



February 7, 2022

Leo Martinez, Council Chair
American Bar Association
Section of Legal Education and Admissions to the Bar

Re: Proposed Revision to ABA Standard 306

Dear Mr. Martinez:

The National Disabled Law Students Association (NDLSA) supports the proposed revision to Standard 306 and applauds the American Bar Association (ABA) for taking this long overdue step. We maintain, however, that more is required to protect students from risk of infection, severe illness, and death from Covid-19 and ensure that law schools comply with the Americans with Disabilities Act (ADA).

Many disabled law students are immunocompromised or at higher risk for complications should they contract Covid-19. Those who are immunocompromised or high risk are more likely to be hospitalized despite being vaccinated against Covid-19 than their non-disabled counterparts. These law students are entitled to reasonable accommodations under the ADA and state laws prohibiting discrimination based on disability.

NDLSA has received reports that law schools all over the country have been reflexively denying remote attendance accommodations to students at high risk for Covid complications, or who have high-risk household members, claiming schools have no flexibility under ABA accreditation standards. We understand that claim to be untrue on two grounds: first, because schools can request a variance as detailed in your November 2021 Memorandum on Attendance and Distance Education Variances, and second, because schools' legal responsibilities under the ADA are not excused due to any potentially conflicting ABA standard. Nonetheless, schools continue to use ABA Standards as a cudgel to deny remote attendance options.

Students from multiple schools have also reported the following:

- Schools met remote attendance disability accommodation requests with the suggestion that students take leave or drop out.
- Schools have prohibited professors from offering remote, virtual, or hybrid classes.
- Schools have refused to grant “excused” absences or permit remote attendance for students who test positive for Covid, incentivizing them to attend class while contagious.
- Schools have allowed for remote attendance only for those who have Covid-19 while simultaneously denying the same flexibility to disabled, high-risk, and immunocompromised students.

In short, some law schools wrongly view the pandemic as over, or “endemic,” and a rush to return to in-person instruction has become the norm. Disabled and immunocompromised



National Disabled Law Students Association

students should not have to risk their lives in order to receive their education or be forced to take a leave of absence after the denial of a reasonable accommodation.

The proposed Standard 306(c) provides much-needed but insufficient guidance to schools and students:

Remote participation in a non-distance education course by a student as an accommodation provided under law (such as the Americans with Disabilities Act) or under exceptional circumstances shall not cause the course to count towards the distance education credit limits in Standard 311(e) for that student. The law school shall document all instances in which it permits a student's remote participation in a non-distance education course for which the credits will not be counted towards the credit hour limits in Standard 311(e).

The proposed revision is not explicit enough to ensure there is no confusion about disabled and high-risk students' standing and ability to graduate should they need to engage in additional hours of remote, virtual, or hybrid education due to the pandemic. Schools must be made to understand that remote, virtual, or hybrid attendance is not only allowed under ABA Standards, but it is mandated under the Americans with Disabilities Act as a reasonable accommodation in some circumstances. To that end, **we propose the following addition:**

Remote participation in a non-distance education course by a student as an accommodation provided under law (such as the Americans with Disabilities Act) or under exceptional circumstances shall be credited toward the 83 credit hours required by Standard 311(a) and shall not cause the course to count towards the distance education credit limits in Standard 311(e). The law school shall document all instances in which it permits a student's remote participation in a non-distance education course for which the credits will not be counted towards the credit hour limits in Standard 311(e).

Additionally, we appreciate the inclusion of the “or under exceptional circumstances” provision and urge you to include guidance elaborating that “exceptional circumstances” (such as excused absences to attend a family funeral or remote attendance during a pandemic by a student with an immunocompromised household member) can warrant accommodations not required by law.

We further propose an addition to Interpretation 311-1, consistent with the intent expressed in the proposed revision to Definition (7) to distinguish between distance education and a remote attendance accommodation for an otherwise in-person class:

(a) In calculating the 64 credit hours of regularly scheduled classroom sessions or direct faculty instruction for the purpose of Standard 311(a), the credit hours may include:

- (1) Credit hours earned by attendance in regularly scheduled classroom sessions or direct faculty instruction;*
- (2) Credit hours earned by participation in a simulation course or law clinic in compliance with Standard 304;*
- (3) Credit hours earned through distance education;*



National Disabled Law Students Association

(4) Credit hours earned by participation in law-related studies or activities in a country outside the United States in compliance with Standard 307; and

(5) Remote attendance of an otherwise in-person class as an accommodation provided under the law (such as the Americans with Disabilities Act) or under exceptional circumstances.

We also ask the Section to issue a memorandum encouraging schools to prioritize community health and safety and permit substantial latitude to professors and students to protect themselves from Covid exposure, pursuant to ABA Standards and variance mechanisms. We all have pandemic fatigue, but the pandemic is far from over. Schools must remain flexible to ensure all students can receive a quality education without risking their lives or the lives of their loved ones. Any shortcomings virtual, hybrid, or remote education entails must be balanced not only against student safety, but also students' ability to take in information when they fear catching a deadly infection in the classroom.

We hope this comment will be the starting point for further dialogue between NDLSA and the Section of Legal Education and Admissions to the Bar, as pandemic-related remote attendance accommodations are but one of many issues we would like the opportunity to discuss. There are longstanding problems resulting in disability discrimination that predated the pandemic and will continue if the ABA does not take action. For example, even before the pandemic, many schools denied flexible attendance accommodations by citation to fictitious ABA standards, with language like, "We will lose ABA accreditation if we permit any flexibility on attendance." We have raised this issue with the Commission on Disability Rights before, but we were told that the Commission had not heard about the issue elsewhere and no further action was pursued. We would welcome the opportunity to work directly with your Section. We appreciate your consideration of our comment and look forward to a response.

Sincerely,

The National Disabled Law Students Association
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