Memorandum

Date: June 3, 2011

To: Section of Legal Education and Admissions to the Bar (LEAP), Standards Review Committee

From: Commission on Mental and Physical Disability Law (CMPDL); Katherine H. O'Neil, Chair, CMPDL; Carrie G. Basas, Chair, CMPDL Committee on Lawyers with Disabilities; and William J. Phelan, IV, CMPDL Staff Attorney

Subject: Suggested Comments for ABA Standards and Rules of Procedure for Approval of Law Schools (Standards)

The mission of the CMPDL is "[t]o 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." The CMPDL, when established in 1973, was charged with responding to the advocacy needs of persons with mental disabilities. After the passage of the Americans with Disabilities Act of 1990, the ABA broadened the CMPDL's mission to serve all persons with disabilities.

Today, the CMPDL is the ABA's voice regarding the protection and advancement of the rights of law students and lawyers with disabilities. Over the past several years, the CMPDL has received numerous stories from applicants and law students with disabilities regarding the difficulties they have personally encountered in accessing a legal education. In order to fulfill the ABA's Goal III of eliminating bias and enhancing diversity, it is imperative that the ABA ensures that individuals with mental, physical and sensory impairments have an unobstructed path to the legal profession. The Standards are an integral tool in making sure law schools offer a sound and accessible program of legal education that will prepare law school graduates to become effective members of the legal profession.

Therefore, per you call for comments,[1] we respectfully submit below the suggestions for ensuring that the Standards better assist law students and applicants with disabilities. Insertions are done in brackets, deletions are strikethroughs, and all alterations are in bold. Explanations for the changes follow underneath each section.

While there is no comment on this matter below, some members of the Commission did express concern that Chapter 4 of the Standards, regarding faculty, omitted a reference to having a diverse faculty and that its content on the responsibilities of faculty failed to address law professors who may need a reasonable accommodation. The Commission may address these concerns at a later time, but we wanted to bring them to your attention regardless.

[1] http://www.americanbar.org/groups/legal_education/committees/standards_review.html

Please contact William at 202-662-1576 or william.phelan@americanbar.org if you have any questions. Thank you and we look forward to working with LEAP on this matter.

I. "Standard 213. REASONABLE ACCOMMODATION FOR ~~QUALIFIED~~ INDIVIDUALS WITH DISABILITIES. Assuring equality of opportunity for ~~qualified~~ individuals with disabilities, as required by Standard 211, may require a law school to provide such **[prospective students,]** students, faculty**[,]** ~~and~~ staff**[, guests, and visitors]** with reasonable accommodations **[or reasonable modifications]**."

a. Derived from the ABA's commitment to making court houses accessible,[2] the Commission urges law schools to make sure they provide reasonable accommodations and modifications.

b. Added "prospective students, guests, and visitors" to make sure relevant and effected parties are mentioned. The original language seemed to focus on those who spend most of their time at a law school.

c. Added "reasonable modifications" so programming offered by law schools is covered.

d. "Interpretation 213-1. For the purpose of this Standard and Standard 211, disability is defined as in Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794~~, as further defined by the regulations on post secondary education, 45 C.F.R. Section 84.3(k)(3)~~ and by the Americans with Disabilities Act, 42 U.S.C. Sections 12101 et seq. **[and the regulations promulgated thereunder.]**"

   i. Inserted regulation reference because the ADA is an ever-evolving statutory framework that has included a major 2008 amendment as well as a dynamic body of regulations and case law. Since that time—and just as recently as last year—federal agencies have issued regulations under the ADA that should be followed.

   ii. Removed clause regarding Section 504 regulations because the proposed language inserted at the end would cover these regulations.

e. "Interpretation 213-3. ~~Applicants~~ **[Prospective students]** 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 [prospective student] and each student's qualifications in light of reasonable accommodations.~~ Reasonable accommodations are those that**[: best ensure—to the maximum extent feasible—that a student can meet the academic standards requisite to the admission process and participation in the law school program;]** ~~are consistent with the fundamental nature of the school's program of legal education~~ that can be provided without **[an]** undue ~~financial or administrative~~ burden **[or fundamental alteration;]** and that can be provided while maintaining academic and other essential performance standards."

   i. Due to deletion of the word "qualified" in the Standard, there is no need for an explanation in this interpretation.

[2] ABA Resolution on Courthouse Accessibility (Feb. 2002), *available at*: http://www2.americanbar.org/sdl/Documents/2002_MY_112.pdf.

ii. There are individuals who may be interested in attending law school, but have not submitted an application; therefore, the term "prospective student" is more appropriate than "applicant."

iii. The changes in the last sentence reflect the basic legal requirements under the ADA; the inserted language "maximum extent feasible" comes from a 1991 ABA resolution regarding providing benefits to ABA members with disabilities.[3]

f. We propose the following: **"Interpretation 213-4: Any inquiries into a person's disability regarding a request for a reasonable accommodation should be narrowly tailored for the purpose of determining whether an accommodation is needed. The law school must comply with the applicable laws and regulations that protect the confidentiality of medical records, such as the Americans with Disabilities Act, 42 U.S.C. § 12112(d)(3)(B), the Health Insurance Portability and Accountability Act, Pub. L. 104-191, and the Family Education Rights and Privacy Act, 20 U.S.C. §1232g."**

i. The Commission—taking terminology and concepts from the ADA and the ABA's 1994 resolution regarding mental health inquiries and bar admissions[4]—attempted to strike a balance between the law school's need to know in order to grant an accommodation and the applicant's right to privacy and to avoid unnecessary assumptions based on his or her disability. Unnecessarily broad or intrusive queries into someone's medical history or disability status should be avoided if they do not offer dispositive information on the need for an accommodation.

II. "Standard 501. ADMISSIONS. (a) A law school shall maintain sound admission policies and practices, consistent with the objectives of its educational program and the resources available for implementing those objectives. (b) A law school shall not admit applicants who do not appear capable of satisfactorily completing its educational program and being admitted to the bar."

a. Interpretation 501-4: "A law school may not permit financial considerations detrimentally to affect its admission and retention policies and their administration**[, including costs associated with providing reasonable accommodations for a student]**. A law school may face a conflict of interest whenever the exercise of sound judgment in the application of admission policies or academic standards and retention policies might reduce enrollment below the level necessary to support the program."

i. The costs associated with providing accommodations for a student—while minimal to begin with—should not adversely affect the determination as to whether that applicant with a disability is fit for admission. Schools should be prohibited from denying admission to a student with a disability because they believe accommodating him or her would be costly.

III. "Standard 503. 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

[3] ABA Resolution on Benefits to Members with Disabilities (Feb. 1991), *available at*: http://www2.americanbar.org/sdl/Documents/1991_MY_102.pdf.

[4] This resolution was co-sponsored by LEAP. *See* ABA Resolution on State Bar Character and Fitness Reviews for Applicants with Mental Health Impairments (Aug. 1994), *available at*: http://www2.americanbar.org/sdl/Documents/1994_AM_110.pdf

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."

a. The Commission urges that there should be no requirement for an admission test. The reliability of such a test, in general, to determine success in law school has been questioned.[5] Moreover, applicants with disabilities who have faced problems attaining accommodations for the Law School Admission Test would be better served if a test is not required.
b. Regardless of whether a test is ultimately required, we propose the following interpretation: "**Interpretation 503-5. An admission test that is administered with accommodations shall be considered as equally valid and reliable as a test administered with no accommodations. An entity that grants accommodations for an admission test shall not 'flag' a test score by notifying a law school that the score was achieved with an accommodation.**"
    i. The Standard requires that a test be "valid and reliable," yet when the Law School Admission Council (LSAC), a testing agency, flags a score, the score is typically identified as neither valid nor reliable. Additionally, it has been argued that individuals given extra time as an accommodation are likely to be as valid as the scores of students who take the exam under regular conditions.[6]
c. Regardless of whether a test is ultimately required, we also propose the following interpretation: "**Interpretation 503-6: An entity that administers a law school admission test must ensure that the test's results accurately reflect the applicant's skills and aptitude rather than a disability that impairs sensory, manual, or speaking skills."**
    i. This language is drawn directly from the ADA.[7] Elements of a law school admission test should not be administered in a manner that inherently put applicants with sensory, manual, or speech impairments at a disadvantage. An example would be a test question that requires a blind test taker to visualize and draw a logical succession of events in order to properly answer the question.

IV. "Standard 504. CHARACTER AND FITNESS. (a) A law school shall advise each applicant that there are character, fitness and other qualifications for admission to the bar and encourage the applicant, prior to matriculation, to determine what those requirements are in the state(s) in which the applicant intends to practice. The law school should, as soon after matriculation as is practicable, take additional steps to apprise entering students of the importance of determining the applicable character, fitness and other qualifications. (b) The law school may**~~, to the extent it deems appropriate,~~** adopt such tests, questionnaires, or required references as the proper admission authorities may find useful and relevant, in determining the character, fitness or other qualifications of the applicants to the law school. (c) If a law school considers an applicant's character, fitness or other qualifications, it shall exercise care that the consideration is not used as a reason to deny admission to a qualified

[5] *See* Ruth Colker, "Extra Time as an Accommodation," 69 U. PITT. L. REV. 413 (2008); Pamela Edwards, "The Shell Game: Who is Reponsible for the Overuse of the LSAT in Law School Admissions?" 80 St. John's L. Rev. 153, 159-62 (2006).
[6] *See* Colker, *supra* note 5.
[7] *See* 42 U.S.C. §12112(b)(7). Although these citations refer to ADA protections in the employment context, they primarily address the administration of tests for persons with disabilities.

applicant because of political, social, or economic views that might be considered unorthodox."

a. We propose the following interpretation: **"Interpretation 504-1. Any inquiries into an applicant's disability should be avoided unless necessary and narrowly tailored to elicit information about whether the person is otherwise qualified to attend law school."**
    i. Again taking terminology and concepts from the ADA and the ABA's 1994 resolution regarding mental health inquiries and bar admissions,[8] the Commission attempted to strike a balance between the law school's need to know in order to carry out its purpose and the applicant's right to privacy. There should be no need for a law school to look into an applicant's disability history, particularly mental health history, when determining his or her character and fitness.
    ii. The term "otherwise qualified" is derived from the Americans with Disabilities Amendment Act of 2008.[9]
    iii. In order to respect the spirit of the edits for Standard 504 and the proposed interpretation, we struck the phrase "to the extent it deems appropriate" from the Standard.

V. "Standard 511. STUDENT SUPPORT SERVICES. A law school shall provide all its students, regardless of enrollment or scheduling option, with basic student services, including maintenance of accurate student records, academic advising and counseling, financial aid counseling, **[disability support services, mental health or substance abuse support services]** and an active career counseling service to assist students in making sound career choices and obtaining employment. If a law school does not provide these types of student services directly, it must demonstrate that its students have reasonable access to such services from the university of which it is a part or from other sources."

a. Many law schools have disability support services within their law school, and many more have these services at the university-wide level. Yet it is imperative to make sure such services are available to assist students with disabilities, whether regarding accommodations or assistance with mental health or substance abuse issues.

VI. "Standard 701. GENERAL REQUIREMENTS. A law school shall have physical facilities that are adequate both for its current program of legal education and for growth anticipated in the immediate future."

a. We propose the following interpretation: "**Interpretation 701-6. A law school shall ensure that all of its physical facilities are accessible and, at a minimum, comply with the current versions of the ADA Accessibility Guidelines for Buildings and Facilities (U.S. Access Board) and ADA Standards for Accessible Design (Department of Justice) ."**
    i. Stemming from the ABA's commitment to making court houses accessible,[10] the Commission urges that all approved law schools are free of architectural barriers. The standards issued by the federal government should serve as a baseline of accessibility.

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[8] *See* ABA Resolution on State Bar Character and Fitness Reviews, *supra* note 3.

[9] Pub. L. No. 110-325; 42 U.S.C. §12111(8); *see also* 28 C.F.R. § 1630.2(m). Although these citations refer to ADA protections in the employment context, they still offer valuable insight and authority for determining placement as a student.

[10] *See supra* note 2.

VII. "Standard 704. TECHNOLOGICAL CAPACITIES. A law school shall have the **accessible** technological capacities that are adequate for both its current program of legal education and for program changes anticipated in the immediate future."

a. Inserted the word "accessible" to ensure any technology employed by law schools is available for use by individuals with disabilities.
b. We propose edits to the following interpretation: "Interpretation 704-1. Inadequate technological capacities are those that have a negative and material effect on the education students receive**[, including websites owned and operated by law schools that are not created and maintained in an accessible manner.]**
    i. These recommendations regarding the standard and its interpretation take language from an ABA resolution urging the legal profession, including law schools, to make its websites accessible.[11]

VIII. Appendix 2

a. The Commission urges removal of the penultimate paragraph: "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."
    i. There are studies published[12] that show that tests taken with extra time as an accommodation have the same meaning as non-accommodated scores. Ultimately, however, flagging is inherently discriminatory and should be prohibited, and it therefore requires no explanation.
    ii. This paragraph does not make the distinction between all scores taken by individuals who were granted accommodations (e.g., relocation to a physically accessible site, a reader) and scores achieved with extra time as an accommodation. The LSAC has not evaluated any data regarding the former, so a distinction needs to be made. Moreover, according to the LSAC, accommodated scores that *do not* involve extra time are averaged with scores from tests taken under standard conditions.

IX. Creation of Appendix 4. ACCOMMODATING TEST-TAKERS WITH DISABILITIES.

a. We suggest the creation of an appendix that will assist law schools and testing agencies in providing reasonable accommodations to test-takers with disabilities.
b. Over the past few years, the Commission has received many stories from test-takers with disabilities who were unrightfully denied or delayed accommodations. Additionally, some of these instances have been litigated in court.
c. At a minimum, the appendix should include the following provisions:

[11] ABA Resolution on Website Accessibility (Aug. 2007), *available at*: http://www2.americanbar.org/sdl/Documents/2007_AM_108.pdf
[12] *See supra* note 6.

i. The test shall be selected and administered so as to best ensure that, when the test is administered to an individual with a disability, the test results accurately reflect the individual's aptitude or achievement level, rather than reflecting the individual's impairment.[13]
ii. Deference to the opinion and diagnoses of the applicant's primary treating medical professional when deciding whether to grant an accommodation; inquiries into the history of a disability shall be narrowly tailored.[14]
iii. If an accommodation is denied, the test-taker will be provided with adequate detail as to why their accommodation was denied and the basis for the denial.
iv. Conduct the process in a timely manner so test-takers are afforded a proper timeframe in order to make plans to take the test.
v. Provide an appeals process that is timely and has a method to properly appeal an accommodations denial.
vi. When possible, provide an explanation of the accommodations process, including: what is expected of an applicant seeking an accommodation; statistics regarding the granting, denial, and nature of accommodations sought that are no more than 2 years old; an approximate timeline that an accommodation applicant can expect.

[13] *See* 28 C.F.R. 36.309(b)(1)(i).
[14] *See* 1994 ABA Resolution, *supra* note 4.