American Council on Education

Office of the President

August 18, 2008

Ms. Grace C. Becker
Acting Assistant Attorney General
U.S. Department of Justice
Civil Rights Division
Disability Rights Section
1425 New York Ave., NW
Suite 4039
Washington, DC 20005

RE: CRT Docket No. 105; Notice of Proposed Rulemaking, *Nondiscrimination on the Basis of Disability in State and Local Government Services; Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities*; CRT Docket No. 106; Notice of Proposed Rulemaking, *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities*

Dear Ms. Becker:

On behalf of the American Council on Education, the National Association of College and University Business Officers, the National Collegiate Athletic Association, and the undersigned higher education associations, we respectfully submit the following comments in response to the above referenced Notices of Proposed Rulemaking ("NPRMs"). The NPRMs seek public comment on the U.S. Department of Justice's ("DOJ's") proposed amendments to its regulations under the Americans with Disabilities Act of 1990 ("ADA"). *See* 73 Fed. Reg. 34,466 (June 17, 2008); 73 Fed. Reg. 34,508 (June 17, 2008). The undersigned associations represent a broad spectrum of this nation's higher education institutions.

Colleges and universities support the objective of the ADA: Eliminating discrimination against individuals with disabilities, including in education. Colleges and universities have a long history of leadership in advancing the aim of the ADA by their strong commitment – both in terms of financial support and human capital – to making institutional services, programs and activities available to disabled persons. The continuing rise in the number of disabled students attending higher education institutions

One Dupont Circle NW, Washington, DC 20036-1193
Telephone: (202) 939-9355 • Fax: (202) 833-4762
Web: http://www.acenet.edu

demonstrates that the ADA's objective is being fulfilled on the campuses of this nation's colleges and universities.[1]

In light of higher education's commitment to enabling disabled individuals to participate in the services, programs and activities that colleges and universities offer, we appreciate DOJ's efforts to enforce the ADA. As DOJ recognizes, however, its regulations must reflect the ADA's intended balance between accommodating individuals with disabilities and the significant burdens doing so often entails.[2] *See* 42 U.S.C. § 12182(b)(2)(A). From the perspective of higher education, the need to maintain this delicate balance is increasingly important in view of the mounting challenges that colleges and universities face in maintaining or lowering tuition costs and increasing access for students regardless of their means or status. As DOJ considers overhauling the ADA regulations, we urge you to bear in mind the substantial cost impact that additional compliance obligations have on higher education. We believe that final rules must include ample flexibility for colleges and universities to meet the needs of students with disabilities in ways that do not impose excessive financial or other burdens on the institutions.

We offer the following additional comments on several of the discrete issues that are of particular concern to our members.

I. Ticketing

We recognize the need for DOJ to provide guidance to "entities involved in the sale or distribution of tickets," which include higher education institutions. 73 Fed. Reg. at 34,526. In general, we also agree with DOJ that, given the wide variety of venues and events, its regulations cannot prescribe a "one-size-fits-all" approach for ticketing by all

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[1] *See, e.g., Equal Access to Post-Secondary Education: The Sisyphean Impact of Flagging Test Scores of Persons with Disabilities*, 55 CLEV. ST. L. REV. 15, 23 (2007) (noting "dramatic rise in the number of disabled students attending undergraduate programs"); *Disability Lessons in Higher Education: Accommodating Learning-Disabled Students & Student-Athletes Under the Rehabilitation Act & the Americans with Disabilities Act*, 41 AM. BUS. L.J. 145, 161-162 (Fall 2003) ("Since the enactment of the ADA there has been a marked increase in the number of learning-disabled students seeking accommodations from institutions of higher education."); *The Buck Stops Here: Graduate Level Disability Services & the 1998 Rehabilitation Act Amendments*, 28 J.C. & U.L. 1, 32-33 (2001) ("The number of students with disabilities attending American colleges and universities is on the rise.").

[2] *See, e.g.*, 73 Fed. Reg. at 34,515 ("The Department seeks to strike an appropriate balance between ensuring that people with disabilities are provided access to buildings and facilities and potential financial burdens on existing places of public accommodation under their continuing obligation for barrier removal.").

venues,[3] but instead must afford flexibility consistent with the ADA.[4] However, we urge DOJ to consider that its ticketing regulations will impose significant costs on higher education. DOJ's regulations should reflect this reality by providing colleges and universities with flexibility to meet their ADA obligations – as the ADA intends.

Proposed Section 36.302(f)(5) & Questions 20 and 21. DOJ's proposed regulation to govern season ticket sales will significantly affect colleges and universities because many of their sporting events – such as football and basketball games – are largely sold on a season ticket basis. Season ticket holders often sell or give away their tickets to one or more of the events during the course of a season. In light of this reality, we agree with DOJ that a season ticket holder in an accessible seating area should be able to transfer his or her ticket in the same manner as any other season ticket holder. *See* 73 Fed. Reg. at 34,526.

However, if an individual with a disability transfers a ticket in an accessible seating area to someone who is not in need of accessible seating, the transferee should not be permitted to sit in that seating area. Seating in accessible areas should be reserved only for those individuals who are in need of it. By the same token, when an individual who needs an accessible seat obtains a ticket for an "inaccessible seat" through the secondary market, the assigned seat should be exchanged for a seat in an accessible seating area.

In order to overcome the logistical challenges of reseating ticket transferees in appropriate seating areas, DOJ should accord venue operators significant discretion to manage ticket transfers. Thus, DOJ should allow venues to adopt and administer their own published policies on how reseating of individuals into appropriate seats shall occur. Such policies should address the amount of advance notice that a venue will require based on the nature of the venue and the event. For example, when a season ticket is purchased in an accessible seating section, the purchaser should be notified that, under the venue's established seat transfer policy, any transfer of his or her ticket to a person who does not need a seat in an accessible seating area must be arranged through the venue's established process within a given number of hours before the event. Advance

[3] *See* 73 Fed. Reg. at 34,527 ("The Department believes that guidance in this area is needed, but also recognizes that ticketing practices and policies vary with venue size and event type, and that a 'one-size-fits-all' approach may be unrealistic. These options provide flexibility so that ticketing policies can be adjusted according to the venue size and event type.").

[4] *See also Drawing the Line Between Reasonable Accommodation & Undue Hardship Under the Americans With Disabilities Act: Reducing the Effects of Ambiguity on Small Business*, 41 UNIV. KAN. L. REV. 783, 794 (1993) (explaining that "Congress intended the case law developed under Section 504 should serve as a guide to understanding the ADA's flexible approach to the concepts of reasonable accommodation and undue hardship.").

notice should also be required when a holder of a ticket for an inaccessible seat transfers his or her ticket to a person who needs a seat in an accessible section. Allowing venue operators to administer this type of process would facilitate the exchange of tickets while permitting venue operators to make sure that accessible seating is available for those who need it.

Proposed Section 36.302(f)(8). We strongly support DOJ's effort to curb fraudulent purchases of seats in designated accessible seating areas. Fraudulent ticket purchases injure legitimate wheelchair users, their families, their companions, and the venue itself. As formulated, DOJ's proposed regulation appropriately balances the interests of individuals with disabilities against the need for public accommodations to guard against potential ticket fraud that prevents them from making accessible seating available to individuals with disabilities. *See id.* at 34,527.

Proposed Section 36.302(f)(9) & Question 23. Colleges and universities respect the desire of individuals with disabilities to sit near their companions at events. DOJ's proposed approach to accommodate this interest is confusing and misguided, however. *See id.* at 34,527-28. As an initial matter, DOJ's proposal to require public accommodations to provide up to three companion seats for each person with a disability in a designated wheelchair area seems more appropriately addressed in the design guidelines rather than through ticketing policies.

Additionally, as DOJ acknowledges, the proposed regulations may reduce the amount of accessible seating available for those who need it. For example, if a venue has 20 sets of wheelchair/companion seats in a particular accessible area (for a total of 40 seats), and the first 10 persons who purchase tickets in this area purchase three companion seats each, then this accessible seating area is sold out. Yet, under that scenario, only 10 of the seats have been sold to individuals that require wheelchair accessible seats. That outcome – which DOJ's proposed regulation permits – seems inconsistent with the design guidelines, which generally require public accommodations to provide a single companion seat for every wheelchair space (except for venues with a capacity of more than 5,000 seats that must have five wheelchair seats with three companion seats each).

II. Assembly Areas

Colleges and universities believe that their assembly areas should be made extensively accessible to disabled individuals. We therefore generally support DOJ's proposed regulations governing new construction and alterations of assembly areas. However, we have serious concerns about DOJ's proposed prohibition on the use of temporary platforms or other movable structures to provide accessible seating. *See id.* at 34,493; *see also id.* at 34,545. First and foremost, we believe that the obligation to provide wheelchair accessible seating is a separate issue from the types of architectural designs and construction materials that may be used to provide that seating. Thus, any

regulation that DOJ issues to address its concern that use of removable seating in assembly areas may reduce the seating opportunities for people who use wheelchairs and their companions should take aim at how assembly area operators make use of their accessible seating – not on how the seating is designed and constructed. *See id.* at 34,493; *see also id.* at 34,545. Questions about how accessible seating should be designed are properly addressed first by the Access Board, not DOJ.

Furthermore, DOJ's prohibition poses a serious problem for assembly areas that host events for which seating is primarily assigned on a season ticket basis far in advance of the first event of the season. For those venues, there is no question that all wheelchair accessible seating must be initially made available to individuals with a disability and that, even after season tickets are sold, some wheelchair seating must be held in reserve throughout the season. But, consistent with the ADA, these assembly areas need – and should be provided – the flexibility to use temporary platforms or movable rows of seats to manage their stock of available seating.

III. Wheelchairs and Other Mobility Devices

We support DOJ's proposal to vest assembly area operators with discretion to restrict the use of certain power-driven mobility devices where appropriate under the circumstances. *See* 73 Fed. Reg. at 34,539-40; *id.* at 34,556. We understand that some individuals with disabilities depend on wheelchairs and other mobility devices for locomotion. Under the ADA and the Architectural Barriers Act of 1968, 42 U.S.C. §§ 4151 *et seq.*, the Uniform Federal Accessibility Standards and the ADA Accessibility Guidelines for Buildings and Facilities establish the space dimensions for wheelchair accessible seating. Assembly area operators, including colleges and universities, used those standards to put in place designated areas to accommodate those requiring wheelchair accessible seating. Accommodation of mobility devices that do not fit within the size and height dimensions of existing standards would be impracticable if not impossible. In fact, accommodating power-driven mobility devices that exceed established space dimensions may well obstruct the views of other patrons or interfere with the overall existing space required for wheelchair access. Given the burdens that use of power-driven mobility devices imposes on public accommodations, DOJ may appropriately provide assembly area operators flexibility to adopt policies that carefully regulate their use.

IV. Service Animals

We also welcome DOJ's proposed revisions to its regulations governing public accommodations' obligation to make their services, programs and activities reasonably available to individuals who use service animals. *See id.* at 34,515-16; *see also id.* at 34,519-22. Higher education institutions recognize the need for some students with disabilities to use service animals, and they are committed to making reasonable

modifications to their policies and procedures to allow those students to participate in their services, programs and activities. However, the breadth of the existing definition of "service animals" has led to fraud and abuse and sparked litigation.[5] DOJ's existing definition has also made it difficult for colleges and universities to adopt coherent policies to determine whether a given animal is a legitimate service animal. The confusion spawned by the current definition is particularly troubling when colleges and universities must balance a request to accommodate a student's pet animal against the interests of other students, such as when a student seeks to introduce an animal into a communal living environment like a dormitory.

DOJ's proposed revisions to the definition of service animal go a long way towards eliminating this confusion and providing colleges and universities with guidance on the types of animals that do – and do not – qualify as "service animals." *See* 73 Fed. Reg. at 34,515-16; *see also id.* at 34,519-22. The proposed addition of language to the regulation that specifically identifies types of animals – *i.e.*, wild animals, certain specified species, and comfort/emotional support animals – that are not service animals is especially helpful. *See id.* at 34,553. Further clarification as to what constitutes "other common domestic animal" might also be useful, as such term is vague when coupled with the exclusions. We would also prefer that DOJ refrain from imposing any height/weight restrictions for service animals, so that colleges and universities can maintain flexibility in evaluating service animals on a case-by-case basis. DOJ's proposed revisions will help colleges and universities to determine the circumstances under which consistent with the ADA they may deny a student's request to use an exotic or non-traditional pet as a service animal.

V. Stages

DOJ proposes to require an accessible route that directly connects the seating area and the accessible seating, stage, and all areas of the stage. Higher education institutions welcome such a requirement. Colleges and universities utilize a variety of campus venues for performances and graduations. We support DOJ's proposed design guideline with respect to direct stage access. We are aware of institutions that have benefited from working with student performers with disabilities to enable their participation in campus performances, and we believe that such a cooperative approach affords colleges and universities the flexibility they need to provide direct access to stages.

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[5] *See, e.g., Assenberg v. Anacortes Hous. Auth.*, Case No. C05-1836RSL, 2006 WL 1515603, *4 (W.D. Wash. 2006) (rejecting plaintiffs' claim for accommodation of snakes as service animals); *Access Now, Inc. v. Town of Jasper*, 268 F. Supp. 2d 973, 980 (E.D. Tenn. 2003) (rejecting plaintiffs' claim that miniature horse was a service animal).

Colleges and universities are committed to removing discrimination on the basis of disability in higher education and support DOJ's efforts to ensure that objective is met. Regulations adopted to advance this goal, however, must reflect the balance required under the ADA between the needs of individuals with disabilities and the burdens imposed to meet those needs. With the costs of higher education on the rise, the need for a careful balance between those interests is increasingly vital. To strike that balance, it is crucial for DOJ's final regulations to give colleges and universities flexibility to meet the needs of disabled individuals without incurring undue burdens that impair their ability to carry out their educational missions.

Sincerely,

Molly Corbett Broad
President

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On behalf of:
American Association of Community Colleges
American Council on Education
APPA ("Leadership in Educational Facilities")
Association of College and University Housing Officers – International
National Association of College and University Business Officers
National Association of Independent Colleges and Universities
National Association of State Universities and Land-Grant Colleges
National Collegiate Athletic Association