MEMORANDUM

TO: Section of Legal Education and Admissions to the Bar, Standards Review Committee
FROM: Commission on Disability Rights (CDR); Katherine H. O’Neil, CDR Chair; Amy Allbright, CDR Director
DATE: May 10, 2013
SUBJECT: Comments on Propose Revisions to Chapters 5 and 7 of the ABA Standards and Rules of Procedure for Approval of Law Schools

The ABA has an established commitment to fostering diversity in the legal profession. One of the ABA’s four fundamental goals, Goal III, is the elimination of bias and the enhancement of diversity in the profession. The mission of the Commission on Disability Rights (CDR) is two-fold: “To promote the ABA’s commitment to justice and the rule of law for persons with mental, physical, and sensory disabilities and to promote their full and equal participation in the legal profession.” As a Goal III entity, the CDR is committed to eliminating bias, enhancing diversity, and advancing the full and equal participation of lawyers with disabilities in the profession. The CDR works to eradicate those barriers that persons with disabilities encounter in being admitted to law school, participating fully and equally in the law school experience, passing the bar exam, and getting hired and promoted.

Therefore, on behalf of the CDR, we respectfully submit our recommendations to Chapters 5 (Admissions and Student Services) and 7 (Facilities, Equipment, and Technology) of the Standards. Please contact Amy Allbright at 202-662-1575 or amy.allbright@americanbar.org if you have any questions.

CHAPTER 5

STANDARD 503
Standard 503 reads:

**ADMISSION TEST.** A law school shall require each applicant for admission as a first year J.D. student to take a valid and reliable admission test to assist the school and the applicant in assessing the applicant’s capability of satisfactorily completing the school’s educational program. In making admissions decisions, a law school shall use the test results in a manner that is consistent with the current guidelines regarding proper use of the test results provided by the agency that developed the test.”

The CDR’s comments address *Interpretation 503-4*, which states: “The ‘Cautionary Policies Concerning LSAT Scores and Related Services” published by the Law School Admission Council is an example of the testing agency guidelines referred to in Standard 503 [See Appendix 2]. Our focus is on the following Cautionary Policy:

**Carefully evaluate LSAT scores earned under accommodated or nonstandard conditions.**

LSAC has no data to demonstrate that scores earned under accommodated conditions have the same meaning as scores earned under standard conditions. Because the LSAT has not been validated in its various accommodated forms, accommodated tests are identified as nonstandard and an individual’s scores from accommodated tests are not averaged with scores from tests taken under standard conditions. The fact that accommodations were granted for the LSAT should not be dispositive evidence that accommodations should be granted once a test taker becomes a student. The accommodations needed for a one-day, multiple choice test may be different from those needed for law school coursework and examinations.

Standard 503 requires that an admission test be both “valid and reliable.” However, the Law School Admission Council (LSAC) does not consider the LSAT in its various accommodated forms as “valid and reliable.” Scores earned under the accommodation of extended time are identified as nonstandard and are not averaged with scores of all other test takers. The CDR maintains that LSAC’s practice of “flagging” scores—putting a notation on the score report that the score of an examinee who received extra time was earned under nonstandard conditions—is discriminatory, in violation of Title III of the Americans with Disabilities Act (ADA). CDR bases its position on: Title III; the Department of Justice’s (DOJ) Title III regulations on examinations and courses and its complaint ([http://www.ada.gov/briefs/lsac_complaint.pdf](http://www.ada.gov/briefs/lsac_complaint.pdf)) and statement of interest ([http://www.ada.gov/briefs/lsac_soi.pdf](http://www.ada.gov/briefs/lsac_soi.pdf)) in *Department of Fair Employment & Housing v. Law*
TITLE III & DOJ REGULATIONS

Title III of the ADA prohibits private entities that offer examinations related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes from discriminating on the basis of disability. The DOJ—as the entity authorized to implement Title III—passed final regulations addressing examinations and courses for persons with disabilities. Section 12189 of the ADA and the DOJ’s implementing regulation, 28 C.F.R. §36.309(a), state:

Any person that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

To ensure accessibility, entities offering examinations must provide modifications or auxiliary aids so as to best ensure that the examination measures a person’s aptitude and achievement rather than his or her disability. Id. at §36.309(b)(1)-(3). Section 36.309(b)(2) provides: “Required modifications may include changes in the length of time permitted for completion of the exam and adaptation of the manner in which the exam is given.” The legislative history of 309 states: “This provision was adopted in order to assure that persons with disabilities are not foreclosed from education, professional or trade opportunities because an examination or course is conducted in an in accessible site or without an accommodation.” H.R. Rep. No. 101-484 (III), at 68-9 (1990). Accordingly, this section furthers the ADA’s purpose by leveling the playing field.

The U.S. Supreme Court and the Ninth Circuit have found that the DOJ’s regulations are entitled to deference. In Bragdon v. Abbott, 524 U.S. 624, 646 (1998), the Supreme Court concluded that the DOJ’s views in its Title III regulations are entitled to deference. In Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc., 467 U.S. 837, 844 (1984), the Court concluded that considerable weight should be accorded to the DOJ’s construction of a statutory scheme it is entrusted to administer. The Ninth Circuit in Enyart v. National Conference of Bar Examiners, 630 F.3d 1153, 1161-62 (9th Cir. 2011), cert. denied, No. 10-1304, 2011 WL 4536525 (Oct. 3, 2011), found the statutory requirement—that examinations be offered “in a
place and manner accessible to persons with disabilities”—to be sufficiently ambiguous so that it
must respect the DOJ’s interpretive regulations. The court pointed out that the DOJ’s
interpretation deserves deference “so long as that interpretation is based on a permissible
construction of the statute.” Id. at 1162. The Enyart decision was cited in Elder v. National
Conference of Bar Examiners, 2011 WL 672662, at *6-7 (N.D. Cal. Feb. 16, 2011), which also
accorded the DOJ’s regulations deference.

**DOJ’S COMPLAINT & STATEMENT OF INTEREST**

Particularly noteworthy, the DOJ intervened in a class action lawsuit brought by the
California Department of Fair Employment and Housing against LSAC, Department of Fair
Employment & Housing v. Law School Admission Council, Inc., No. CV 12-1830-EMC (N.D.
Cal. July 13, 2012). “Credentialing examinations, such as the LSAT, are increasingly the
gateway to educational and employment opportunities, and the ADA demands that each
individual with a disability have the opportunity to fairly demonstrate their abilities so they can
pursue their dreams,” said Thomas E. Perez, Assistant Attorney General for the Civil Rights
Division. The lawsuit alleges that “LSAC denies prospective law students with disabilities a full
and equal opportunity to demonstrate their knowledge and aptitude and to fairly compete for
educational and employment opportunities for which the LSAT is a prerequisite.” In particular,
LSAC (1) fails to administer the LSAT in a manner accessible to prospective law students with
disabilities, in violation of 42 U.S.C. §12189; (2) denies prospective law students with
disabilities the full and equal enjoyment of its goods, services, facilities, privileges, advantages,
and accommodations by flagging test scores and identifying and reporting otherwise confidential
disability-related information, in violation of §12182; and (3) interferes with individuals’
exercise of their ADA rights, in violation of §12203.

In its Statement of Interest, the DOJ asserts that LSAC’s flagging is “the very type of
discriminatory policy, based on unfounded stereotypes and prejudices, that Congress sought to
eradicate with the ADA.” “Defendant’s unjustified practice of singling out persons with
disabilities—essentially announcing to law schools that examinees who exercise their civil right
to needed testing accommodations may not deserve the scores they received—is discrimination
prohibited by the ADA.” It “raises issues of stigma, privacy, and discrimination . . . that
implicate core tenets of the ADA.”

The DOJ characterizes flagging as “an impermissible end-run around ADA obligations.”
It concludes that flagging’s identification of the person as having a disability “cannot be reconciled with the ADA’s mandate that testing entities must administer exams so as to best ensure that exam results reflect individuals’ skills and achievement level and not their disability.” See 28 C.F.R. §36.309(b)(1)(i). This policy interferes with test takers’ rights and privacy “because they exercised a right granted and protected by Section 309 of the ADA.”

Furthermore, the DOJ points out that flagging may discourage test takers with disabilities from exercising their right to testing accommodations, further undermining the purpose of the ADA generally and Section 309 specifically. Pursuant to 42 U.S.C. §12203(b), it is a violation of the ADA “to coerce, intimidate, threaten, or interfere with an individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed,” any right granted or protected by the ADA.” See also Breimhorst v. Educational Testing Service, No. C-99-CV-3387, 2000 WL 34510621, at *7 (N.D. Cal. Mar. 27, 2000) (unpublished) (finding that plaintiffs stated a claim against Educational Testing Service for violation of §12203(b) by flagging test scores achieved with testing accommodations due to an established disability).

The DOJ also pointed out that the Educational Testing Service announced in 2001 that it would discontinue flagging the results of students with disabilities who received extra time or other special accommodations on the Graduate Record Exam; the Graduate Management Admission Test; the Praxis, a test of teachers; and the Test of English as a Foreign Language. In 2003, the College Board discontinued flagging the scores of students who received extra time on the tests it administers, including the SAT and PSAT.

**ABA Resolution**

The focus of Resolution 111, which the ABA House of Delegates passed unanimously in February 2012, is on entities that administer law school admissions tests. Of particular relevance for this discussion, is the language:

FURTHER RESOLVED, That the American Bar Association urges all entities that administer, score, or report the results of a law school admission test to establish procedures to ensure that the application process, the scoring of the test, and the reporting of test scores is consistent for all applicants and does not differentiate on the basis that an applicant received an accommodation for a disability.

Based on Resolution 111, ABA President Laurel G. Bellows wrote a letter urging Governor Brown to sign California Assembly Bill 2122, which added §99161.5 to the California
Education Code. He did so. That section, which is directed to “[t]he test sponsor of the Law School Admission Test,” imposes a number of requirements regarding accommodations for examinees with disabilities and reporting of test scores to law schools. Specifically, LSAC is prohibited from (1) notifying “a test score recipient that the score of any test subject was obtained by a subject who received an accommodation pursuant to this section” (§99161.5(c)(1)), and (2) withholding “any information that would leave a test score recipient to deduce that a score was earned by a subject who received an accommodation pursuant to this section.” (§99161.5(c)(2)). Of particular note, §99161.5(c)(3) provides that subdivision (c) does not constitute a change in the law, but instead is declaratory of existing law. {[Note: LSAC sued the State of California and was granted a preliminary injunction enjoining enforcement of §99161.5 while this action is pending. Law School Admission Council, Inc. v. State of California, No. 34-2012-00135030 (Cal. Super. Ct. Dec. 28, 2012)]. The DOJ referenced Resolution 111 in its call to stop the “unfair practice of flagging.”

CHAPTER 7

INTERPRETATION 701-1

With regard to Chapter 7 (Facilities, Equipment, and Technology), the CDR has several recommendations. We recommend the addition of a fourth factor to Interpretation 701-1, which sets forth three factors to consider in determining whether technology and technology support comply with Standard 701. That fourth factor would be accessibility of technology for persons with disabilities and knowledge of accessibility by staff providing technology support. As you are well aware, technology in law schools has exploded over the past two decades. Technology includes classroom technology (e.g., projectors, screens, digital video cameras, videoconferencing equipment, microphones, lighting, electronic book readers, VCR, DVD, and CD-ROM equipment); library resources, services, and websites; the school’s website (with each department likely to have its own web page); and communications infrastructure (e.g., email, high-speed Internet access, a local area network with print and file service, and telephone support). Furthermore, most law schools provide some level of technology support for students, faculty, and staff—from network support to classroom and library technology support, support of the physical hardware, and software applications and administrative systems.

STANDARD 702(b)
Standard 702(b) provides that a “law school shall provide reasonable access and accommodations to persons with disabilities, consistent with applicable law.” The CDR recommends replacing the term “reasonable access” with “full and equal access.” Doing so would mirror the language of Title III of the ADA: “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” 42 U.S.C. §12182(a).

The CDR also suggests adding an interpretation for 702(b) that fleshes out what the duty to provide “full and equal access” under the ADA entails, specifically: making reasonable modifications in policies, practices, or procedures that do not fundamentally alter the nature of the facilities; providing auxiliary aids and services that do not alter the nature of the facility or result in an undue burden; and removing architectural and structural communication barriers where readily achievable or, if not readily achievable, offering alternative methods if readily achievable. These additions are based on 42 U.S.C. §12182(b)(2)(A)(ii)–(v).

The CDR is grateful for the opportunity to provide our comments. We look forward to offering our testimony at your upcoming hearing on these Chapters.