TO: The Honorable Solomon Oliver, Jr., Chairperson, Council of the Section of Legal Education and Admissions to the Bar

Barry A. Currier, Managing Director of Accreditation and Legal Education, Section on Legal Education and Admissions to the Bar

From: Mark D. Agrast, Chair
ABA Commission on Disability Rights

Date: January 31, 2014

RE: Comment on Standard 207

The mission of the American Bar Association (ABA) Commission on Disability Rights (Commission) is to promote the full and equal participation of persons with disabilities in the legal profession. Our work focuses on lawyers with disabilities, as well as law students with disabilities—the next generation of lawyers. To ensure that law students with disabilities have full and equal access to all of the benefits of a legal education, the Commission respectfully submits the following proposed changes to Standard 207 of the ABA’s Standards and Rules of Procedure for Approval of Law Schools:

Standard 207. REASONABLE ACCOMMODATION: INCLUSION FOR OF QUALIFIED INDIVIDUALS WITH DISABILITIES

(a) Assuring equality of opportunity for qualified individuals with disabilities, as required by Standard 205, requires a law school to provide such students, faculty and staff with reasonable accommodations consistent with applicable law all students with (1) an equal opportunity to access, and enjoy the benefits of, services, programs, activities, and technology of the school and (2) appropriate auxiliary aids and services where necessary to afford such an opportunity and ensure effective communication with the students.

(b) A law school shall adopt, publish, and adhere to written policies and procedures for assessing and handling requests for reasonable accommodations, auxiliary aids and services made by qualified individuals with disabilities to ensure that students receive all educational benefits in an equally effective and equally integrated
manner, and that faculty and staff receive reasonable accommodations in accordance with applicable law.

**Interpretation 207-1**

Applicants and students shall be individually evaluated to determine whether they meet the academic standards requisite to admission and participation in the law school program. The use of the term “qualified” in the Standard requires a careful and thorough consideration of each applicant and each student’s qualifications in light of *reasonable accommodations required auxiliary aids and services that afford qualifying individuals meaningful access to all educational benefits*. Reasonable accommodations in employment are those that are consistent with the fundamental nature of the school’s program of legal education, that can be provided without undue financial or administrative burden, and that can be provided while maintaining academic and other essential performance standards.

Legal education is the gateway to our profession. Access to a legal education must therefore be open and accessible to a diverse pool of qualified applicants. The Commission’s proposed changes to Standard 207 will help ensure that law schools, as the educators of our future leaders, provide students with disabilities with an equal opportunity to access and enjoy the benefits of law schools’ services, programs, activities, and technology. Our revised Standard 207 also will help ensure that law schools meet their legal obligations to students, faculty, and staff with disabilities.

It should be noted that the term “reasonable accommodation” is principally, though not exclusively, a standard that is used in the context of employment. Title I of the Americans with Disabilities Act (ADA) outlines the duty of employers to provide reasonable accommodations to job applicants and employees. 42 U.S.C. §§ 12111(9), 12112(5)(A) & (B).

Title II of the ADA prohibits public entities from discriminating against individuals with disabilities. “No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. A “public entity” is defined as “any department, agency, special district, or other instrumentality of
a state or states or local government.” *Id.* §12131(1)(b). Accordingly, public law schools are covered under Title II. Public law schools must provide “appropriate auxiliary aids and services where necessary to afford individuals with disabilities . . . an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity” of the school. 28 C.F.R. § 35.160(b)(1).

Title III of the ADA prohibits discrimination against individuals with disabilities in the “full and equal enjoyment” of public accommodations. 42 U.S.C. § 12182(a). Places of public accommodation include “postgraduate private school[s],” and therefore law schools. 28 C.F.R. § 36.104. Private law schools must also provide “appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities.” *Id.* § 36.303(c)(1).

Section 504 of the Rehabilitation Act states: “No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.” 29 U.S.C. § 794(a). Accordingly, as recipients of financial assistance from the U.S. Department of Education, both public and private law schools must provide individuals with disabilities with (1) an opportunity to participate in or benefit from the aid, benefit, or service that is equal to that afforded others and (2) aids, benefits, and services that are as effective as those provided to persons without disabilities. 34 C.F.R. § 104.4(b)(1)(ii) & (iii). To be equally effective, the aids and services offered must “afford [persons with disabilities] equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person’s needs.” 45 C.F.R. § 84.4(b)(2).

Both the ADA and Section 504 encompass a broader standard than simply adequate or reasonable access. “§ 504 of the Rehabilitation Act and Title III of the ADA each require [educational institutions] to provide reasonable auxiliary aids and services to afford [students with disabilities] ‘meaningful access’ or an equal opportunity to gain the same benefit as [their] nondisabled peers.” Argenyi v. Creighton Univ., 703 F.3d 441, 449 (8th Cir. 2013). See also Alexander v. Choate, 469 U.S. 287, 301 (1985). Significantly, the statutes guarantee these students “more than mere access to [educational] facilities; it guarantees them ‘full and equal enjoyment.’” Baughman v. Walt Disney World Co., 685 F.3d 1131, 1135 (9th Cir. 2012) (quoting 42 U.S.C. § 12182(a)). Accordingly, the Commission concludes that the Proposed
Standard’s sole focus on “reasonable accommodations” misstates law schools’ legal obligations to students with disabilities under the ADA and Section 504.

Inaccessible software programs and internet-based applications are examples of educational tools that do not afford to students with disabilities an equal opportunity to access educational benefits and do not ensure effective communication with those students. Recognizing the moral and legal imperative posed by these emerging technologies, the U.S. Departments of Justice and Education wrote to the presidents of all American post-secondary institutions in June 2010, advising:

Requiring use of an emerging technology in a classroom environment when the technology is inaccessible to an entire population of individuals with disabilities—individuals with visual disabilities—is discrimination prohibited by the Americans with Disabilities Act of 1990 (ADA) and Section 504 of the Rehabilitation Act of 1973 (Section 504) unless those individuals are provided accommodations or modifications that permit them to receive all the educational benefits provided by the technology in an equally effective and equally integrated manner.

In enforcing the requirements of the ADA and Section 504, the Department of Justice reached a settlement with Louisiana Tech University (LTU) on July 23, 2013. A LTU blind student was denied access to a course because a professor adopted an inaccessible internet-based application. The settlement required LTU to implement the following policy concerning accessible technology:

The University will only purchase, develop or use technology and instructional materials that allow persons who are blind or who have other vision disabilities the equal opportunity to access, use, and avail themselves of such technology or instructional materials in as full, equal, and independent a manner as persons without disabilities.

Law schools must adopt policies and programs that afford an equal opportunity to access all educational benefits in an equally effective and equally integrated manner. In particular, as
law schools deploy new technology and educational content becomes increasingly digitized, the ABA must vigorously ensure that accredited law schools are deploying accessible technologies.

In conclusion, for the reasons set forth above, the Commission respectfully urges the Council to adopt the proposed changes to Standard 207. Although we will not be able to present our views at the hearing this week, we would be pleased to meet with you or testify on a future occasion.