TERRY GODDARD
Attorney General

Lisa K. Hudson, 012597
Alisa A. Blandford, 022901
Assistant Attorney General
1275 W. Washington
Phoenix, Arizona 85007-2997
Telephone: (602) 542-7673
Telephone: (602) 542-7687
Fax: (602) 542-7644
Lisa.Hudson@azag.gov
Alisa.Blandford@azag.gov

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

The NATIONAL FEDERATION OF THE BLIND, The AMERICAN COUNCIL OF THE BLIND, and DARRELL SHANDROW, Plaintiffs, vs. The ARIZONA BOARD OF REGENTS and ARIZONA STATE UNIVERSITY Defendants.	Case No: CV09-01359 GMS **REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF SHANDROW FOR LACK OF STANDING** (Assigned to Honorable G. Murray Snow)

Defendants Arizona Board of Regents (ABOR) and Arizona State University (ASU) submit their Reply in Support of Defendants' Motion to Dismiss Plaintiff Shandrow for Lack of Standing. Plaintiff Shandrow lacks standing because he can not establish an injury in fact, which is required to establish Article III standing.

MEMORANDUM OF POINTS AND AUTHORITIES

Shandrow, a blind student, is protesting ASU's pilot program involving the Kindle DX, a new technology that is currently inaccessible to students with no vision. The Kindle DX pilot program is a year-long program that involves three sections of one

class in the Barrett Honors College. Declaration of Ted Humphrey (Humphrey Declaration) ¶ 4[1]. Shandrow is not eligible to take any sections of this class because he is not in the Barrett Honors Colleges. Humphrey Declaration ¶ 6. The sole basis for Shandrow's exclusion from the class and, as a result the Kindle DX pilot program, is the fact that he is not a student in the Barrett Honors College. Shandrow does not allege that he was excluded from the Kindle DX pilot program due to his disability.

Notwithstanding the fact that Shandrow is ineligible to participate in the Kindle DX pilot program due only to the college he is associated with, he nevertheless asserts that ASU has harmed and discriminated against him due to its participation in the Kindle DX pilot program. Shandrow's assertions as to the harm he suffers or might suffer if Kindles become available for additional classes fails to establish Article III standing. His allegations of potential future harm are too speculative to constitute a "concrete injury" as is required by law. His assertion that he suffers "dignitary harm" because ASU has adopted technology that is inaccessible to him fails to rise to the level of an injury in fact, as is required to prove standing. Finally, his assertion that he is harmed because he pays tuition at ASU fails as a matter of law.[2]

I. Shandrow's Allegation of Future Harm Is Insufficient to Establish Standing.

Shandrow's allegation that the potential wider adoption of the Kindle DX in the future by ASU presents a threat of discrimination is not sufficient to confer standing. Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss Plaintiff Darrell Shandrow for Lack of Standing (Brief) at 10-13. See also Complaint at ¶ 23. Although the courts have held that under some circumstances the threat of future harm is sufficient

[1] The Declaration of Ted Humphrey is attached to Defendants' Motion to Dismiss Plaintiff Shandrow for Lack of Standing at Exhibit 1.

[2] Both parties have submitted extrinsic evidence in support of their motions. Because Defendants' Motion to Dismiss was for lack of subject matter jurisdiction pursuant to Federal Rule of Procedure 12(b)(1), consideration of material outside pleadings does not convert the motion into one for summary judgment. *See Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983); *see also McCarthy v. U.S.*, 850 F.2d 558, 560 (9th Cir. 1988).

to establish standing, Shandrow's assertion that he has standing due to the threat of future discrimination is speculative at best.

The Supreme Court and the Ninth Circuit have held that "threatened rather than actual injury can satisfy Article III standing requirements." *Harris v. Bd. of Supervisors, Los Angeles County*, 366 F.3d 754, 761 (9th Cir. 2004). Plaintiffs must still establish an "injury in fact," which requires them to "allege an imminent threat of concrete injury, and [plaintiffs] must distinguish themselves from the public at large by demonstrating that the alleged injury 'affect[s them] in a personal and individual way.'" *Id*. quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992). Plaintiffs must establish a concrete risk of harm; speculative, "some day" damages are insufficient to confer standing to sue. *Id*. at 762 quoting *Lujan*, 504 U.S. at 563.

Cases in which the courts have held that the threat of future harm is sufficient to establish standing involve situations where the nature and severity of the threatened harm are concrete and established. In *Harris*, plaintiffs – a group of chronically ill indigent patients who relied on county health services – could establish that if the County was not enjoined from closing a hospital and reducing beds at another, their physical health and well being would be threatened. *Id*. at 758-759, 762. In *Covington v. Jefferson County*, the court held that the risk plaintiffs faced was "in no way speculative" because plaintiffs lived across the street and down-gradient from an improperly run landfill that increased their risk of fires, explosions, and groundwater contamination. *Id*. at 761 citing *Covington v. Jefferson County*, 358 F.3d 626, 638 (9th Cir. 2004).

Courts hold that the threat of future harm is insufficient to establish standing where the assertions of harm are speculative. The quintessential example is *Lujan v. Defenders of Wildlife*, in which plaintiffs attempted to challenge the Secretary of the Interior's interpretation of the geographical scope of the Endangered Species Act (ESA), limiting it to actions only within the United States or on the high seas. 504 U.S. 555,

557-58 (1992). The *Lujan* plaintiffs asserted that they had standing to challenge the interpretation of the rule because "they had observed the habitats of certain endangered species in foreign countries, and . . . they intended to return sometime in the future to try to see the animals" but were concerned that there was a risk of damage to the habitats that might cause the animals' extinction if the geographical scope of the ESA was limited. *Harris*, 366 F.3d at 761-62, citing *Lujan*, 504 U.S. at 563-64. In *Lujan*, "[t]he Supreme Court concluded that the plaintiffs' 'some day' intentions were insufficient to confer standing to sue." *Id*. at 762, citing *Lujan*, 504 U.S. at 564. The Court also discussed the difficulty plaintiffs have in challenging the legality of government action when, as in this case, the plaintiff is not the object of the action or inactions, concluding that "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded but it is ordinarily substantially more difficult to establish." *Lujan*, 504 U.S. at 561-62.

The cases Plaintiffs' rely upon in their brief fail to support their assertion that the harm alleged by Shandrow confers standing. In *Parents Involved in Cmty. Schools v. Seattle School Dist. No. 1*, Plaintiffs – a group of parents with children enrolled in Seattle School District No. 1 – asserted two different injuries that arose from the school district's "racial tie-breaker policy." 551 U.S. 701, 718-19 (2007). First, that in the future their children might be subject to exclusion from the school of their choice on the basis of race if the racial tie-breaker policy was in place. *Id*. at 718. Second, that being forced to compete in a race-based admissions system caused injury under the Equal Protection Clause. *Id*. at 719. The Supreme Court held that the parents had standing to sue on both grounds, but focused primarily upon the standing conferred by case law under the Equal Protection Clause. *Id*. Unlike Shandrow's allegation of injury which relies upon hypothetical adoption of a technological device in some fashion in the future, the *Parents* plaintiffs could identify a concrete policy that, at the time their suit was filed, could operate to exclude their child in a specific, identifiable manner on the basis of that

child's race. Shandrow alleges no such policy, nor can he state with any certainty how he will be impacted or affected, unlike the *Parents* plaintiffs.

Similarly, the plaintiffs in *Ocean Advocates v. United States Army Corps. of Engineers*, were able to identify a specific plan for the immediate future that might result in a specific, identifiable type of harm. 402 F.3d 846 (9th Cir. 2005). Plaintiffs were non-profit environmental groups and individuals opposing the issuance of a permit that allowed BP West Coast Products to build an addition to an existing oil refinery dock. *Id*. at 855. In asserting that they had standing, Plaintiffs asserted that the extension of the dock would lead to increased tanker traffic and increase the risk of an oil spill. *Id*. at 860. The Court held that the plaintiffs had standing because the alleged injury was not conjectural or hypothetical and that, in environmental cases, requiring "actual evidence of environmental harm, rather than an increased risk based on a violation of [a] statute . . . would unduly limit the enforcement of statutory environmental protections." *Id*. (internal citations and quotation marks omitted). Once again, unlike Shandrow, the plaintiffs identified a specific basis for their potential harm – the issuance of a permit allowing expansion of the oil refinery dock – and a specific resultant harm that might occur as a direct result – increased risk of oil spills.

Plaintiff Shandrow's assertion that he has standing due to a threat of future harm is speculative and is far more similar to the alleged future harm claimed in *Lujan* than in those cases where plaintiffs were found to have standing. Like the *Lujan* plaintiffs, Shandrow is not the object of the Defendants' actions in this matter. Unlike the plaintiffs in cases where standing was found, Shandrow can not point to a policy, permit or regulation currently in place that will lead to an identifiable, concrete harm or the increased risk of such harm in the future.

The potential future uses of the Kindle DX at ASU have not been established and there is no current plan or policy in place to expand the Kindle DX beyond the pilot program. Plaintiff's threat of future harm depends on a number of conditions coming

into existence that are currently unknown. First, the Kindle DX must remain inaccessible. Second, ASU must actually expand Kindle use within the university. Third, to show that ASU has caused this future harm, ASU must provide the Kindles to students in the hypothetical future classes. In addition, Plaintiff must actually register in one of these hypothetical classes. Finally, Plaintiff must actually be subject to discrimination in the sense that he is denied meaningful participation in the hypothetical class using the Kindle. In other words, it would have to be true that the Kindle DX provides a highly superior learning experience that cannot be duplicated by accessing texts through any other medium.

Plaintiff can not state that any of the conditions necessary to establish a concrete risk of future harm will be present in the future. Plaintiff Shandrow's assertions of harm based on the threat of discrimination in the future are purely speculative and fail to establish an injury-in-fact such that it confers standing.

II. Shandrow's Claim of Suffering Dignitary Harm Is Not Sufficient to Establish Standing.

Plaintiff Shandrow asserts that he has suffered dignitary harm because ASU has adopted a technology that excludes him and others with his disability. Shandrow's argument is without merit and, if accepted by the court and expanded to its logical end, would open the door to a possible ban on textbooks as well as a ban on a number of assistive devices used by individuals with various disabilities.

In asserting that dignitary harm is sufficient to establish an injury in fact, Plaintiff relies upon *Smith v. Pac. Pro. and Dev. Corp.*, a Fair Housing Amendments Act (FHAA) case that stands for the proposition that testers have standing to bring suit under the FHAA. 358 F.3d 1097, 1107 (9th Cir. 2004). In determining that testers had standing under the FHAA, the court held that observing overtly discriminatory conditions, such as a lack of a ramped entryway or other architectural barrier, was an injury sufficient to establish standing. *See Smith*, 358 F.3d at 1104. The court then indicated that observing

"such overtly discriminatory conditions" could cause dignitary harm to a disabled person. *Id.* "Dignitary harm" has not been relied upon or cited in any cases since *Smith* as a basis to establish standing.

The facts in this matter differ from *Smith* in a number of significant respects. First, *Smith* involves the FHAA, not the Americans with Disabilities Act or the Rehabilitation Act. Plaintiff asserts in his response that the ADA should be interpreted consistent with the FHAA because the ADA and FHAA have similar intent. Plaintiffs' Brief at 14. Although the Tenth Circuit has "held that a disabled tester has standing to seek injunctive relief under Title II of the ADA," the only decision from a court in the Ninth Circuit to examine this issue explicitly declined to extend tester standing to those cases brought under the ADA. *Harris v. Stonecrest Care Auto Ctr., LLC*, 472 F.Supp.2d 1208, 1219 (S.D. Cal. 2007), citing *Tandy v. City of Wichita*, 380 F.3d 1277, 1286 (10th Cir. 2004).

In addition, a University participating in a one-year pilot program involving an emerging technology and a miniscule fraction of the enrolled students is not an "overtly discriminatory condition," like those discussed in *Smith*. 358 F.3d at 1104. The *Smith* court referenced overtly discriminatory conditions in a discussion of architectural barriers that prevented the tester from accessing the building at issue. *Id.* Shandrow has not been denied access to a building or a class due to the Kindle DX pilot program. Shandrow has not been denied access to materials in an accessible format for any class that he has registered for due to the Kindle DX program. Indeed, Shandrow had not observed the Kindle DX pilot program and knew none of the details of the program at the time he brought suit. *See D'Lil v. Best Western Encina Lodge & Suites*, 538 F.3d 1031, 1036 (2008), citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 n.4 (1992) ("The evidence relevant to the standing inquiry consists of 'the facts as they existed at the time the plaintiff filed the complaint.'")

Shandrow attempts to rely on other cases in support of his "dignitary harm" argument but fails because the plaintiffs in those matters were able to show sufficient injury to establish standing under the relevant legal theories unlike Shandrow. Plaintiffs' Brief at 13-16. Shandrow asserts that the fact that he is offended and feels unwelcome at ASU because they are participating in the Kindle DX pilot program; none of the cases cited by Shandrow grant standing on either basis. In *Harris v. Itzhaki*, the court found that the plaintiff had limited standing even though she had identified an indirect injury, because she had identified "a distinct and palpable injury resulting from the differential treatment," namely the exclusion of African-American individuals on the basis of their race, which was sufficient under the FHA to establish standing. 183 F.3d 1043, 1051 (9th Cir. 1999). In *Barnes-Wallace v. City of San Diego*, the court held that the plaintiffs had standing because they had "shown both personal emotional harm and the loss of recreational enjoyment," which are both recognized as basis for standing under Establishment Clause cases and in environmental cases respectively. 550 F.3d 776, 784-85 (9th Cir. 2008). Although Shandrow alleges that his injury is analogous to the injuries identified in the above cases, he has not alleged that Defendants are refusing to admit disabled students to ASU or that he is avoiding ASU or has withdrawn as a student due to the Kindle DX pilot program.

Shandrow has not clearly stated how he would be harmed by other students' use of the Kindle DX device whether in the context of the Kindle DX pilot or as an independent assistive device. To establish standing, Shandrow must demonstrate "invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent . . .." *Lujan*, 504 U.S. at 560-61 (citations and quotation marks omitted). Plaintiff has not and can not demonstrate that he has a legally protected interest in ensuring that every device used by every student in every classroom is accessible to him. The vast majority of students currently use textbooks for classroom and collegiate learning. Because Plaintiff cannot use printed textbooks, should they be

prohibited? Should the libraries on the ASU campus be closed and all future book purchases prohibited because Plaintiff can not access the books? Plaintiff himself uses technology that is inaccessible to students with disabilities other than blindness. A deaf student would be unable to use the audio-books created by ASU at Plaintiff's request. Should audio-books be banned because they are inaccessible to deaf students? Indeed, there may currently be an ASU student utilizing a Kindle outside the confines of the Kindle DX pilot program as an assistive or substitute device. Should that student be prohibited from using his personal device because it is not accessible to Shandrow?

While Shandrow claims that he is offended by ASU's use of technology that is inaccessible to him, simple offense without more is insufficient to establish standing. Without a legally protected interest and an injury that is concrete, particularized, actual, and imminent, Shandrow can not establish an injury in fact. Shandrow has failed to meet his legal burden.

III. Paying Tuition Does Not Give Shandrow Standing to Sue Over the Expenditure of State Funds.

Shandrow's argument that he has suffered a tangible economic injury because his tuition dollars are being used to purchase inaccessible technology is without legal basis. Plaintiff's argument is an attempt to create "student standing," whereby any student who pays tuition can sue a university over the expenditure of those funds. While students may sue a university over a policy that causes harm to the student, Shandrow cites to no case that permits a student to sue a university over how it allocates its financial resources or the type of technology it purchases because the student pays tuition. For example, in *Hack v. President and Fellows of Yale Coll.*, a case cited by Plaintiffs, students challenged Yale's policy that required the students to live in dormitories in violation of their religious beliefs under the Fair Housing Act. 237 F.3d 81, 88 (2d Cir. 2000), *abrogated on other grounds by Sweirkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). The students also claimed a "tangible economic injury" in that they were harmed by paying

for dormitory rooms that were unavailable to them because of their religion. *Id*. A critical distinction between *Hack* and this matter is that the students were not suing Yale because Yale had expended college funds to build these dormitories but because Yale had a policy that caused them economic harm.

Plaintiffs' concept of "student standing" appears to be analogous to "taxpayer standing," especially in this case, given that Defendants are state entities. "It is well established that individuals do not generally have standing to challenge governmental spending solely because they are taxpayers, because 'it is a complete fiction to argue that an unconstitutional federal expenditure causes an individual federal taxpayer any measurable economic harm.'" *Winn v. Ariz. Christian School Tuition Org.*, 562 F.3d 1002, 1008 (9th Cir. 2009), quoting *Hein v. Freedom From Religion Found, Inc*., 551 U.S. 587 (2007). "This rule applies with equal force to taxpayer suits challenging an allegedly unconstitutional state action and those challenging federal action." *Id.*, citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342-49 (2006); *Arakaki v. Lingle*, 477 F.3d 1048, 1062-63 (9th Cir. 2007).

Shandrow's assertion that he has standing to sue ASU and ABOR because his tuition dollars were used to purchase Kindles for use in the Kindle DX pilot program is no different from those plaintiffs that sue the government over expenditure of taxpayer funds asserting standing solely on the basis that they pay taxes. Without more, Shandrow like all other students at ASU lacks standing to sue over ASU's expenditure of funds.

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

IV. Conclusion.

For the above stated reasons and those set forth in Defendants' Motion to Dismiss Plaintiff Shandrow for Lack of Standing, Defendants request that this Court grant Defendants' Motion and dismiss Plaintiff Shandrow for lack of standing.

Respectfully submitted this 4th day of September, 2009.

Terry Goddard
Attorney General

s/ Alisa A. Blandford
Lisa K. Hudson
Alisa A. Blandford
Assistant Attorney General
Attorney for Defendants

I certify that I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following, if CM/ECF registrants, and mailed a copy of same to any non-registrants, this this 4th day of September, 2009 to:

Andrew S. Friedman
Guy A. Hansen
BONNETT, FAIRBOURN, FRIEDMAN & BALINT, P.C.
2901 North Central Avenue, Suite 1000
Phoenix, AZ 85012

Daniel F. Goldstein
Mehgan Sidhu
BROWN, GOLDSTEIN & LEVY, LLP
120 E. Baltimore St., Suite 1700
Baltimore, MD 21202

Amy Robertson
FOX & ROBERTSON, P.C.
104 Broadway, Suite 400
Denver, CO 80203

Eve Hill
1667 K St. NW, Suite 640
Washington, DC 20006

Attorneys for Plaintiffs

s/Deb Anderson
Secretary to Lisa K. Hudson

550030.1