

CONSENT DECREE

This action arose out of a complaint seeking injunctive relief filed by Plaintiffs National Association of the Deaf (“NAD”), C. Wayne Dore, Christy Smith, and Lee Nettles (“Plaintiffs”) alleging that Defendant President and Fellows of Harvard College (“Harvard” or “Defendant”) violated Title III of the Americans with Disabilities Act (“ADA”) and section 504 of the Rehabilitation Act of 1973 by failing to provide captioning for all online audio and video content on Harvard domains and third-party web platforms.

Harvard denies these allegations.

Plaintiffs and Defendant (the “Parties”) have determined that there is no further need to litigate this action. With the mutual intent of increasing access to Harvard’s online audio and video content for deaf and hard of hearing people, the Parties have jointly agreed to the final disposition of this action in its entirety by Consent Decree, the terms of which are as follows:

I. Jurisdiction and Venue

This Court has jurisdiction over the above-captioned action pursuant to 28 U.S.C. §§ 1331 and 1343. Venue is proper in the District of Massachusetts pursuant to 28 U.S.C. § 1391 because Harvard is located in the District of Massachusetts and because the alleged events, acts, and omissions giving rise to Plaintiffs’ claims occurred in the District of Massachusetts.

II. Conditions Precedent of this Consent Decree

This Consent Decree is conditioned upon, and will be effective only upon, the occurrence of all of the following events:

- A. Motion.** Plaintiffs move for, and the Court grants, an order granting approval of this Consent Decree and provisional certification of the Settlement Class for settlement purposes only.
- B. Fairness Hearing.** A Fairness Hearing is held in accordance with Section XIII of this Consent Decree.
- C. Court Approval.** The Court grants final approval of the Consent Decree, certification of the Settlement Class for settlement purposes only, and entry of judgment in accordance with the terms set forth herein following a Fairness Hearing. The Judgment will resolve finally all issues raised in this proceeding. The date on which the Court grants final approval is the “Effective Date.”

III. Agreement to Caption

A. Definitions

In this Agreement:

- i. “Caption” or “Captioning” means:
 - a. in the case of video files, to overlay or externally embed synchronized visual text for speech and, consistent with WCAG 2.1 AA, provide non-dialogue audio information needed to understand the program content, including sound effects, music, laughter, speaker identification, and location on a digital media file at an accuracy rate equal to that offered by a vendor captioning service such as 3PlayMedia and in a manner consistent with industry standards regarding synchronicity, completeness, and proper placement; and
 - b. in the case of “audio-only” files, or in the case of video files for which Harvard lacks the access required to overlay or externally embed captioning, to prepare and provide a text-only transcript and, where practicable, to place an easily identifiable link to such transcript near to or alongside the content online.
- ii. “Class Counsel” means the Civil Rights Education and Enforcement Center (“CREEC”), Cohen Milstein Sellers & Toll PLLC, the Disability Law Center (“DLC”), the Disability Rights Education and Defense Fund (“DREDF”), and the National Association of the Deaf Law and Advocacy Center (“NAD”).
- iii. “Content” means audio or video files that are posted online for general public access.
- iv. “Massive Open Online Course” or “MOOC” means interactive online courses that are offered by Harvard free of charge, on an open-enrollment basis, through HarvardX or any successor program to HarvardX, or directly by any of Harvard’s Schools.
- v. “Policy” means the Harvard University Digital Accessibility Policy, adopted April 30, 2019, as it may be amended from time to time by Harvard.
- vi. “Procedures” means the implementing procedures developed under the Policy, as they may be amended from time to time by Harvard.
- vii. “Settlement Class” includes all persons (other than students of Harvard University) who, at any time between February 11, 2013 and the date of preliminary approval of this settlement, have claimed or could have claimed to assert a right under Title III of the ADA, Section 504 of the Rehabilitation Act, and/or other federal, state or local statutes or regulations that set forth standards or obligations coterminous with or equivalent to Title III of the Americans with Disabilities Act or any of the rules or regulations promulgated thereunder, alleging that they are deaf or hard of hearing and that Harvard has failed to make accessible to persons who are deaf or hard of hearing online content posted and

available for the general public that is produced, created, hosted, linked to, or embedded by Harvard.

- viii. “University Website” means any public-facing website or web-based application within a Harvard-controlled domain used to conduct University Business by Harvard faculty and staff. The term “University Website” includes websites operated by all of Harvard’s Schools and Academic Departments, News Organizations, Administrative Offices, Museums and Libraries, Academic Centers, Initiatives, and Programs.
- ix. “University Business” includes activities carried out under the auspices of Harvard University but does not include activities organized or conducted by students or student organizations.

B. Content Covered by Harvard’s Digital Accessibility Policy

The parties agree that the Policy, as interpreted by the Procedures, requires captioning for — and that Harvard shall caption — the following:

- i. New video or audio content, created and produced at Harvard and, on or after December 1, 2019, posted on a University Website. The Policy’s use of the words “at Harvard” does not mean that the content must have been created and produced on Harvard’s campus. For example, a research video created by a faculty member in the field and later posted on a University Website would fall within the Policy. Similarly, content created or produced by a vendor at the direction of Harvard faculty or staff is content “created or produced at Harvard.”
- ii. Video or audio content, created and produced at Harvard and posted on a University Website prior to December 1, 2019, upon a specific request by an individual who is unable to access that specific content. Captions shall be provided within five business days of the request consistent with Section III.A.i.

C. Content Beyond That Covered by Harvard’s Digital Accessibility Policy

In addition to the content explicitly covered by the Policy, Harvard agrees to Caption:

- i. ***Department Sponsored Student Organization Content:***

New video or audio content, created and produced at Harvard by a Department Sponsored Student Organization, as defined in the *Harvard College Handbook for Students*, and posted on any public-facing website within a Harvard-controlled domain on or after December 1, 2019.

ii. ***Massive Open Online Course Content:***

To the extent not captured above, audio and video content posted online as part of a MOOC.

iii. ***Certain Content on Certain Third Party Platforms:***

New video or audio content created and produced at Harvard and posted on/after December 1, 2019 on the official YouTube channel and, if any, the official Vimeo or SoundCloud channel for each of the Harvard schools, museums, libraries, and other units listed on Appendix A. The “official YouTube channel” or “official Vimeo or SoundCloud channel” for a unit is the principal channel maintained and curated for that unit’s University Business. If the principal channel maintained and curated for a unit’s University Business is moved to a newly-developed Third Party Platform, then the new video or audio content created and produced at Harvard and posted on such channel shall be subject to the requirements of this paragraph.

iv. ***Legacy Content:***

Video or audio content created and produced at Harvard and posted between January 1, 2019 and December 1, 2019 either: (1) on a University Website; or (2) on the official YouTube channel and, if any, the official Vimeo or SoundCloud channel for the Harvard schools, museums, libraries, and other units listed on Appendix A (collectively, “Legacy Content”). Legacy Content shall be captioned as soon as practicable but no later than two years after the execution of the Agreement, or by request consistent with Section III.B.ii.

v. ***By Request:***

Video or audio content created and produced at Harvard and posted prior to December 1, 2019 on the official YouTube channel and, if any, the official Vimeo or SoundCloud channel for each of the Harvard schools, museums, libraries, and other units listed on Appendix A, upon a specific request by an individual who is unable to access that specific content. Captions shall be provided within five business days of the request consistent with Section III.A.i.

IV. Additional Obligations of the Parties

- A. Harvard shall not amend the Policy or Procedures in a manner that provides for less captioning than any prior versions of the Policy or Procedures.
- B. Harvard will provide industry-standard live captioning for University-wide events (such as Commencement, ceremonies for special honorands, and presidential installations), for which video and/or audio are live-streamed over the Internet. Any such video and/or audio of the University-wide event that are later posted to a University Website are subject to the Policy and to the obligations in section III.B.i, above. For any other live-

streamed event of high interest, Harvard will consider requests for industry-standard live captioning.

- C. By December 1, 2019, Harvard will establish, implement, and make available to the public a process (the “Public Request Process”) by which any member of the public may submit a captioning request to Harvard pursuant to Section III.B. and III.C.
- D. In its Procedures, Harvard will make clear that University Websites shall include a link to the Policy and to the Public Request Process and the Cure Process.
- E. In its Procedures, Harvard will “strongly urge” all community members, including students, to: (1) caption all videos they create at the time they are produced; (2) caption all videos they post on third-party platforms; and (3) post content only on accessible third-party platforms.
- F. Harvard will continue to include the Policy on the list of key University-wide policies that is located on the website of the Office of the Provost.
- G. NAD commits that the organization, its agents, and attorneys will not engage with, instruct, or encourage any group or individual to submit requests for captioning of content they are not personally interested in accessing.

V. Reporting

- A. Throughout the Term of this Consent Decree, Harvard shall submit confidential written reports (the “Reports”) to NAD, as follows:
- B. On June 1, 2020:
 - i. A description of the steps taken to comply with the provision of Captions pursuant to the Consent Decree, including but not limited to a description of training provided consistent with Section VII; and
 - ii. Any changes or additions to the Policy, the Procedures or the Policy FAQs.
- C. Every 6 months beginning June 1, 2020, each Report shall also include, for the period since the preceding Report:
 - i. Any changes or additions to the Policy, the Procedures or the Policy FAQs;
 - ii. The number of requests for Captioning received by Harvard University Information Technology’s Office of Digital Accessibility Services through the Public Request Process;
 - iii. The number of minutes of video and audio content Captioned through the Public Request Process;

- iv. For any request for Captioning received through, and compliant with, the Public Request Process that did not result in Captioning of the requested content, information concerning the request and the reason it was not fulfilled; and
- v. Copies of the records required by Section VI.B below, except that Harvard shall not produce any personally identifiable information about a requester, including without limitation the name of the requester.

VI. Cure Process

- A. By the Effective Date, Harvard will establish, implement, and make available to the public a process (the “Cure Process”) by which any member of the public, including any Plaintiff, may inform Harvard in writing that any content required to be Captioned under this Consent Decree has not been Captioned; that any Captioning required under this Agreement contains material errors; or that any University Website does not include a link to the Policy or the Public Request Process. Harvard will not be liable for violation of this Consent Decree if, within 10 business days of receiving such a complaint, it resolves the issue. Harvard will not rely on the Cure Process to circumvent the requirements of Sections III.B and III.C of this Consent Decree. A lack of accurate captioning may be resolved by Captioning, correcting errors in the Captioning of, or removing from public view the specified content. Harvard will engage in a good-faith effort to Caption content before removing it. The Cure Process shall be integrated with the Public Request Process, to permit a member of the public to submit a request that uncaptioned content be Captioned whether or not it was required to be Captioned by this Consent Decree.
- B. Harvard will maintain records of all requests it receives as part of the Public Request Process or the Cure Process, and will document the steps it takes to respond to those requests, including the Content at issue, the steps taken to Caption or cure the Captioning of that Content, and the dates on which: (1) the request was received; (2) Captioning or other measures were taken; and (3) a response provided to the individual making the request.

VII. Training of Harvard Community

Harvard shall provide appropriate training on captioning audio and video content necessary and appropriate to support its good-faith efforts to comply in full with the Policy, the Procedures, and this Consent Decree.

VIII. Extent of Captioning Requirement

Except as expressly provided, Harvard shall have no obligation under this Consent Decree to Caption any content.

IX. Denial of Liability

Harvard has denied and continues to deny any liability to the named Plaintiffs, the Settlement Class, or Plaintiffs' counsel. Harvard has denied and continues to deny that it violated any laws relating to persons with disabilities or otherwise through posting or making available any online content. Neither this Consent Decree, nor any actions taken by Harvard in satisfaction of this Consent Decree, constitutes, or may be construed as, an admission of any liability or wrongdoing, or recognition of the validity of any allegations of fact or law made by Plaintiffs in this action, or in any other action or proceeding. This Consent Decree, any statements, discussions, or negotiations made in connection with this Consent Decree, and any actions taken by Harvard pursuant to this Consent Decree, may not be offered or be admissible as evidence or in any other fashion against Harvard in any action or proceeding for any purpose, except in any action or proceeding brought to enforce the terms of this Consent Decree.

X. Release

Upon final approval of this Consent Decree by the Court pursuant to Section II.C, Plaintiffs (as specifically defined herein), on behalf of themselves and all members of the Settlement Class, hereby release and forever discharge Harvard, and each of its respective past, present, and future employees and appointees; any of its affiliate corporations or other business entities; and its past, present and future members of the governing boards, officers, directors, faculty, fellows, agents, personal representatives, attorneys, and assigns (the "Releasees") from the Released Claims as defined below.

The "Released Claims" are all claims asserted or that could have been asserted by the named Plaintiffs and/or any member of the Settlement Class in the lawsuit against the Releasees, including any and all past and/or present claims, counterclaims, remedies, liabilities, debts, demands, charges, complaints, actions, causes of action, obligations, costs, expenses, attorneys' fees (except as otherwise provided herein), set-offs, and third-party actions of any kind or nature whatsoever, whether known or unknown, matured or unmatured, foreseen or unforeseen, suspected or unsuspected, accrued or unaccrued which they ever had, now have, claim to have had, or will have against any of the Releasees for injunctive, declaratory, or other non-monetary relief, however described, based upon Title III of the ADA, the Rehabilitation Act of 1973, and/or other federal, state, or local laws or regulations regarding accessibility, for the lack of captioning or accurate captioning of free online audio or video content for the general public that is produced, created, hosted, linked to, or embedded by the Releasees.

The Parties agree that this Consent Decree applies to all of the named Plaintiffs' unknown and unanticipated claims, damages, and expenses as of the date of execution of this Agreement, and they waive any rights that they might have under Section 1542 of the California Civil Code or under any similar statute or legal theory.

Named Plaintiffs acknowledge having been informed by an attorney of the provisions of Section 1542 of the Civil Code of the State of California, and hereby expressly waive and relinquish all rights and benefits that they may have under that Section or similar laws from other states, including, without limitation, any similar laws in Massachusetts. Section 1542 reads:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

Plaintiffs realize and acknowledge that they may have sustained injury or losses, within the scope of the releases set forth above, that (or the severity and amount of which) are not now anticipated. Nevertheless, Plaintiffs acknowledge that this Consent Decree has been negotiated and agreed upon in light of this realization and, being fully aware of this situation, they nevertheless intend to release, acquit, and forever discharge the parties released from any and all such unknown claims, including damages which are unknown or unanticipated, relating to the Released Claims, occurring up until the effective date of this Consent Decree.

XI. Attorneys' Fees

Harvard shall not oppose Class Counsel's motion for attorneys' fees and costs in the amount of \$1,575,000.

XII. Enforcement

The term of this Consent Decree is three and one half years from the Effective Date. During that term, this Court shall retain jurisdiction over this action for the purpose of ensuring compliance and enforcing the provisions of this Consent Decree. After the term of this Consent Decree has elapsed, this Consent Decree automatically will expire by its own terms except as expressly provided.

The Court may grant declaratory and all other relief necessary to enforce this Consent Decree pursuant to 28 U.S.C. §§ 2201 and 2202.

Failure by any party to seek enforcement of this Consent Decree pursuant to its terms with respect to any instance or provision shall not be construed as a waiver to such enforcement with regard to other instances or provisions.

The Parties to this action and no one else shall have standing to seek enforcement of this Consent Decree.

A. Dispute Resolution. Before any Party approaches the Court to assert a violation of this Consent Decree, the Parties shall first engage in and complete the Dispute Resolution Process set forth in this paragraph.

For any dispute that may be addressed through the Cure Process (which may be integrated with the Public Request Process) set forth above, the Parties shall engage in and complete the Cure Process prior to engaging in further steps of the Dispute Resolution Process.

If the Parties are unable to resolve the dispute through the Cure Process, then the Parties shall meet and confer in good faith to resolve any dispute relating to the interpretation or implementation of this Consent Decree.

The Parties agree that if they cannot resolve any dispute relating to the interpretation or implementation of this Consent Decree through the Public Request Process, the Cure Process, or meeting and conferring in good faith with each other, then they will engage in a telephonic conference with the Hon. Judith A. Dein, United States Magistrate Judge, or another mediator mutually agreeable to the Parties, for no longer than two hours in an effort to resolve the dispute.

- B. Resolution by the Court.** If, after completing the steps in Section XII.A, either Party believes that a dispute still exists relating to the performance or interpretation of this Consent Decree, either Party may seek further relief from the Court

Should any matter proceed to Court under this Section, attorneys' fees and costs shall be awarded in accordance with 42 U.S.C. § 12205, including the fee-shifting standards in *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 422 (1978).

- C. Modification.** Any Party that wishes to propose changes to this Consent Decree after the Effective Date shall meet and confer with the other Parties before filing a motion with the Court.

XIII. Judgment, Final Approval, Dismissal

- A. Request for Order.** No later than November 27, 2019, Plaintiffs will move for an Order seeking preliminary approval of this Consent Decree and approval of a Joint Notice Plan pursuant to F.R.C.P. 23. Plaintiffs will request that a Fairness Hearing take place following preliminary approval of the Consent Decree, or as soon thereafter as the Court may set. Plaintiffs will provide to Harvard the motion seeking preliminary approval of the settlement no less than five (5) business days prior to filing.
- B. Motion for Attorneys' Fees and Costs.** No later than 15 days prior to the Objection Deadline, Class Counsel shall file a motion requesting an award of reasonable attorneys' fees and costs as provided in Section XI. The Court's reduction, if any, of the attorneys' fees and costs agreed upon by the Parties shall not be cause to rescind this Consent Decree. Class Counsel shall accept and shall not appeal the amount awarded by the Court in the Final Judgment and Order Granting Final Approval of this Consent Decree.
- C. Judgment, Final Approval, and Dismissal.** At the Fairness Hearing, Plaintiffs will request that the Court enter a Final Judgment and Order granting Final Approval of this Consent Decree and certifying the Settlement Class for settlement purposes only.

This action shall be dismissed with prejudice, under Federal Rule of Civil Procedure 41, within 30 days after expiration of the term of this Consent Decree as provided in Section XII above.

XIV. Publicity

The Parties agree that they may speak with the media about the settlement of this action. The Parties and their respective counsel may report on websites and other public communications and why they believe the terms of the settlement are fair and reasonable and in the best interests of the parties. Public communications by the Parties will recognize the cooperation of Harvard in this settlement and will not make any misrepresentations of facts. The Plaintiffs and Class Counsel may make any disclosures necessary to seek Court approval of the settlement and to communicate with members of the class.

XV. Miscellaneous

- A. Binding Effect.** This Consent Decree is final and binding on the Parties and the Settlement Class, including their principals, agents, executors, administrators, representatives, successors in interest, beneficiaries, and assigns.
- B. Integration.** This Consent Decree embodies in full the terms of the agreement and understanding between the parties related to the subject matter of this action or this Consent Decree.
- C. Notices.** Notices under this Consent Decree shall be effective when physically delivered by certified mail, overnight mail, or some other method of providing evidence of actual delivery, to the addresses set forth in this Consent Decree, which may be updated by the Parties from time to time without formal amendment of this Consent Decree by written notice to all Parties and the Court. Notice shall also be provided by attachment to email to outside counsel, but the notice shall not be effective until physically delivered.

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- D. Severability.** If any provision or any part of this Consent Decree shall at any time be held unlawful, or inconsistent with applicable law, in whole or in part, under any federal, state, county, municipal or other law, ruling or regulation, then the remaining provisions of this Consent Decree shall remain effective and enforceable.
- E. Execution in Counterparts.** This Consent Decree may be signed in counterpart and shall be binding and effective immediately upon the execution by all Parties of one or more counterparts.
- F. Duty to Support and Defend Consent Decree.** Named Plaintiffs and Harvard, by their signatures below, each agree to abide by all of the terms of this Consent Decree in good faith and to support it fully, and shall use their best efforts to defend this Consent Decree from any legal challenge, whether by appeal or collateral attack. Nothing in this Consent Decree shall either require Harvard to remove or prevent Harvard from removing any Content from public view on any of its websites.
- G. Entire Agreement.** This Consent Decree contains all the agreements, conditions, promises and covenants among Named Plaintiffs, the Class, and Harvard regarding matters set forth in it and supersedes all prior or contemporaneous agreements, drafts, representations or understandings, either written or oral, with respect to the subject matter of the present Consent Decree.

ACCEPTED AND AGREED:

Dated: November 8, 2019

DEFENDANT:

By: 

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Dated: November 8, 2019

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IT IS SO ORDERED:

Dated: ~~November~~ ^{February 26, 2020}, 2019


KATHERINE A. ROBERTSON
United States Magistrate Judge

Appendix A

A) All of Harvard's Schools:

- Harvard Business School
- Harvard School of Dental Medicine
- Harvard Graduate School of Design
- Harvard Divinity School
- Harvard Graduate School of Education
- Harvard Faculty of Arts & Sciences
 - Harvard College
 - Harvard Graduate School of Arts & Sciences
 - Harvard John A. Paulson School of Engineering and Applied Sciences
 - Harvard Division of Continuing Education
- Harvard Kennedy School
- Harvard Law School
- Harvard Medical School
- Harvard T.H. Chan School of Public Health
- Radcliffe Institute for Advanced Study
- any School established after the Agreement

B) The following museums, libraries, and other units:

- Harvard Public Affairs and Communications
- Alumni Affairs & Development
- Harvard X
- Harvard Art Museums
- Arnold Arboretum
- Dumbarton Oaks
- Harvard Museums of Science and Culture
- Collection of Historical Scientific Instruments
- Harvard Museum of Natural History
- Peabody Museum of Archaeology and Ethnology
- Harvard Semitic Museum
- Harvard Library
- Cabot Science Library
- Harvard University Archives
- Houghton Library
- Lamont Library
- Widener Library