

1 BONNETT, FAIRBOURN,
 FRIEDMAN & BALINT, P.C.
 2 Andrew S. Friedman (AZ Bar. 005425)
 Guy A. Hansen (AZ Bar. 013549)
 3 2901 North Central Avenue, Suite 1000
 Phoenix, Arizona 85012
 4 afriedman@bffb.com
ghanson@bffb.com
 5 Telephone: (602) 274-1100
 Facsimile: (602) 274-1199

OFFICE OF THE
 ATTORNEY GENERAL
 Alisa Ann Blandford (AZ Bar: 012597)
 Lisa Kaye Hudson (AZ Bar: 022901)
 1275 W Washington
 Phoenix, AZ 85007
Alisa.blandford@azag.gov
Lisa.hudson@azag.gov
 Telephone: (602) 542-7687
 Facsimile: (602) 542-7644

6 Daniel F. Goldstein
 7 Mehgan Sidhu
 BROWN, GOLDSTEIN & LEVY, LLP
 8 120 E. Baltimore St., Suite 1700
 Baltimore, MD 21202
 9 Telephone: (410)962-1030
 Facsimile (410)385-0869
 10 dfg@browngold.com
ms@browngold.com

11 Counsel for Plaintiffs
 12 [Additional Counsel Appear on Signature Page]

13
 14 **UNITED STATES DISTRICT COURT**
 15 **DISTRICT OF ARIZONA**
 16

17 NATIONAL FEDERATION OF THE BLIND,
 18 AMERICAN COUNCIL OF THE BLIND, and
 DARRELL SHANDROW,

Case No: CV09-01359-GMS

CASE MANAGEMENT REPORT

19 Plaintiffs,

20 vs.

21 The ARIZONA BOARD OF REGENTS and
 22 ARIZONA STATE UNIVERSITY,

(Assigned to Honorable G. Murray
 Snow)

23 Defendants

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1 Pursuant to Fed. R. Civ. P. 26(f) and this Court's Order of July 17, 2009 [Doc. #
2 24], counsel for Plaintiffs, National Federation of the Blind, American Council of the
3 Blind and Darrell Shandrow ("Plaintiffs"), and counsel for Defendants, Arizona Board of
4 Regents and Arizona State University, conferred on July 23, 2009 and hereby submit
5 this Proposed Case Management Plan. All matters set forth herein were agreed to by
6 the parties, unless different positions are ascribed to the respective parties.

7 **1. Attendees at the Meeting of Counsel**

8 Counsel for the Plaintiff's, Daniel F. Goldstein, by telephone, and counsel for the
9 Defendant's, Lisa Hudson and Alisa Blandford, attended the Rule 26(f) meeting and
10 assisted in developing this Case Management Report.

11 **2. Parties in the Case**

12 Plaintiffs: National Federation of the Blind ("NFB"), American Counsel of the
13 Blind ("ACB") and Darrell Shandrow are the Plaintiffs.

14 Defendants: Arizona Board of Regents and Arizona State University are the
15 Defendants. There are no parent corporations or entities.

16 **3. Short Statement of the Nature of the Case**

17 Plaintiffs: Case Statement

18 Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and Title II of the
19 Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.* prohibit, respectively,
20 recipients of federal funding and public entities, from offering programs, services and
21 activities that discriminate on the basis of disability and thus forbid Defendant Arizona
22 State University – a public university that receives federal funding – from continuing its
23 program of providing and making textbooks available on the Kindle DX, electronic book
24 reader that is inaccessible to its blind students.

25
26 Historically, blind college students have educational opportunities inferior to
27 sighted students because books in alternative formats, Braille, e-books or audio books
28 are rarely available on a timely basis or at the same quality as a print book. Even when
universities (like Arizona State University's Disability Resource Center) would, as a last

1 resort, scan and OCR a print book purchased by a blind student, the result typically is
2 inferior due to conversion errors, an absence of structural data and thus navigability,
3 and a nonsensical reading order when columns or sidebars are present. Graphics are
4 unlabeled.

5 The advent of the commercial e-textbook should eliminate these historical
6 disparities by offering equal access to content for blind and sighted alike. Accordingly,
7 in February 2008, representatives of plaintiff NFB met with Amazon to advise them on
8 the two steps necessary for meaningful accessibility – text-to-speech software for both
9 the controls and the content of Amazon’s e-book reader, the Kindle. In October 2008
10 NFB reminded Amazon that if, as rumored, it planned a large screen Kindle for
11 academic use, Federal law prohibited universities from using the Kindle unless it were
12 accessible to the sight-impaired. Nonetheless, in May 2009, Amazon released the
13 large-screen Kindle DX portable e-book reader for academic use and announced pilot
14 projects with 6 colleges and universities, including Defendant ASU. Because a blind
15 student cannot operate the controls of the Kindle, unless enjoined, ASU will offer a
16 program of mobile access to e-books that discriminates against blind students.
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19 The experience of being a blind student in a vast university setting is often one of
20 separation and segregation. Plaintiff Darrell Shandrow has personally experienced this
21 discrimination. ASU’s embrace of the Kindle heightens Mr. Shandrow’s sense that ASU
22 condones the treatment of blind students as second-class academic citizens and
23 disregards or underestimates the importance of giving blind students equal access to
24 information that is readily possible. The two organizational plaintiffs – the NFB and the
25 ACB -- have been tirelessly pressing for decades to achieve equal opportunity, equal
26 access to technology and equal access to information. These well-respected
27 organizations have done so by participating in the development of technology,
28

1 educating technology developers, providing consumer education, working for legislative
2 change and through litigation when necessary.

3 Digital information -- including not only e-books, but the internet, dynamic
4 screens on ATMs, point-of-sale machines and home appliances -- should provide equal
5 access. Electronic information is not inherently visual, aural or tactile, but it is
6 nevertheless typically presented only visually. As a result, isolation of the blind has
7 been heightened, not decreased by technological advances. The contours of federal
8 disability law are such that manufacturers are not prohibited from creating inaccessible
9 technology, but institutional purchasers are prohibited from using it. Accordingly, when
10 a new technology like the Kindle is launched and has the potential to spread widely and
11 rapidly, a failure to halt its illegal acquisition immediately has devastating results: if the
12 Kindle is permitted to remain inaccessible during the pilot program and it performs well,
13 it will spread exponentially. If just 100 schools, community colleges or universities
14 adopt it next year, the organizational plaintiffs do not have the option under federal law
15 of suing Amazon, but must instead file 100 separate law suits, something that neither or
16 both have the resources to do. This harm – to blind students, blind organizations, and
17 the schools themselves – can be avoided by making clear that accessibility is required
18 from the beginning, rather than as an afterthought.

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21 Defendants: No blind students are impacted in any way by ASU's participation in
22 the Kindle pilot. No blind students met the academic requirements to participate and
23 none sought to participate. ASU's Kindle DX pilot is a one-year experiment that will
24 commence in the Fall of 2009 and continue through the 2009-2010 academic year. The
25 pilot program involves only a single course: the Human Event. The Human Event is a
26 course offered only to students in the Barrett Honors College at ASU. There are forty-
27 seven sections of the Human Event offered in the 2009-2010 academic year. Of those
28 sections, only those three taught by Professor Ted Humphrey are participating in the
Kindle DX pilot program. The three sections participating in the pilot program have

1 completed enrollment. The schedule did not separately list the pilot sections. There are
2 currently no blind individuals participating in the Human Event course for the 2009-2010
3 academic year. ASU did not exclude any individuals with disabilities from participating
4 in the course or the pilot. ASU could and would have accommodated any blind students
5 who happened to register for the pilot sections of the course.

6 Plaintiff Shandrow lacks standing to bring this Complaint as a matter of law. To
7 establish standing to sue, a plaintiff must allege "(1) [he] has suffered an 'injury in fact'
8 that is (a) concrete and particularized and (b) actual or imminent, not conjectural or
9 hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant;
10 and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by
11 a favorable decision." *Stormans, Inc. v. Selecky*, 2009 WL 1941550 * 6 (9th Cir. July 8,
12 2009) (internal citation omitted). The Kindle DX pilot is limited to the Human Event
13 course in the Barrett Honors College. Plaintiff Shandrow, like a great number of ASU
14 students, is excluded from the Kindle DX pilot because he is not a student in the Barrett
15 Honors College. His disability was not a factor in determining eligibility for the Human
16 Event course, - his status as a student in the School of Journalism prevents him from
17 being eligible.
18

19 Plaintiffs cannot show that ASU's participation in the Kindle DX pilot program
20 violates the Rehabilitation Act or Title II of the ADA. The standards for establishing a
21 claim under Title II of the ADA and Section 504 of the Rehabilitation Act are essentially
22 the same. *See Zukle*, 166 F.3d at 1045 n. 11. The plaintiff must show: (1) a disability
23 under the Act; (2) that he or she is "otherwise qualified" for the program or activity; (3)
24 dismissal or exclusion from the program or activity because of the disability; and (4) that
25 the school receives federal financial assistance and is a public entity. *See id.*, 166 F.3d
26 at 1045.
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1 Plaintiffs cannot show that a blind student was dismissed or excluded from the
2 Kindle pilot program because of their disability. No blind students have registered to
3 take the Human Event course at ASU for the 2009-2010 academic year. No blind
4 students applied for any of the three sections of the Human Event that are participating
5 in the Kindle pilot – all of which are full. Although the vast majority of ASU students are
6 excluded from participation in the pilot program because they are not members of the
7 Barrett Honors College, no students were excluded from participation in the pilot
8 program because of a disability.
9

10 **4. Jurisdiction**

11 Jurisdiction arises under 28 U.S.C. 1331 and 1343(a)(4), as this is a civil action
12 seeking equitable relief for alleged violations of the Rehabilitation Act and the
13 Americans with Disabilities Act, each an Act of Congress, and each providing for
14 protection of civil rights.

15 **5. Service**

16 All parties have been served and Defendants will have answered by the date of
17 the Case Management Conference.

18 **6. Statement Regarding Additional Parties and Amendments**

19 Neither the Plaintiffs nor the Defendants anticipate adding additional parties or
20 amending or supplementing the Complaint

21 **7. Contemplated Motions and Statement of Issues**

22 Plaintiffs: Plaintiffs have filed a Motion for Preliminary Injunction and anticipate
23 no other motions. Plaintiffs anticipate that testimony at a hearing on that motion may
24 form much of the evidentiary basis for trial.

25 Defendants: Defendants have filed a Response to Plaintiffs' Motion for
26 Preliminary Injunction. Defendants have also filed a Motion to Dismiss Plaintiff
27 Shandrow. Defendants anticipate filing a Motion for Summary Judgment.
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8. Reference to United States Magistrate Judge

Plaintiffs: Plaintiffs do not consent to reference to a United States Magistrate Judge for trial. Plaintiffs do not believe that at this time the case is suitable for reference to a United States Magistrate Judge for a settlement conference.

Defendants: Defendants do not believe that at this time the case is suitable for reference to a United States Magistrate Judge.

9. Related cases

There are no other pending cases; however, NFB and ACB have filed administrative complaints with the United States Department of Justice and the United States Department of Education against five other post-secondary institutions that are, like ASU, planning pilot programs with the Kindle DX for the coming academic year.

10. Initial Disclosures

Plaintiffs and Defendants have both provided Initial Disclosure Statements.

11. Statement Regarding Electronic Discovery

Plaintiffs and Defendants will produce discoverable electronically stored information in a reasonable usable format and will identify, when possible in its responses to written discovery, the specific file format in which electronically stored information will be produced.

12. Statement Regarding Issues of Privilege/Work Product

The parties are not currently aware of any issues regarding documents or information protected from disclosure by the attorney-client privilege, work product doctrine, or other investigative privilege.

13. Discovery

a. Plaintiffs and Defendants believe that most of the discovery involves documents in the possession of one or the other parties, but that there may be some third party discovery from Amazon, Inc. Discovery should not be very extensive.

b. Plaintiffs and Defendants believe this case should proceed on a standard track.

1 c. Plaintiffs and Defendants propose that the presumptive time limit for each
2 deposition be four hours, unless extended by agreement of the parties.

3 **14. Proposed Schedule**

4 Plaintiffs: Plaintiffs propose that a preliminary injunction hearing occur before
5 August 24, 2009, the date of the commencement of the academic year at Arizona State
6 University and the deployment of Kindle DX's by that institution. Plaintiffs further
7 propose that fact discovery in this case be completed on or before January 29, 2010
8 and expert disclosures by February 26, 2010 and expert depositions by April 2, 2010.
9 Any summary judgment motion should be filed by May, 14, 2010. The parties will work
10 in good faith to schedule depositions at mutually agreeable date and times. Plaintiffs
11 propose to engage in good faith settlement talks after disposition of its preliminary
12 injunction motion.

13 Defendants: Defendants do not believe that a hearing is necessary on Plaintiffs'
14 pending Motion for preliminary injunction. Defendants generally agree with Plaintiffs'
15 proposed dates, but request staggered disclosure of expert witnesses.

16 a. Deadline for fact discovery: January 29, 2010

17 b. Deadline for expert disclosures:

18 1. Plaintiffs' initial disclosure: December 4, 2009

19 2. Defendants' initial disclosure: January 29, 2010

20 3. Rebuttal disclosure: February 26, 2010

21 c. Deadline for completion of expert depositions: April 2, 2010

22 d. Deadline for filing dispositive motions: May 14, 2010

23 e. Deadline for engaging in good faith settlement talks: Following the
24 disposition of the pending motion for preliminary injunction.

25 **15. Jury trial**

26 A Jury trial has not been requested.

27 **16. Length of Trial**

28 Plaintiffs: Plaintiffs anticipate that trial will last three days at the outside.

Plaintiffs believe that the trial can be shortened by (1) using the record developed at the

1 hearing on the motion for preliminary injunction as permitted by Rule 65, Fed. R. Civ. P.
2 and (2) that stipulations can be reached on three of the four elements of Plaintiffs'
3 claims, leaving the trial to focus on the issue of equal access and any affirmative
4 defenses asserted by the Defendant.

5 Defendants: Defendants anticipate that the trial will last three to four days.

6 **17. Prospects for Settlement**

7 Plaintiffs and Defendants believe that after the Court rules on its Motion for
8 Preliminary Injunction settlement talks could be fruitful, probably without the necessity of
9 assistance from the Court.

10 **18. Other Matters**

11 None.

12 RESPECTFULLY SUBMITTED this 24th day of July, 2009.

13
14 OFFICE OF THE
ATTORNEY GENERAL

BONNETT, FAIRBOURN,
FRIEDMAN & BALINT, P.C.

15
16 /s/ Alisa Ann Blandford
Alisa Ann Blandford (Bar: 012597)
17 Lisa Kaye Hudson (Bar: 022901)
1275 W Washington
18 Phoenix, AZ 85007
Alisa.blandford@azag.gov
19 Lisa.hudson@azag.gov
20 Telephone: (602) 542-7687
Facsimile: (602) 542-7644

/s/ Andrew S. Friedman
Andrew S. Friedman (Bar. 005425)
21 Guy A. Hanson (Bar. 013549)
2901 North Central Avenue, Suite 1000
Phoenix, AZ 85012-2311
afriedman@bffb.com
22 ghanson@bffb.com
23 Telephone: (602) 274-1100
24 Facsimile: (602) 274-1199

25 OF COUNSEL

26 Daniel F. Goldstein
27 Mehgan Sidhu
BROWN, GOLDSTEIN & LEVY, LLP
120 E. Baltimore Street, Suite 1700
Baltimore, Maryland 21202
28 Telephone: (410) 962-1030
Facsimile: (410) 385-0869
dfg@browngold.com
ms@browngold.com

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Amy Robertson
FOX & ROBERTSON, P.C.
104 Broadway, Suite 400
Denver, CO 80203
TTY: (877) 595-9706
Telephone: (303) 595-9700
Facsimile: (303) 595-9705
ARob@foxrob.com

Eve Hill
1667 K St. NW, Suite 640
Washington, DC 20006
ehill@law.syr.edu
Telephone: (202) 296-2044
Facsimile: (202) 296-2047

Attorneys for Plaintiffs