Memorandum

To: The Council

From: The Standards Review Subcommitteee

Date: February 6, 2020

Re: Proposed Changes to Standards on Distance Education

At its November 2019 meeting, the Council considered changes to Standard 306, Distance Education, and the use of a variance when a law school wishes to grant more than the credits allowed under Standard 306. [See November 2019 Memo to Council on Distance Education attached as Exhibit B.]

As noted in Exhibit B, the Department of Education finds our use of a variance instead of acquiescence in a substantive change to approve Distance Education Programs to be problematic. Exhibit B presented two options to the Council to address this issue. The Council agreed to pursue the second option, which was the removal of Standard 306, and the addition of distance education under Standard 105 and Rule 24 as a substantive change. This option included adding a definition of distance education to our definitions and adding language under Chapter 5 to address verification of student identity (required by Department criteria). It is our understanding that the Council’s thinking was that a distance education course would be treated like any other course, and if a law school wishes to have a program offering more than one-third of the credits required for the J.D. Degree, the law school would need to apply for acquiescence in a substantive change. No other accreditors have a separate Standard on distance education, so it appeared the Council was comfortable with deleting the Standard.

Exhibit A is attached to this Memorandum and presents recommended changes to the Standards and Rules in order to implement the changes regarding Standard 306. The first step in the proposal is to delete Standard 306. The language currently in Standard 306(a), providing the definition of “distance education” would be addressed in the definitions, adding a definition for “Distance Education Course” and “Distance Education J.D.”

The language currently in Standard 306(b) addresses approving distance education courses as part of a law school’s regular curriculum approval process. Because all courses (distance or not) are approved as part of a law school’s regular curriculum approval process, it does not appear that the language in 306(b) is necessary.
The language currently in Standard 306(c) requires a law school to have the technological capacity, staff, information resources, and facilities necessary to assure the quality of distance education. Because the Standards have requirements for technology, staffing, information resources, and facilities, it appears this language is already covered by other Standards.

The language currently in Standard 306(d) addresses when distance education may count toward the 64 credit hours of regularly scheduled classroom sessions under Standard 311, including that learning outcomes are consistent with Standard 302. Proposed language has been added to Standard 311 in Exhibit A. It appears that the requirements of Standard 302 on learning outcomes applies to the entire law school and does not exclude distance education, thus it does not appear that a separate section such as Standard 306(d) continues to be necessary.

The language currently in Standard 306(e) regarding the amount of credit that can be granted for distance education has been included in the new definitions for distance education in Exhibit A. The one issue is whether the Standards should continue the limitation of 10 distance education credits in the first year. The SRS recommends maintaining this limitation.

Finally, the language currently in Standard 306(f) regarding the verification of student identity has been moved to a new Standard 511 under Student Services.

The Council also noted that it would like to maintain some of the requirements that have been imposed when granting a variance for distance education like reporting and time limits. This language has been added to the proposed changes in Exhibit A.

Please note that approving these recommendations for Notice and Comment will also involve minor amendments to both sets of criteria for Foreign Programs, more specifically, deleting references to Standard 306. The redlined versions in the Criteria are included in Exhibit C, which would be included in the Notice and Comment memorandum.
A. Redline of Recommended Additions to Definitions:

Definitions:

(6) “Distance education course” means one in which students are separated from the faculty member or each other for more than one-third of the instruction and the instruction involves the use of technology to support regular and substantive interaction among students and between the students and the faculty member, either synchronously or asynchronously.

(7) “Distance Education J.D. Program” means a program where a law school grants a student more than one third of the credit hours required for the J.D. degree for distance education courses.

B. Redline of Recommended Additions to Standard 105:

Standard 105. ACQUIESCENCE FOR SUBSTANTIVE CHANGE IN PROGRAM OR STRUCTURE

(a) Before a law school makes a substantive change in its program of legal education or organizational structure, it shall obtain the acquiescence of the Council for the change. A substantive change in program or structure that requires application for acquiescence includes:

(12) The addition of courses or programs that represent a significant departure from existing offerings or method of delivery since the latest site evaluation including instituting a new full-time or part-time program, instituting a Distance Education J.D. Program, or establishing a new or different program leading to a certificate or degree other than a J.D. degree.

C. Redline of Recommended Deletion of Standard 306:

Standard 306. DISTANCE EDUCATION

(a) A distance education course is one in which students are separated from the faculty member or each other for more than one-third of the instruction and the instruction involves the use of technology to support regular and substantive interaction among students and between the students and the faculty member, either synchronously or asynchronously.

(b) Credit for a distance education course shall be awarded only if the academic content, the method of course delivery, and the method of evaluating student performance are approved as part of the school’s regular curriculum approval process.

(c) A law school shall have the technological capacity, staff, information resources, and facilities necessary to assure the educational quality of distance education.
(d) A law school may award credit for distance education and may count that credit toward the 64 credit hours of regularly scheduled classroom sessions or direct faculty instruction required by Standard 311(a) if:

1. there is opportunity for regular and substantive interaction between faculty member and student and among students;
2. there is regular monitoring of student effort by the faculty member and opportunity for communication about that effort; and
3. the learning outcomes for the course are consistent with Standard 302.

(e) A law school may grant a student up to one-third of the credit hours required for the J.D. degree for distance education courses qualifying under this Standard. A law school may grant up to 10 of those credits during the first one-third of a student’s program of legal education.

(f) A law school shall establish an effective process for verifying the identity of students taking distance education courses and that also protects student privacy. If any additional student charges are associated with verification of student identity, students must be notified at the time of registration or enrollment.

Interpretation 306-1

Methods to verify student identity as required by Standard 306(f) include, but are not limited to (i) a secure login and pass code, (ii) proctored examinations, and (iii) other technologies and practices that are effective in verifying student identity. As part of the verification process, a law school shall verify that the student who registers for a class is the same student that participates and takes any examinations for the class.

D. Redline of Recommended Changes to Standard 311

Standard 311. ACADEMIC PROGRAM AND ACADEMIC CALENDAR

(a) A law school shall require, as a condition for graduation, successful completion of a course of study of not fewer than 83 credit hours. At least 64 of these credit hours shall be in courses that require attendance in regularly scheduled classroom sessions or direct faculty instruction.

(b) A law school shall require that the course of study for the J.D. degree be completed no earlier than 24 months and, except in extraordinary circumstances, no later than 84 months after a student has commenced law study at the law school or a law school from which the school has accepted transfer credit.

(c) A law school shall not permit a student to be enrolled at any time in coursework that exceeds 20 percent of the total credit hours required by that school for graduation.

(d) Credit for a J.D. degree shall only be given for coursework taken after the student has matriculated in a law school’s J.D. program of study, except for credit that may be granted pursuant to Standard 505. A law school may not grant credit toward the J.D. degree for work taken in a pre-admission program.
(e) A law school may grant up to 10 credit hours required for the J.D. degree for distance education courses during the first one-third of a student’s program of legal education.

**Interpretation 311-1**

(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 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 in compliance with Standard 306; and

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

**E. Redline of Recommended Addition of Standard 511:**

**Standard 511. VERIFICATION OF STUDENT IDENTITY**

A Law School shall verify that a student who registers for any distance education course is the same student that academically engages in the course.

**F. Redline of Recommended Changes to Rule 24:**

**Rule 24: Application for Acquiescence in Substantive Change**

(a) Substantive changes requiring application for acquiescence include:

(12) The addition of courses or programs that represent a significant departure from existing offerings or method of delivery since the latest site evaluation including instituting a new full-time or part-time program, instituting a Distance Education J.D. Program, or establishing a new or different program leading to a certificate or degree other than a J.D. degree.

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(i) The decision of the Council granting acquiescence in a substantive change to institute a Distance Education J.D. Program under Rule 24(a)(12) may be for a term certain and can be extended once, with the extension being for either a further term certain or indefinite, but subject to revocation.

The decision granting acquiescence in a substantive change to institute a Distance Education J.D. Program may require the law school to report to the Managing Director or the Council regularly as specified in the decision.
MEMORANDUM

To: Council

From: Stephanie Giggetts

Date: November 2019

Re: Distance Education

Under Standard 306, any approved law school may grant credit for distance education courses up to one-third of the credit hours required for the J.D. program. Unlike other accreditors that require a school to apply for a substantive change for distance education, our standard address distance education and allows any approved school to grant credit as noted above.

Currently, if a school wishes to grant credit for more than one-third of the credits needed for graduation for distance education courses, it needs to apply for a variance under Standard 107. Standard 107 allows a school that wishes to make any change that is or may be inconsistent with one or more standards to apply for a variance from such standard(s). Since granting more than one-third of the credits needed for graduation via distance education would be inconsistent with Standard 306, a law school must submit an application for a variance. The application process for a variance is very similar to a substantive change application.

34 CFR §602.22 requires an accreditor to maintain adequate substantive change policies. An accreditor meets this requirement if it requires an institution to obtain the accreditor’s approval of the substantive change before the accreditor includes the change in the scope of the accreditation of the institution. The accreditor’s definition of substantive change must include “the addition of courses or programs that represent a significant departure from existing offerings of educational programs, or method of delivery, from those that were offered when the accreditor last evaluated the institution.

1 Standard 306 provides that a “distance education course” is a course where more than one-third of the instruction for which credit is awarded is done by distance education.

2 Standard 107 (Variance) currently provides that if changes constitute or come to constitute a substantive change, a school must apply for acquiescence for a substantive change. It is my understanding from the Department that for any variance (from distance education or otherwise), a determination would need to be made whether it is a significant departure from existing offerings or method of delivery, and therefore constitute a substantive change. We should make clear when reviewing variances that this type of analysis was conducted.
Standard 105 and Rule 24, Acquiescence in Substantive Change, provides that substantive changes requiring application for acquiescence include “the addition of courses or programs that represent a significant departure from existing offerings or method of delivery since the latest site evaluation.”

After speaking with the Department of Education (“Department”) regarding our handling of distance education and variances for distance education, my understanding is that 1) given that Standard 306 allows schools to grant up to one-third of the credit hours required for graduation for distance education courses, 2) because a school could go from 0 to 30 credits (as an example if it takes 90 credits to graduate) under this standard with no prior approval required, and 3) because the standard does not currently address whether going from 0 to 30 credits would be a significant departure from the existing offerings or method of delivery, the Department finds this problematic and believes this may require approval under the substantive change rules.

As a result, I am proposing two options for Council consideration. The first option is to provide a definition for “significant departure” and specifically state that offering one-third of the credits required for the J.D. in distance education courses is not considered a “significant departure.” The Department did suggest such a solution. Anything more than one-third of the credits would be considered a significant departure and would require prior approval. This would allow us to maintain Standard 306. However, I believe we may still need to make the offering of more than one-third of the credits required for the J.D. in distance education courses, a substantive change under Standard 105 and Rule 24. We could argue that the variance process is the same as the substantive change process because a school is still required to obtain prior approval. However, 34 CFR §602.22(a) has two parts. Part 1 provides that an accreditor requires an institution to obtain prior approval of the substantive change. Part 2 provides that an accreditor’s definition of substantive change includes the addition of courses or programs that represent a significant departure. I think it would be difficult to take the position that offering more than one-third of the credits needed for graduation in distance education courses is not considered a “significant departure.”

The second option for consideration is the removal of Standard 306, and the addition of distance education under Standard 105 and Rule 24 as a substantive change. As noted earlier, most accreditors do not have a standard on distance education but include it as a substantive change requiring a school to seek prior approval for initiating distance learning courses or programs. We could add a definition of distance education to our definitions and add language under Chapter 5 to address verification of student identity (required by Department criteria). I believe our current standards would be sufficient to address the other provisions of Standard 306 on faculty, technology, curriculum approval, and facilities with regard to a distance education course. Our Supplemental Questionnaire for Distance Education covers all these areas as well.

I recommend that the Council require a school\(^3\) to apply for acquiescence if a law school wants to add a distance education program that offers more than one-third of the credits needed for graduation.\(^4\)

On July 1, 2006, the Higher Education Reconciliation Act (HERA) went into effect. Under HERA, otherwise eligible institutions that offer over 50 percent of their courses by distance education, or have 50 percent or more of their students enrolled in distance education courses, became eligible to participate in Title

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\(^3\) 34 CFR §602.22 applies to agencies that accredit institutions. The agency must require “institutions” (not programs) to apply for prior approval of substantive change.

\(^4\) Recommended language is attached as Exhibit A.
IV, provided that the institution was accredited by an accrediting agency with distance education in its scope of authority, and that the agency has evaluated the institution’s capability to offer distance education and included the distance education programs in the grant of accreditation.

For accreditors with distance education in the scope of their authority, the focus is on a program by which students can earn over 50% of a program’s credit through distance learning. Programs where a student can earn over 50% of the credits through distance education need to be approved by an accreditor with distance education in the scope of its authority, which the Council has in its scope of authority (as of February 2019). Therefore, one question for the Council will be whether to move from one-third of the credits for the JD to 50% of the credits needed for the J.D.

Finally, since the Council has added distance education to its scope of authority, it is required to monitor the headcount enrollment of each institution the Council has accredited that offers distance education as provided in 34 CFR §602.19. If a school experiences an increase of 50% or more, the Council is required to provide notice to the Secretary within 30 days of receiving the data. This will require the addition of a trigger in the annual PDI reports for schools that have a headcount enrollment increase of 50% or more. I also recommend that a provision be added to IOP 6, Submission of Information to Secretary of Education, to document this process as follows:

The Council shall provide written notification to the Department of Education that a law school for which the Council serves as an institutional accreditor and that offers a Distance Education J.D. Program, has an increase in headcount of 50 percent or more within one fiscal year within 30 days of acquiring such data.
Criteria for Programs Offered by ABA-Approved Law Schools in a Location Outside the United States

These Criteria apply to summer, intersession, semester, and year-long programs offered by ABA-approved law schools in a location outside of the United States. Programs in which students enroll in an institution outside the United States to receive credit toward the J.D. degree are governed by the Criteria for Accepting Credit for Student Study at a Foreign Institution.

These Criteria recognize that the primary responsibility for determining the quality of the educational experience that students receive during a study abroad experience rests with the faculty and administration of the law school.

The ABA Standards and Rules of Procedure for the Approval of Law Schools shall apply to study abroad programs except as modified by the Criteria or by necessary implication.

I. Criteria Applicable to All Programs Offered by ABA-Approved Law Schools in a Location Outside the United States

A. Educational Program

1. The dean and faculty of the law school are responsible for formulating and administering the educational program.

2. The faculty must approve the academic content of the educational program in the same manner as the curriculum of the law school’s on-campus program.

3. The academic content of the educational program must meet the same standards, including evaluation of student performance, as the on-campus program of the law school.

4. The number of students enrolled shall not exceed the number appropriate for the academic content of the educational program, available facilities, the number and availability of faculty members, the administrative support structure, and any special educational program goals.

5. Students must be provided with the name and contact information of the program director or another responsible person on-site who can be reached at all times during the program.
6. The law school shall offer students at or shortly after the conclusion of the program an opportunity to evaluate in writing both the overall program and the faculty and courses offered in the program.

7. The law school may include participants other than those earning credit toward the J.D. degree, provided that such participation does not detract from the law school’s ability to maintain a program that meets the requirements of these Criteria and the Standards.

B. Academic Credit

1. Length of program
   
   (a) The educational program must provide adequate time for class preparation, reflection and intellectual maturation similar to that provided in the regular semester.
   
   (b) The number of credits a student may receive in the program must comply with Standard 310 regarding credit hours and in no event shall a student receive more than 1.5 semester credit hours for each week of the program.

2. Instruction Conducted in a Foreign Language
   
   (a) When instruction is offered in a foreign language with consecutive English interpretation, the time expended in class is not commensurate with class time spent when instruction is in English. For purposes of Standard 310 compliance, classes in which consecutive interpretation is needed may not count more than fifty (50) percent of actual class time expended.
   
   (b) When instruction is offered in a foreign language with simultaneous English interpretation, the time expended in class is commensurate with class time spent when instruction is in English.

3. If credit is given for field placements, the educational program must meet the requirements of Standard 304.

4. If credit is given for distance education courses, those courses and credits must comply with the requirements of Standard 306.

5. Educational Visits
   
   (a) The program shall include at least two visits that relate to the socio-legal environment in the host country.
(b) Time or a portion of the time allocated for visits may not be counted toward the requirements of Standard 310 regarding credit hours unless the content of the visit is academic in nature and specifically related to the class for which the credit is being awarded.

65. If course materials, including all case, statutory, and text materials needed for full understanding of the course and completion of assignments, are not self-contained, then adequate library resources must be available.

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Criteria for Accepting Credit for Student Study at a Foreign Institution

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The ABA Standards and Rules of Procedure for the Approval of Law Schools shall apply to study abroad programs except as modified by the Criteria or by necessary implication.

For the purpose of these Criteria the following definitions apply:

- “law school” refers to an ABA-approved law school.
- “foreign institution” refers to the institution outside the United States at which a student from an ABA-approved law school is studying to receive credit toward the law school J.D. degree.

I. Criteria Applicable to all Student Study at a Foreign Institution

A. Course of Study

1. The law school must ensure that the content of the studies at the foreign institution is such that credit would have been granted towards satisfaction of degree requirements of the law school.

2. To be approved for credit toward the J.D. degree, the course of study must be related either to the socio-legal environment of the country in which the foreign institution is located, or it must have an international or comparative focus.

3. A law school that permits students to undertake foreign study under these Criteria shall develop and publish, prior to approving any foreign study, a statement that defines the educational objectives the law school seeks to achieve in allowing students to study abroad for credit toward the J.D. degree. Publication should usually be on a website, in an announcement or brochure, or in writing directly to prospective students.
4. Academic Advisor

(a) The law school must appoint an academic advisor for any student studying at a foreign institution. The academic advisor must approve in advance the student’s academic course of study to be undertaken at the foreign institution. The academic advisor must be a faculty member or a law school administrator who has the training or experience to permit effective approval and monitoring of foreign study by law students.

(b) The student and the academic advisor shall develop a written plan to define the educational objectives a student seeks to achieve during a period of study abroad. The plan shall specify the methods to be used in evaluating the student’s attainment of those objectives. If changes occur, such as a course change or cancellation, the student and the academic advisor shall reexamine the written plan to determine whether the approved foreign study continues to satisfy the stated educational objectives.

5. The law school must ensure that course materials and methods of evaluation of student performance are satisfactory for the award of credit at the law school.

6. The law school must ensure that a student approved for foreign study under these Criteria is proficient in the language of instruction.

7. The law school must ensure that any student who studies at a foreign institution has reliable access to library resources that are adequate to meet the educational objectives of the course of study.

8. The law school must offer students at or shortly after the conclusion of the period of study abroad an opportunity to evaluate in writing the faculty, courses offered and the experience at the foreign institution.

9. The law school must ensure that there is a contact person at the foreign institution and must provide the contact information for that person to each student studying at the foreign institution.

B. The foreign institution. The foreign institution must be:

1. Government sanctioned or recognized, if educational institutions are state regulated within the country;

2. Recognized or approved by an accrediting agency, if such an agency exists within the country; or

3. Chartered to award first degrees in law by the appropriate authority within the country.

C. Academic Credit

1. Credits toward the J.D. degree for all foreign study shall not exceed one-third of the credits required for the J.D. degree at the law school.

2. A law school shall award credit consistent with the requirements of Standard 310 regarding the determination of credit hours for coursework, and should make reasonable efforts to determine appropriate comparability between the foreign course and the regular law school curriculum.
3. The law school shall ensure that no credit is given for field placements (e.g., in a law firm, government office, or corporation) unless the field placement is consistent with the requirements of Standard 304(d).

4. The law school shall ensure that no credit is given for distance education unless the courses are consistent with the requirements of Standard 306.

D. Students. Only students who have completed one year of full-time or part-time study and are in good standing at the law school may participate in foreign study under these Criteria.

E. Fees. The law school shall make known to students any costs in addition to tuition that are charged by the foreign institution, including any fee that is charged for transferring or receiving credit earned at the foreign institution.

F. State Department Travel Information
   1. The law school shall supply the U.S. State Department Country-Specific Information for the country(ies) in which the foreign study will be conducted. If the Country-Specific Information for the country(ies) is revised prior to or during the period of foreign study, the updated information must be distributed promptly to students.
   2. Travel Warnings and Travel Alerts
      (a) If, prior to the commencement of the foreign study, a U.S. State Department Travel Warning or Alert covering program dates and destinations is issued for the country(ies) in which the foreign study will be conducted, all students must be notified promptly and be given an opportunity to withdraw.
      (b) If, during the period of foreign study, a U.S. State Department Travel Warning or Alert covering program dates and destinations is issued for the country(ies) in which the foreign study is being conducted, students must be notified promptly and given an opportunity to withdraw.

G. Refund Policy. The law school must adopt policies regarding the circumstances and timing of the refund of monies advanced by students.

H. Disclosures. When the law school has an ongoing or announced relationship with a foreign institution, the following information must be published to each prospective student in a timely fashion, usually on a website for that purpose, in the initial announcement or brochure, or in writing directly to prospective students, but, in any event, prior to the date when the student must commit or pay a nonrefundable deposit, whichever is earlier:
   1. The nature of the relationship with the foreign institution;
   2. The number of students from the law school who studied at the foreign institution in the previous year;
   3. Requirements for student performance and grading methods;
   4. Name, address, telephone and email address of the contact person at the foreign institution;
5. The extent to which the country, city, and facilities are accessible to individuals with disabilities;

6. Circumstances under which the study at the foreign institution is subject to cancellation, what arrangements will be made in the event of cancellation and information regarding prior cancellations, if any;

7. Information on the availability, approximate cost, and location of housing;

8. Refund polices, in accordance with Standard 509(c)(1).

II. Procedures for Review

A. To assist the Council in monitoring compliance with these Criteria, a law school shall complete an Annual Questionnaire in the form specified by the Council.

B. The law school must retain student evaluations done in accordance with Section I.A.8. and any student complaints for review by sabbatical site teams.

C. The Council may ask for further information in any year where responses to the questionnaire suggest that the law school is out of compliance with these Criteria. Examples of actions or changes that might trigger this review include:

1. Failure to timely file the Annual Questionnaire;
2. Submitting an incomplete questionnaire;
3. Changes in the curriculum that significantly reduce the comparative or international focus of the course of study;
4. A persistent pattern of complaints by students regarding the quality of the educational experience.

D. If the Council has reason to believe that a law school is not operating in compliance with these Criteria, the Council shall proceed with an action under Rule 11(a)(3).