October 3, 2023

Rebecca B. Bond
Chief, Disability Rights Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Dear Ms. Bond,

On behalf of the American Council on Education and the undersigned higher education associations, I write regarding the Notice of Proposed Rulemaking (NPRM) issued on August 4, 2023, titled "Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities" (CRT Docket No. 144). In an effort to respond adequately to the NPRM, we sent a letter to the Department of Justice (Department) asking for an additional 90-day extension to the public comment period.[1] We were hopeful that we would have been given more time to provide a comprehensive and substantive response but, unfortunately, no additional time was granted. Given the limited amount of time we had to respond to the NPRM, we offer the comments below.

We Support Increased Access to Online Platforms for Those with Disabilities

We would like to begin our comments by expressing our support for ensuring that all students, especially those with a disability, are able to access online content in an ever-changing technological learning environment. Today, we are seeing more classes, student services, and other learning modalities utilizing the web and other online platforms. For instance, in academic year 2018-2019, 96% of courses were taught in person, 44% of faculty were aware of open educational resources (OERs), and only 14% of faculty utilized OERs in their classroom instruction.[2] Today, 72% of courses are taught in person, 64% of faculty are aware of OERs, and almost 50% of faculty utilized OERs in their classroom instruction.[3] In the NPRM, it is stated that:

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[1] American Council on Education. (2023, September). *Request for extension of comment period for NPRM on disability nondiscrimination*. https://www.acenet.edu/Documents/Letter-DOJ-Disability-Nondiscrimination-Extension-091523.pdf
[2] Seaman, J. E., & Seaman, J. (2023). *Digitally established: Educational resources in U.S. higher education*. https://www.bayviewanalytics.com/reports/digitallyestablished-2023.pdf
[3] *Ibid.*

Public entities are also using websites as an integral part of public education. Public schools at all levels, including public colleges and universities, offer programs, reading material, and classroom instruction through websites. Access to these sites became even more critical during the COVID−19 pandemic, when, at one point, all U.S. public school buildings were closed.[4]

Provided further, data from the National Center for Education Statistics shows that, in fall 2019, a total of 7,254,455 students (accounting for 37% of the total student population)[5] were participating in distance education compared to 11,205,320 students (accounting for 60% of the student population)[6] in fall 2021. From this snapshot of data alone, it is evident that more learning is moving online. The pandemic spearheaded this process, but as we continue to normalize the postsecondary experience, more faculty are beginning to understand the benefits of incorporating online education into their classrooms.

More Time is Needed for Institutions of Higher Education to Comply with WCAG 2.1 Level AA

When the Department issued a Supplemental Advanced Notice of Proposed Rulemaking (SANPRM) in 2016, it suggested that all public entities, including public institutions of higher education, would only be given two years to comply with the Web Content Accessibility Guidelines (WCAG) 2.0 Level AA. In our response to the SANPRM, we articulated the burden that would have been imposed on institutions should this time frame be implemented. [7] While we acknowledge the Department's attempt to address our prior concerns by allowing a three-year time frame for small public entities to comply, we remain convinced that the continually proposed two-year time frame for large public entities and the newly proposed three-year time frame for small public entities is not enough. Additional time is still needed to ensure full compliance with the new requirement of WCAG 2.1 Level AA.

WCAG 2.1 Level AA has 12 new success criteria in addition to the 38 total success criteria in WCAG 2.0. The new success criteria include the following:

- Creating content that is not limited to a single display orientation;
- Allowing for content to prepopulate in input fields to ease the burdens on the

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[4] Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities, 88 Fed. Reg 51954 (August 4, 2023) (to be codified at 28 CFR 35).
[5] Digest of Education Statistics. (2021). *Number and percentage of students enrolled in degree-granting postsecondary institutions, by distance education participation, location of student, level of enrollment, and control and level of institution: Fall 2019 and fall 2020* [Table]. National Center for Education Statistics. https://nces.ed.gov/programs/digest/d21/tables/dt21_311.15.asp
[6] Digest of Education Statistics. (2022). *Number and percentage of students enrolled in degree-granting postsecondary institutions, by distance education participation, location of student, level of enrollment, and control and level of institution: Fall 2020 and fall 2021* [Table]. National Center for Education Statistics. https://nces.ed.gov/programs/digest/d22/tables/dt22_311.15.asp
[7] American Council on Education. (2016, October). *Comments on the Justice Department's Notice of Proposed Rulemaking on Web Accessibility at the State and Local Level*. https://www.acenet.edu/Documents/Comments-DoJ-SANPRM.pdf

user;

- Displaying content fully with minimal need to scroll up, down, or sideways;
- Ensuring that any colors used are bold enough to be seen on the screen;
- Creating content that uses proper text spacing between letters and words;
- Allowing for pop up text boxes to not completely cover the content when using a mouse to scroll over the text;
- The ability to modify or turn off character key shortcuts;
- Allowing multiple ways for a user to use pointer gestures;
- Ensuring that a user has the ability to avoid the cancellation of an action if needed;
- Aligning voice commands with the actual text on the screen;
- Giving users the ability to choose a motion functionality that is best for them; and
- Ensuring that the user is given a confirmation of completion of certain actions.[8]

In the NPRM, the Department states that compliance with these new standards should not be too much of an issue due to the five years that public entities have had to familiarize themselves with the new standards.[9] However, regardless of the fact that the WCAG 2.1 was released in 2018, not all institutions of higher education have embarked on a complete remediation of all of their online courses to adhere to the new standards. Absent a federal regulation mandating this level of compliance, most institutions would assume that WCAG 2.1 would act as more of a guide to follow and less of a mandate.

To ensure full compliance with the new standards, we recommend allowing at least five years for all institutions of higher education to comply, regardless of size, and creating a zone period to give institutions time to get into compliance with ever-changing technological modalities and future updated WCAG standards. In an effort to provide substantive feedback, we surveyed our members and learned that 84% of those surveyed use mixed oversight of websites, learning management systems, and mobile apps. When asked how many people are responsible for the web content, learning management systems, and mobile apps on their campuses, respondents articulated a range of two to over 3,000. Additionally, 100% of respondents shared that email was a primary mode of general communications followed by websites at 89% and mobile apps at 44%. When examining the data provided, the complexity of the type of systems, and who has oversight over those systems, becomes apparent. Institutions of higher education are not state or local governments and should not be treated as such. There is not one centralized office that manages online content for an entire institution as a whole, leading institutions to require significantly more time and resources to ensure full compliance.

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[8] Web Accessibility Initiative. (2022, August). *What's new in WCAG 2.1*. W3C. https://perma.cc/W8HK-Z5QK

[9] Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities, 88 Fed. Reg 51964 (August 4, 2023) (to be codified at 28 CFR 35).

As we have articulated before, we propose an alternative way for institutions of higher education to meet the WCAG 2.1 Level AA standard. We propose that institutions have three years from the effective date to do a full assessment of the current accessibility of their websites; develop and strengthen their institutional compliance policies and processes; and develop a comprehensive plan for achieving full compliance within five years of the effective date. This approach would allow for the proper initial training and hiring of relevant and needed staff to both reach, and maintain, compliance as it would greatly benefit our more under-resourced institutions, and rural institutions, in balancing both the demands to comply with the new regulations and any potential challenges given the likely limited availability of professionals and service providers. This approach would also allow for a smoother transition, causing less potential disruption in the modality of academic programs.

In addition, we recommend at least a one-year zone period when new technologies are introduced to comply with the WCAG 2.1 Level AA standards. Furthermore, while a draft WCAG 2.2 has been released, we do believe that version 2.1 is the appropriate version for compliance at this time. Should the Department consider updating to the WCAG 2.2 Level AA standard for compliance, our recommended time frame of five years would remain the same.

The Determination of Large and Small Public Entities is Problematic

In the NPRM, the Department describes a public entity as small if it has a total population of less than 50,000, and a public entity is considered to be large if it has a total population more than 50,000. Of concern to us is how the Department is proposing to implement this standard. For instance, the Department states:

> [A] county school district in a county with a population of 60,000 adults and children is not a small public entity regardless of the number of students enrolled or eligible for services. Similarly, individual county schools are also not considered small public entities if they are components of a county government that has a population of over 50,000 (i.e., when the individual county schools are not separate legal entities). Though a specific county school may create and maintain web content or a mobile app, the county, as the legal entity governed by title II, is also responsible for what happens in the individual school. The Department expects that the specific school benefits from the resources made available or allocated by the county.[10]

The Department also shares that because there is no population data in the U.S. Census Bureau for public institutions of higher education, the Department proposes to use population data "associated with the entity the . . . university belongs to, like a county or State" to allow the institution to assess what time frame it belongs to. This

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[10] Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities, 88 Fed. Reg 51963- 51964 (August 4, 2023) (to be codified at 28 CFR 35).

is extremely problematic because the size of an institution should be based on the actual size of the institution itself and not the county or state the institution is located in. The Department wrongfully assumes that the state will provide the needed and necessary funds for institutions to be compliant with WCAG 2.1 Level AA requirements and this is not a reliable assumption to make. While there has been some steady, modest, and incremental increases to education appropriations at the state level nationally, overall, state funding for public higher education has remained below 2001 funding levels per full-time equivalent (FTE) student in inflation-adjusted dollars.[11] Also, state funding varies widely among states and ranges from $3,699 per FTE student to $27,187 per FTE student,[12] and states offered the lowest state funded support for institutions in FY 2023 than the past two fiscal years.[13] Some states are increasing their support while other states are headed in the opposite direction. We can never be certain of the funding institutions will receive in any given year as state-level funding can increase and decrease based on the strength of the economy and is subject to the political priorities and whims of state legislatures and governors. Additionally, some states allocated budgets on a biennial basis, further stressing existing resources and complicating the ability to quickly undertake large digital audits.

As we have shared before, one of the best ways to determine the size of an institution of higher education is to use the Carnegie Classifications system that already categorizes these institutions using size as an element. The Carnegie Classifications system describes a small, or very small, two-year institution as one with an FTE student enrollment below 1,999 and a large, or very large, two-year institution as one with an FTE student enrollment above 5,000.[14] A small, or very small, four-year institution is defined as one with an FTE student enrollment of less than 2,999, and a large four-year institution is considered to have an FTE student enrollment of at least 10,000.[15]

If the Department moves forward without correcting how to properly define the size of institutions of higher education, we are afraid that the unintended consequence would result in some large institutions being classified as small public entities, giving them three-years to comply according to the NPRM, because they are located in a small town under 50,000, and some small institutions of higher education being classified as large public entities, giving them two-years to comply, because they are located in towns with a population size of 50,000 or more. In no way is this a fair approach to categorizing institutions, and it is our hope that the Department

[11] State Higher Education Finance. (2022). *State funding and enrollment*. SHEEO. https://shef.sheeo.org/report-2/?report_page=state-funding-and-enrollment#education-appropriations
[12] *Ibid.*
[13] SHEEO reports this information but later shares that the total state funding support has increased in FY 2023 due to federal stimulus funding; however, the stimulus funds were temporary. SHEEO. (2023, February). *Annual grapevine compilation shows initial 6.6% increase in state support for higher education.* https://sheeo.org/grapevine-fy-2023/
[14] Carnegie Classification of Institutions of Higher Education. (2023). *Size & setting classification*. https://carnegieclassifications.acenet.edu/carnegie-classification/classification-methodology/size-setting-classification/
[15] *Ibid.*

will make our requested change.

Password Protected Website Exception Does Not Truly Benefit Institutions of Higher Education

The NPRM allows for an exception to the need to comply with WCAG 2.1 Level AA standards for websites that are protected with a password and are not offered to the general public. While we appreciate the option to alleviate compliance issues if no one with a disability is engaged in certain password-protected web content, we do not find this exception to be too particularly helpful.

Regardless of the exception in the NPRM, institutions are required to ensure full WCAG 2.1 Level AA compliance if an institution is aware of a student that has pre-registered for a course who has a disability before the student begins the academic term. Also, an institution is required to ensure compliance with WCAG 2.1 Level AA within five days after learning that a student enrolled has a disability. It is nearly impossible to alter the modality of an education course on short notice, especially within five days, to ensure compliance and leaves staff and administrators at institutions largely feeling like all online modalities need to be compliant regardless of whether a student has a disability, especially when a student can self-report their disability at any given time.

In the survey we conducted, 80% of respondents said that it would either be difficult or very difficult to ensure that password-protected course websites were compliant by the start of the academic term. Below are excerpts of responses received from our survey that highlight the concerns shared by representatives at our member institutions.[16]

- A student can enroll as early as 6 weeks ahead of the first day or as late as the day before classes in a quarter-based system, which is a very large range of time, and this rule does not clarify what a pre-registered student is in their definition. This is a critical element because providing accessible course materials to meet individualized student access needs can range from 10 days to 10 weeks, or more, based on the type of course material that has be too remediated for individual accessibility needs. For example, an undergraduate student enrolled in an English major who has learning disabilities and requires materials in a text selectable format to utilize a software product to have audio while they simultaneously read along may take less time if the materials have limited images and graphs. However, a graduate student who is enrolled in a material science degree program who has a vison disability and needs all course materials presented in an accessible format could take weeks to months and a heavy engagement with academic staff to ensure material converted (i.e. graphs, 3D models, charts, etc.) is as accurate as all their peers' materials are. The highly individualized nature of addressing

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[16] These excerpts are just a representative sample and do not include all responses. Excerpts are modified for major grammatical errors.

specific and unique accessibility needs on a case-by-case basis for students; along with the numerous types of courses, learning formats, and/or platforms used all are factors that contribute to how extensive a remediation need will be.

- Instructors often don't publish courses in the Learning Management System until the start of the term; publishers can take days to get accessible versions of content to the Disability Resource Center.
- The complexity and variation of course material and tools, without a required proactive approach to begin accessibility work, along with the potential short timeline (pre-registered could be shortly before a course starts) make this difficult and would prove overwhelming for professors and disability services staff and impact effective outcomes for students.
- Content comes from multiple departments, from individual professors, and is not necessarily located in one location. There would also not be a centralized office to coordinate distribution.
- Some materials are more time-consuming than others to make compliant. Video captioning and materials that contain mathematics or musical scores are particularly difficult.
- Teaching faculty how to make their documents and content accessible, and getting buy-in from top administrators so they can address faculty on this issue from the top-down can be difficult to do in a short time frame.
- The quantity of inaccessible content and lack of infrastructure would lead to hundreds, if not thousands, of scanned PDFs in courses that could take weeks to remediate.
- Timeline; volume and complexity of course materials; STEM materials are notoriously difficult to make accessible.
- Limited resources to make the course comply with WCAG 2.1 AA.
- Our vendor would have to ensure their tool is fully compliant. Faculty would have to review their course content prior to being on contract, which is often not the case.
- Short staffed and no money.

In addition, in the survey we conducted, 80% of respondents said that it would either be difficult or very difficult to ensure that password-protected course websites were compliant within five days after learning of an enrolled student with a disability. Representatives from our member institutions shared the following concerns below.[17]

- Similar to the answer above related to a pre-registered student there are numerous factors and steps involved, as well as different staff roles, when it comes to converting in-accessible course material to accessible course materials. Remediating academic content that has already been designed and put into 3rd party software for delivery will likely take additional time based

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[17] These excerpts are just a representative sample and do not include all responses. Excerpts are modified for major grammatical errors. Duplicate responses from the previous section are removed.

on the products used. Finding solutions to specific academic curriculum that heavily use graphs, charts, calculations, modeling, etc. will take more time than curriculum that uses text only based materials.

- Lack of wide-spread knowledge about how to make a course (especially pdfs) accessible; instructional designers and disability resource staff are too few to support all of the courses.
- Getting instructors to ensure their associated content that is loaded into the Learning Management System is accessible (i.e., syllabi, captions on videos, documents are accessible, etc).
- Coordination across multiple teams, including the identification of specific issues not previously planned for, would need to be implemented.
- Faculty learning - how to incorporate Universal Design for Learning and accessibility in their content.
- Faculty do not, generally, have the knowledge or experience, and very limited staff are available for review or fixing the content.
- Quantity of inaccessible content--online courses with 100+ pages of content all needing remediation or PDFs with 100+ pages of text, for example. Again, this is not an excuse for non- compliance.
- Not enough time to even determine the process to make the materials accessible.
- The proposed regulation requires a higher level of work for all media-related disabilities, which would increase our workload immensely.
- The number of courses, websites, and documents that would need to be made accessible is a concern. We would certainly be hard-pressed to make entire courses accessible within five business days. In addition, the exception for material behind passwords will hamper ongoing efforts to get faculty/staff to create born accessible materials, which will only compound the amount of work necessary to comply.
- Lack of content creator training and course accessibility standards remain an issue.
- Not enough fiscal and physical resources to accomplish such an undertaking. Even with 20 FTE this would be next to impossible for a single course.
- Far too few staff to do in five days.

Given the feedback we received from our survey, it is apparent that institutions will need significantly more time to comply with the WCAG 2.1 Level AA requirements should a student pre-register or already be enrolled in a program. Again, we appreciate the option to alleviate compliance issues if no one with a disability is engaged in certain password-protected web content, but the short time frame does not adequately allow for institutions to do this. Instead, we request that the Department allow institutions to determine the amount of time they may need in their comprehensive plan for achieving full compliance within five years of the effective date of the final regulation.

Compliance Costs Will Have a Significant Impact on Institutions of Higher Education

In an effort to adequately comply with this proposed regulation, institutions would need to have available resources to train faculty and staff, hire new staff, enter into contractual agreements with third-party servicers, and update software systems, among other actions. All of these actions would come with a cost and this could be extremely problematic for institutions that are smaller and under-resourced.

The NPRM shares that the initial familiarization, testing, and remediation costs would total $6.8 billion with an average annual cost of $1.1 billion after implementation. This total would include regulatory familiarization, websites, mobile apps, postsecondary course remediation, and third-party website remediation. The NPRM also shares that public institutions would incur a cost of $73.4 million for testing costs, $362.7 million for website remediation costs, $26.7 million for PDF remediation costs, and $17.3 million in video and audio captioning costs, while community colleges specifically would incur a total of $98 million in test costs, $438.4 million in website remediation costs, $30.9 million in PDF remediation costs, and $23 million in video and audio captioning costs.

While the NPRM shares that the monetized benefits of this proposed regulation far exceed the costs, we can't ignore the fact that institutions will be required to tap into additional resources, some of which they may not have, in order to get into, and remain in, compliance with these regulations. Given the financial constraints that some institutions may face, we recommend that the Department remain considerate of the potential financial burdens of institutions and implement a longer time frame of at least five years to allow institutions to fully comply with the proposed regulations.

Conclusion

We reiterate our overall support for ensuring that all students, especially those with a disability, are able to access online content in an ever-changing technological learning environment. We understand and recognize the importance of this proposed rule and want to work with you to allow all institutions of higher education to have the time and resources to adequately comply.

Thank you for your time and attention to this request.

Sincerely,

Ted Mitchell
President

On behalf of:

Achieving the Dream
ACT
American Association of Collegiate Registrars and Admissions Officers
American Association of Community Colleges
American Association of State Colleges and Universities
American Council on Education
American Dental Education Association
APPA, "Leadership in Educational Facilities"
Association of Catholic Colleges and Universities
Association of Community College Trustees
Association of Governing Boards of Universities and Colleges
Association of Public and Land-grant Universities
Career Education Colleges and Universities
Council for Advancement and Support of Education
Council for Opportunity in Education
EDUCAUSE
Hispanic Association of Colleges and Universities
National Association of College and University Business Officers
National Association of College Stores
National Association of Colleges and Employers
National Association of Independent Colleges and Universities
UPCEA