrowly defined category of inactive legacy pages from coverage of the new regulations is to allow covered entities to focus on making active pages conform to the new regulations. The Department should clarify that any exemption for narrowly defined "inactive legacy pages" is not intended to deny access to these pages for people with disabilities. General non-discrimination and effective communication provisions of the regulations, tempered by the undue burden defense, may require a covered entity to provide access to exempted legacy pages on reasonable request by a person with a disability.

*Question 11. Should the Department take an incremental approach in adopting accessibility regulations applicable to websites and adopt a different effective date for covered entities based on certain criteria? For instance, should the Department's regulation initially apply to entities of a certain size (e.g., entities with 15 or more employees or earning a certain amount of revenue) or certain categories of entities (e.g.,*

*retail websites)? Please provide as much detail and information as possible in support of your view.*

No. There should be a consistent requirement for all websites provided by covered entities.

Carving out an exception for revenue or number of employees is not necessary. The well-established "undue burden" defense will be available to Title II and III entities that cannot meet the new regulations for content posted prior to the effective date and not substantially refreshed since the effective date. The five-pronged definition of "undue burden," which takes into account the size of an entity, its financial and other resources, the number of its employees and other factors will adequately protect the legitimate interests of covered entities without erecting additional barriers to implementation of new web accessibility regulations.

Entity size is also not a predictor of ability to satisfy either a generalized performance standard or WCAG 2.0 Level AA criteria. The WCAG 2.0 Implementation Report includes sites of various sizes that have met levels A, AA and AAA Success Criteria. http://www.w3.org/WAI/GL/WCAG20/implementation-report/.

The Department should also clarify, as it has done elsewhere, that if full compliance with the new web accessibility regulations would create an "undue burden" for content posted prior to the effective date and not substantially refreshed after that date for a Title II or III entity, the covered entity must comply with those regulations, to the "maximum extent feasible" and/or provide an alternative even if full compliance would result in an undue burden.

*Question 12. What data source do you recommend to assist the Department in estimating the number of public accommodations (i.e., entities whose operations affect commerce and that fall within at least one of the 12 categories of public accommodations listed above) and State and local governments to be covered by any website accessibility regulations adopted by the Department under the ADA? Please include any data or information regarding entities the Department might consider limiting coverage of, as discussed in the "coverage limitations" section above.*

The NAD has no substantive response to Question 12, but questions its relevance. There was no need to estimate the number of entities covered by the original Title II and III regulations, and the requested information should not affect their further regulatory actions here. A cursory Google search indicates that vast numbers of Title II and III entities will be covered by new web accessibility regulations. More importantly, millions of Americans with disabilities will benefit from clear regulatory guidance from the Department of Justice on this important issue – guidance that underscores the Department's long-publicized position that accessible websites are required by the existing ADA and its regulations.

*Question 13. What are the annual costs generally associated with creating, maintaining, operating, and updating a website? What additional costs are associated with creating and maintaining an accessible website? Please include estimates of specific compliance and maintenance costs (software, hardware, contracting, employee time, etc.). What, if any, unquantifiable costs can be anticipated from amendments to the ADA regulations regarding website access?*

While there are certainly initial accessibility-related start-up costs for entities that have not yet undertaken any accessibility work and minimal on-going costs for maintaining access, these costs must be seen as an investment in full equality in the 21st century to millions of people with disabilities. The undue burden defense will be available to covered entities who have not yet complied with the law and need to enhance content posted prior to the effective date and not refreshed since that date, and will protect such entities from unwarranted costs in meeting the new web guidelines. Cost

factors should be irrelevant to providing access to new and re-designed websites, just as they are when considering access to new construction and alteration in the built environment.

*Question 14. What are the benefits that can be anticipated from action by the Department to amend the ADA regulations to address website accessibility? Please include anticipated benefits for individuals with disabilities, businesses, and other affected parties, including benefits that cannot be fully monetized or otherwise quantified.*

Ensuring that websites are accessible benefits not only deaf and hard of hearing individuals, but benefits all users. In particular, the a small sample of benefits gained by deaf and hard of hearing users in making websites accessible include the following:

- Significant education programs and resources offered by both Title II and III entities are already on line, and again, the Department's regulations in many ways need to play "catch-up." Deaf and hard of hearing students at all levels – from grade school through higher education, trade school, and supplemental programs will benefit from the Department's proposed web accessibility regulations. Making all online education tools and information available to all who wish to benefit from them has untold positive consequences for the country. Again this is important for people of all ages, and is critical for the lifelong education of our population that all are predicting will be needed to keep them competitive and employed.
- Benefits resulting from accessible online healthcare and medical information will also be significant. Several deaf and hard of hearing patients already suffer obstacles from having lack of communication access to health care. Ensuring that they are able to communicate with their health provider online would actually save lives, improve quality of life for many, and even save

costs in reasonable accommodations for many health care providers. Increasingly, health care providers are directing their patients to information available online, and deaf and hard of hearing patients need to be able to access to the specific content their doctors recommend.

- Potentially increased employment of people with disabilities, including those who are deaf or hard of hearing, is also a likely benefit of web accessibility regulations. Many jobs are now done on line, and certainly many jobs are advertised on line. This is certainly true for the deaf and hard of hearing, who can erase the communication barrier by doing online work. Many Title II and III entities have a section on their websites for career seekers to gather information and often fill out job applications. Access to this employment source by people with disabilities is a benefit to those individuals, and to society at large.
- Accessibility of online travel information will benefit both travelers with disabilities and the sellers of the travel-related goods and services they are purchasing. The web is now widely used for researching hotels and airfares, making reservations, booking services at travel destinations, and more. The travel industry will benefit from more individuals being able to use their online services.
- The ability to participate in online entertainment and communities will be a significant benefit to people with disabilities from the proposed regulations. This especially hits close to home for deaf and hard of hearing individuals,

who are often excluded from their local communities due to communication barriers.;

- Increased citizenry and access to state and local services for the deaf and hard of hearing. As more and more government entities, large and small, migrate information and services to the web, citizens with disabilities who use computers are either denied access to those services or have to obtain them in a more expensive manner (from public employees) if government websites are not accessible. Web accessibility is particularly beneficial for those living in rural communities when otherwise they would be required to move to urban and institutional settings because of lack of transportation, physical access, and other factors.

Examples of benefits to parties who are not deaf or hard of hearing in making websites accessible include, but are not limited, to the following:

- An additional consumer base for businesses who market their product, through accessible product demonstrations, to a an additional consumer base (also tied to this is buyer education (pre-sale) and training (post-sale));
- Captioning videos makes audio content more accessible to individuals who are deaf and hard of hearing also helps English speakers of other languages (or individuals who are learning English as a second language) and other visual learners. Additionally, individuals with particular learning disabilities benefit from captioned context;
- There are 30 million individuals who are classified as deaf and hard of hearing in the United States. The number of late-deafened adults is growing. A

significant portion of the population would benefit from websites that make aural information visible in a comparable visual format. This means a lot of increased business and revenues for companies who make their sites accessible;

- Increased accessibility for individuals who use the Internet for work/study while in environments with significant background noise, or noisy environments;
- Increased accessibility for individuals who work in environments or study in environments where the sound on their computers cannot be turned on (without having to carry around headphones everywhere). Examples include libraries, shared-office settings and so forth;
- Additionally, governmental entities benefit from increased web access. They will deal with less calls from deaf and hard of hearing individuals, who will be able to independently browse public websites. Likewise, they will save costs in reasonable accommodations for physical meetings with deaf and hard of hearing individuals, who can instead gain useful information by staying home and visiting the entities' websites. Governmental programs, activities, and programs will be run more efficiently, since deaf and hard of hearing individuals will have access to the necessary information on their websites.

*Question 15. What, if any, are the likely or potential unintended consequences (positive or negative) of website accessibility requirements? For example, would the costs of a requirement to provide captioning to videos cause covered entities to provide fewer videos on their websites?*

See Question 14 for the non-exclusive list of benefits.

The specific answer to the Department's question about captioning is a resounding "no." First, the technologies for captioning web-based videos and other audio content are expanding by the day and many mainstream tools are now available, including the free auto-timing and auto-captioning tools available via Google's YouTube site. The free MAGpie caption authoring tool provided by the National Center for Accessible Media is also useful and widely used for captioning the audio content of all kinds of videos. See http://ncam.wgbh.org/invent_build/web_multimedia/tools-guidelines/magpie. Also, for a list such tools and general guidance for individuals wishing to caption their own content, see http://www.dcmp.org/ciy.

Second, the cost to caption a video is a very small fraction of the cost to create any commercial video even today and those costs are expected to continually decrease to approaching zero in the future. For example, YouTube offers a free feature that allows users to add closed captioning. See http://www.youtube.com/t/captions_about. Third, if it is an undue burden for a covered entity to caption some or all of its video content posted prior to the effective date of the new regulations, the Department's undue burden regulations will be applicable. No public entity will be required by new regulations to provide fewer videos.

*Question 16. Are there any other effective and reasonably feasible alternatives to making the websites of public accommodations accessible that the Department should consider? If so, please provide as much detail about these alternatives, including information regarding their costs and effectiveness in your answer.*

No. See response to Question 8.

*Question 17. The Department seeks input regarding the impact the measures being contemplated by the Department with regard to Web accessibility will have on small entities if adopted by the Department. The Department encourages you to include any cost data on the potential economic impact on small entities with your response. Please provide information on capital costs for equipment, such as hardware and software*

*needed to meet the regulatory requirements; costs of modifying existing processes and procedures; any affects to sales and profits, including increases in business due to tapping markets not previously reached; changes in market competition as a result of the rule; and cost for hiring web professionals for to assistance in making existing websites accessible.*

The NAD reminds the Department that all public accommodation, all state and local government entity covered under Title II or Title III of the American's with Disabilities Act is required to provide accessibility to individuals with disabilities. If an entity such as a small business can demonstrate that a particular accommodation is an undue burden, then that entity may provide an alternative accommodation. However, undue burden is a highly fact-specific inquiry, which is determined on a case by case basis. The threshold for demonstrating undue burden is high, and costs for providing accommodations are included in the overall operational costs of the entire business profits.

*Question 18. Are there alternatives that the Department can adopt, which were not previously discussed in response to Questions 11 or 16, that will alleviate the burden on small entities? Should there be different compliance requirements or timetables for small entities that take into account the resources available to small entities or should the Department adopt an exemption for certain or all small entities from coverage of the rule, in whole or in part. Please provide as much detail as possible in your response.*

No, there should not be different compliance requirements or timetables for small entities because those entities will be able to avail themselves of the undue burden defense for content posted prior to the effective date of the new regulations. For the same reason, and for the reasons stated in response to Questions 9 and 11, under no circumstances should small entities, regardless of the definition, be exempted from coverage in whole or in part.

*Question 19. The Department is interested in gathering other information or data relating to the Department's objective to provide requirements for Web accessibility under titles II and III of the ADA. Are there additional issues or information not*

*addressed by the Department's questions that are important for the Department to consider? Please provide as much detail as possible in your response.*

No comment.

## SUMMARY AND CONCLUSION

The NAD urges the Department to adopt the recommendations set forth above to ensure clarity and provide the guidance necessary to implement and reflect the intent of the ADA in the context of web accessibility.

Respectfully submitted,

_____/s/_____

Debra J. Patkin
Staff Attorney
Law and Advocacy Center
National Association of the Deaf
(301) 328-1983
debra.patkin@nad.org