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Carolyn B. Lamm assumes ABA presidency

ABA delegates adopt new policies on a wide range of legislative issues

The ABA House of Delegates, convening Aug. 3 and 4 in Chicago, approved new policies ranging from regulation of financial products and services to creation of a federal Coordinating Office of Civic Education.

The new financial regulatory policy was proposed by the 13-member ABA Task Force on Financial Markets Regulatory Reform, which includes members from six ABA sections. The ABA now will be able to advocate for specific federal actions designed to improve the regulation of the nation's financial institutions and markets.

The vote supporting a Coordinating Office of Civil Education came after retired Associate Justice David H. Souter urged the association during his Opening Assembly keynote speech to take a lead role in efforts to improve civic education. "We have to take on the job of making American civic education real again," he said.

Attorney General Eric H. Holder Jr., in a speech to the House of Delegates Aug. 3, asked for the ABA's help to move beyond just being "tough on crime" to being "smart on crime." "We need to add new tools and strategies to our existing efforts to fight crime," he said. He added that "it is time to move past politics and ideology" and to "move forward to a criminal justice system that is predicated on the fact that we need to be fair and effective."

Other highlights of the meeting included the passing of the presidential gavel to Carolyn B. Lamm, an international trade and litigation lawyer at the Washington, D.C., office of White and Case (see article, page 5). Miami lawyer Stephen N. Zack became president-elect.

The delegates adopted more than 30 resolutions during their two-day meeting, and the following is a summary of the new legislative policies.

Business Law

Bankruptcy. Opposes provisions in the Bankruptcy Abuse Prevention and Consumer Protection Act, as well as other similar future federal legislative or regulatory proposals, that impose restrictions on the bankruptcy-related legal advice lawyers can provide to individuals and clients and that require lawyers

see "Annual Meeting," page 4



LEGISLATIVE BOXSCORE

ABA LEGISLATIVE PRIORITY	HOUSE	SENATE	FINAL	ABA POSITION
<p>Independence of the Legal Profession. On 7/29/09, the Federal Trade Commission (FTC) announced a 90-day delay until 11/1/09 for a "Red Flags Rule" that would include attorneys in the definition of "creditor" and require lawyers to implement programs to detect, identify and respond to activities that could indicate identity theft.</p>				<p>Opposes the application of the FTC's "Red Flags Rule" to lawyers. Supports preservation of the attorney-client privilege and work product doctrine and opposes governmental policies, practices and procedures that erode these protections, including the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the granting or denial of any benefit or advantage. See page 3.</p>
<p>Health Care Law. The president held a Forum on Health Reform at the White House on 3/5/09. Numerous bills have been introduced and hearings held on various aspects of the health care system, including H.R. 3200. S. S. 1347 and H.R. 1478 would repeal the <i>Feres</i> Doctrine, which prohibits members of the armed forces and their families from suing the military for negligent medical care during their service.</p>	<p>Judiciary subcommittee held a hearing on H.R. 1478 on 3/25/09, and approved the bill on 5/19/09. Education and Labor, Ways and Means, and Energy and Commerce Committees approved different versions of H.R. 3200, health care reform legislation.</p>	<p>S. 1347 was referred to Judiciary Committee on 6/24/09. Health, Education, Labor and Pensions approved draft health care legislation on 7/15/09.</p>		<p>Supports increased access to health care for all Americans. Opposes federal legislation to preempt state medical liability laws or legislation to require patients injured by malpractice to use "health courts" that take away jury trials. Supports S. 1347 and H.R. 1478.</p>
<p>Judicial Independence. P.L. 111-8 (H.R. 1105) waived Section 140 to allow federal judges to receive a 2.8 percent cost-of-living increase for fiscal year 2009. S. 220 and H.R. 486 would create an inspector general for the judicial branch to investigate claims of misconduct against federal judges.</p>	<p>H.R. 486 was referred to the Judiciary Committee on 2/9/09.</p>	<p>S. 220 was referred to the Judiciary Committee on 1/13/09.</p>	<p>President signed P.L. 111-8 (H.R. 1105) on 3/11/09.</p>	<p>Supports increased judicial pay. Opposes initiatives that infringe upon the separation of powers between Congress and the courts. See page 7.</p>
<p>Legal Services Corporation. P.L. 111-8 (H.R. 1105), omnibus fiscal year 2009 appropriations legislation, includes \$390 million for LSC. The House included \$440 million for LSC in H.R. 2847, fiscal year 2010 funding legislation. The Senate Appropriations Committee approved \$400 million for LSC. S. 718 would reauthorize the LSC and lift some restrictions.</p>	<p>House passed H.R. 1105 on 2/25/09. Appropriations subc. held a hearing on 4/1/09. House passed H.R. 2847 on 6/18/09.</p>	<p>Senate passed H.R. 1105 on 3/10/09. Approps. Cmte. approved funding bill on 6/25/09. S. 718 was referred to Health, Education, Labor and Pensions Committee on 4/1/09.</p>	<p>President signed P.L. 111-8 (H.R. 1105) on 3/11/09.</p>	<p>Supports an independent, well-funded LSC. See page 7.</p>

ABA files suit against use of Red Flags Rule

The ABA filed a complaint Aug. 27 asking the U.S. District Court for the District of Columbia to bar the Federal Trade Commission (FTC) from applying its “Red Flags Rule,” intended to prevent identity theft, to practicing lawyers.

The “Red Flags Rule,” mandated by the 2003 Fair and Accurate Credit Transactions Act (FACTA), requires that “financial institutions” and “creditors” implement programs to detect, identify and respond to activities that signal possible identity theft. The FTC has stated that the term “creditor,” as defined by the act, covers all entities – including lawyers – that regularly provide services or goods before seeking payment.

In its complaint for declaratory and injunctive relief, the ABA stated that the FTC is attempting to exceed the powers delegated to it by Congress by seeking to enforce the “Red Flags Rule” against the legal profession. The complaint states that the FTC’s application of the Rule to lawyers is “arbitrary, capricious and contrary to law,” and that the FTC has failed “to articulate, among other things: a rational connection between the practice of law and identity theft; an explanation of how the manner in which lawyers bill their clients can be considered an extension of credit under the FACTA; or any legally supportable basis for application of the Red Flags Rule to lawyers engaged in the practice of law.” The Rule is scheduled to take effect on Nov. 1, 2009.

The FTC did not inform the ABA of its intention to apply the rule to lawyers until April 23, just one week before the Rule was to take effect earlier this year. The ABA immediately asked for a delay of the effective date and quickly established a task force to analyze the Rule and its potential impact on the legal profession.

The task force concluded that Congress did not express any intention to regulate lawyers under FACTA, lawyers do not extend credit in the manner envisioned by the act, and non-application of the Rule to lawyers will not increase the risk of identify theft.

Upon the filing of the lawsuit, ABA President Carolyn B. Lamm said, “The FTC’s decision to apply the Rule to lawyers is contrary to an unbroken history of state regulation for lawyers and intrudes on traditional state responsibilities. The Rule requires extensive reporting and bureaucratic compliance

that would unnecessarily increase the cost of legal services.” Lamm emphasized that “this kind of unauthorized and unjustified federal regulation of law practice threatens the independence of the profession and the lawyer’s role as client confidante and advocate.”

Nearly 30 state and local bar associations have officially registered their opposition to the Rule, and Lamm indicated that the ABA and its counterparts at the state and local levels will continue to work with Congress to obtain clarification that the Rule should not be applied to practicing lawyers. ■

ABA supports lifting of HIV bar to entering U.S.

The ABA expressed support last month for revising the Code of Federal Regulations Title 42 Part 34, to remove Human Immunodeficiency Virus (HIV) infection from the list of “communicable disease[s] of public health significance” that render aliens inadmissible into the United States.

The revision would also remove references to HIV from the scope of examinations in the relevant regulations. Despite recent legislative changes to the Immigration and Nationality Act, aliens infected with HIV remain inadmissible, and Health and Human Services (HHS)/Centers for Disease Control and Prevention (CDC) regulations continue to mandate that applicants for immigration status should be tested for HIV as part of the immigration process.

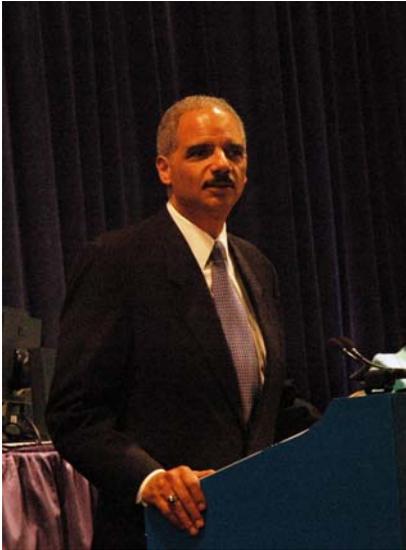
More than 200 other international organizations, including the American Medical Association, the World Health Organization, and the American Public Health Association, have long opposed discrimination against aliens with HIV. The ABA has supported the removal of HIV status as a bar for immigration visitors, asylees, and refugees since 1989, and last year, Congress moved toward this goal with P.L. 110-293, the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008. That law repealed the 1993 statutory change to the Immigration and Nationality Act specifically denying entry or immigration to the United States for individuals with HIV infection.

In an Aug. 17 letter to the CDC’s Division of Global Migration and Quarantine, the ABA argued that the current restriction on HIV-positive immigrants and travelers is discriminatory and serves no reasonable medical purpose given current medical knowledge about HIV/AIDS transmission and infection.

The letter said that the ABA holds that the “HIV ban has not only perpetuated the stigmatization of people living with HIV/AIDS, [but] has also contravened the right of many immigrants and visitors to equal treatment under the law, interfered with thousands of individuals’ personal privacy...[and] put an unnecessary burden on refugees fleeing persecution and the organizations working to assist them.”

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Attorney General Eric H. Holder Jr.

who provide such advice to identify and advertise themselves as “debt relief agencies.” Such provisions, according to the policy, violate core First Amendment principles, undermine the confidential attorney-client relationship and interfere and conflict with traditional state judicial regulation of the legal profession.

Financial Regulation. Supports enactment of federal legislation and adoption of regulations and other governmental measures designed to improve the regulation of financial institutions and markets in the United States, and provides that reform of the financial regulatory system should be consistent with a specified set of eight principles.

Civic Education

Civic Education. Urges policymakers to establish a Coordinating Office of Civic Education in the U.S. Department of Education to enhance students’ civic learning by offering competitive grant programs at the local, state and national levels; and urges policymakers to require that the National Assessment of Education Progress for

civics and U.S. history be conducted every four years and that the results be reported at both the national and state levels.

Criminal Justice

Criminal Justice Study. Supports enactment of legislation that would provide for a national study of the state of criminal justice in the United States to consider ways to reduce crime, lower incarceration rates, save taxpayer money, enhance the fairness and accuracy of criminal justice outcomes, and increase public confidence in the system; and specifies certain criminal justice issues to be considered as part of such a national study.

Criminal Defense Services.

Adopts Eight Guidelines of Public Defense Related to Excessive Workloads, dated August 2009, intended for use by public defense programs and for lawyers who provide the representation for those who cannot afford a lawyer when they are confronted with too many

persons to represent and are thus prevented from discharging their responsibilities under professional conduct rules.

Dispute Resolution

Mediation. Supports legislation, regulations or court rules that utilize mediation to assist in resolving disputes that could lead to foreclosure of mortgages on residential property, and foreclosure cases that are already pending in federal, state or territorial courts; and promote access to pro bono or low-cost counsel or other advocates for parties who would otherwise be unrepresented in the mediation process.

Election Law

Election Administration. Amends the ABA Election Administration Guidelines and Commentary and the Model Statutory Language on Provisional Balloting and Commentary, dated August 2009, to provide greater detail concerning the ad-

see “Annual Meeting,” page 5



During the Annual Meeting, a panel of experts discussed the debate over whether journalists should be protected from revealing their sources under shield laws. The House of Representatives passed a reporters’ shield bill earlier this year that is supported by the ABA, and similar legislation is pending in the Senate. Those appearing on the panel included (from left): moderator Stephen J. Wermiel, Washington College of Law, American University; Patrick Fitzgerald, U.S. attorney, Northern District of Illinois; Judge Reggie B. Walton, U.S. District Court for the District of Columbia; Guylyn Cummins, partner, Sheppard Mullin Richter & Hampton LLP; and Abdon Pallasch, political reporter, *Chicago Sun-Times*.

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ministration of provisional ballots on Election Day.

Health Law

Health Care Access. Supports federal legislation that would ensure every American access to quality health care regardless of the person's income and without regard to the payor system, eliminating the specific payor system characteristics embodied in the recommendations adopted by the House of Delegates in 1990 and 1994.

Human Clinical Trials. Urges Congress to enact legislation and to direct the appropriate federal departments to issue regulations that establish uniform requirements for guidance on addressing conflicts of interest in human clinical trials; and sets forth specific requirements.

Immigration

Criminal Convictions. Supports legislation, policies and practices that preserve the categorical approach used to determine the immigration consequences of past criminal convictions, under which the adjudicator relies on the criminal statute and the record of conviction rather than conducting a new factual inquiry into the basis for the conviction.

Individual Rights

Same-sex Marriage. Urges Congress to repeal 1 U.S.C. § 7, which denies federal marital benefits and protections to lawfully married same-sex spouses.

Intellectual Property Law

Five new policies regarding patents were approved:

- Opposes the elimination of the defense of unenforceability of a patent based upon inequitable conduct arising from proceedings in the U.S. Patent and Trademark Office (PTO) without diminishing the authority

see "Annual Meeting," page 6

Lamm sets agenda for year as president

New ABA President Carolyn B Lamm, an international arbitration, litigation and trade lawyer from Washington, D.C., set an



**ABA President
Carolyn B. Lamm**

agenda last month that includes building membership in all segments of the association, helping lawyers cope with the recession, reviewing lawyer ethics and the global practice of law, and advancing diversity within the legal profession.

"We must continue to build a dynamic and relentless organization dedicated to protecting the rule of law and securing access to justice," Lamm told the ABA House of Delegates Aug. 3. One of her priorities as president

also will be to boost the association's legislative advocacy in Washington.

Lamm announced the establishment of three commissions to help advance her objectives: the Commission on Ethics 20/20, to review our system of legal governance and ethical regulation in light of the dramatic changes in the practice of law wrought by technological advances and globalization of legal services; the Commission on the Impact of the Economic Crisis on the Profession and Legal Needs, to assist lawyers displaced as a result of the economy and to address the legal needs of the public during the economic crisis; and the Diversity Commission, to provide practical resources and guidance for enhancing the association's diversity efforts.

Lamm, a partner with the law firm of White and Case, has served on the House of Delegates since 1982 and was a member of the Board of Governors from 2002 to 2005. She is a former chair of the Young Lawyers Division and the Standing Committee on the Federal Judiciary and served on numerous committees of the Sections of Litigation, International Law, and Business Law.

A past president of the D.C. Bar, she was named one of the 50 Most Influential Women in America by the *National Law Journal* in 2007. She received her law degree from the University of Miami School of Law.

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of the PTO to control the conduct of its own proceedings.

- Urges that any judicially administered defense of unenforceability of a patent based upon inequitable conduct arising from proceedings in the PTO be predicated on principles of common law fraud and that any judgment of such enforceability be entered only upon proof by clear and convincing evidence that meets certain requirements.
- Urges that, in considering whether to hold a U.S. patent unenforceable based upon an applicant's alleged inequitable conduct arising from proceedings in the PTO, information not be found to be material if it would not have been material under statutory and regulatory standards applicable during the prosecution of the application for the patent or its reexamination.
- Urges that the defense of unenforceability of a patent based on proceedings in the PTO can be established only by proof by clear and convincing evidence of a specific intent to deceive the PTO by knowingly and willfully misrepresenting a material fact or material information to the PTO.
- Urges courts to provide guidance for the determination of the scope of subject matter that is eligible to be considered for patenting.

International Law

Internet Governance. Urges the Secretary of State and Assistant Secretary of Commerce/Administrator of

the National Telecommunications and Information Administration to support a renewal of the mandate of the Internet Governance Forum of the United Nations to operate substantially in accordance with its current mandate.

Genocide. Endorses the portions of the Responsibility to Protect doctrine set forth in the 2005 United Nations World Summit Outcome Document, under which states have responsibility to protect their own and other populations from genocide, war crimes, ethnic cleansing and crimes against humanity; and also endorses recommendations in the report, *Preventing Genocide: a Blueprint for U.S. Policymakers*, by the joint Genocide Prevention Task Force of the U.S. Holocaust Memorial Museum, the American Academy of Diplomacy, and the U.S. Institute of Peace.

Commercial Arbitration. Supports the use of commercial arbitration to resolve disputes involving international business transactions, and supports federal or state legislation or regulations that recognize and aid in the enforcement of international commercial arbitration agreements and awards.

Law Practice

Admissions. Amends the Model Rule on Conditional Admission to Practice Law, including the commentary, dated August 2009, which addresses the standard for conditional admission notification of violations and terms of art within the language of the model rule.

Screening. Proposes a housekeeping amendment to

see "Annual Meeting," page 8

Judicial Vacancies/Confirmations — 111th Congress (as of 9/10/09)

<u>Court</u>	<u>Current Vacancies</u>	<u>Pending Nominations</u>	<u>Confirmations</u>
US Supreme Court (9 judgeships)	0	0	1
US Courts of Appeals (179 judgeships)	21	7	0
US District Courts (678 judgeships)	72	9	0
Court of International Trade (9 judgeships)	0	0	0
<hr/> Totals	<hr/> 93	<hr/> 16	<hr/> 1

Washington News Briefs

ADMINISTRATIVE LAW JUDGES (ALJs): The ABA expressed support recently for H.R. 2850, the Administrative Law Judges Retirement Act of 2009, which would provide enhanced retirement benefits for ALJs. “The present retirement system for federal ALJs makes it difficult to recruit and retain the best and the brightest because it does not reflect the work they perform and the extensive level of prior legal experience required of them,” ABA Governmental Affairs Director Thomas M. Susman wrote July 17 to Rep. Stephen F. Lynch, chairman of the House Oversight and Government Reform Subcommittee on Federal Workforce, Postal Service and the District of Columbia. Susman explained that administrative law is complex and demanding, and many ALJs do not enter the system until they are experienced trial lawyers at a later stage in life. Because of this, they must work later in life to attain a full pension under the current federal program, which is based on 30 years of service and was designed for career employees entering federal service earlier in their careers. H.R. 2850, introduced by Rep. Dennis Kucinich (D-Ohio), would remove current disincentives to serving as an ALJ and help ensure that the American people have highly qualified ALJs to decide their cases, Susman said.

UNACCOMPANIED CHILDREN: The largest specialized children’s docket in the country should be continued at the immigration court in Harlingen, Texas, the ABA told the Executive Office of Immigration Review (EOIR) last month. The docket has existed since 1998, when the Harlingen court coordinated with the South Texas Pro Bono Asylum Representation Project (ProBAR) – a project of the ABA – and the Office of Chief Counsel to establish a unified children’s docket for unaccompanied children held in custody. This consolidated docket enables attorneys and accredited representatives from ProBAR to represent all children by their third court hearing, handling the tremendous legal needs of between 50 and 100 children each week. The ABA expressed concern about the future of the docket after learning that Judge Margaret Burkhart, who has presided over the docket since its beginning, will soon be transferring to another court. In an August 21 letter to Brian O’Leary, chief immigration judge at the EOIR, ABA Governmental Affairs Director Thomas M. Susman emphasized the challenge of providing representation with limited ProBAR staff and said that adding additional dockets or multiple judges would make it virtually impossible for ProBAR to continue to provide pro bono representation to all children’s cases. Susman highlighted the considerable time and effort that Judge Burkhart spent ensuring that minor respondents under-

stand the nature of the proceedings and have the opportunity to communicate questions and concerns directly to the court. He also noted that an 2007 EOIR memo recognized the need for specialized children’s dockets, a child-appropriate hearing, child-sensitive questioning, courtroom modifications, and other necessary procedures. In addition, P.L. 110-457, the Trafficking Victims Protection and Reauthorization Act of 2008 set new standards regarding the conditions under which children can be repatriated and requires the Department of Health and Human Services to ensure legal representation for children to the greatest extent possible.

LEGAL SERVICES CORPORATION (LSC): President Obama nominated former ABA President Robert J. Grey and four others Aug. 6 to serve on the 11-member bipartisan LSC Board of Directors. Grey, who served as ABA president in 2004-2005 and was the chair of the ABA House of Delegates from 1998 to 2000, is a partner in the law firm of Hunton & Williams, working out of the Richmond and Washington offices. His practice focuses on government relations and administrative matters before state and federal agencies. The other nominees are John G. Levi, a partner in the Chicago office of Sidley Austin LLP who specializes in employment litigation, executive compensation and labor-management relations; Martha L. Minow, dean of Harvard Law School who has been a professor there for nearly 30 years; Julie A. Reiskin, executive director of the Colorado Cross-Disability Coalition and a psychotherapist in private practice; and Gloria Valencia-Weber, a professor specializing in Native American law at the University of New Mexico School of Law who served in 1991-92 on the Board of Directors of the LSC-funded Oklahoma Indian Legal Services. Grey, Levi, Minow and Valencia-Weber would serve terms through July 13, 2011, while Reiskin’s term would expire July 13, 2010. The ABA Standing Committee on Legal Aid and Indigent Defendants, pursuant to association policy adopted in 1989, will conduct a review of each candidate’s qualifications to serve on the board. The ABA committee will submit its recommendations to the Senate Health, Education, Labor and Pensions Committee, the panel with jurisdiction over the nominations, which must be approved by the full Senate. The ABA-supported LSC, which operates as a private, nonprofit corporation, is the single largest provider of civil legal aid for the poor in the United States. Grants to legal services providers are awarded through a competitive process, and funding is allocated to 137 independent legal aid programs with 920 offices providing legal assistance to low-income individuals and families in every congressional district.

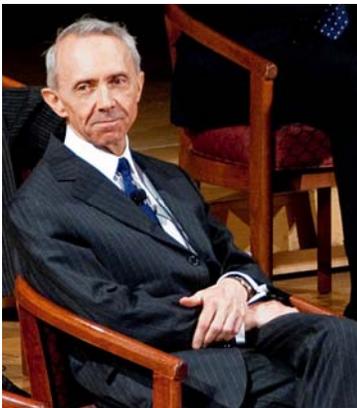
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amend Model Rule of Professional Conduct 1.10 (“Imputation of Conflicts: General Rule”) to explicitly state that the screening procedures permitted under the rule apply only when a lawyer has moved laterally from one practice situation to another.

Legal Services

Pro Bono. Urges corporate counsel to cause positional conflict waivers to be granted in areas related to mortgage foreclosure, bankruptcy and consumer finance, to reduce the number of pro bono matters declined by outside counsel due to conflicts, as long as such waivers are appropriate and consistent with applicable rules of professional conduct.



**Associate Justice David
Souter**

includes providing additional emergency funding for not-for-profit legal services providers, bar associations and pro bono programs.

State and Local Governments

Appropriations. Urges Congress, upon consideration of the circumstances then-existing, including other competitive budgetary priorities and to the extent deemed warranted in light of all of the relevant fiscal

Natural Disasters. Urges federal, state and local governments to address the unmet legal needs of low-income residents of communities affected by major disasters by action that

and economic considerations, to consider the feasibility of enacting legislation authorizing the annual appropriation of federal distributive funding to state and local governments in 2011, and thereafter, to ensure continuity of funding of essential state and local government programs, projects and services following appropriations from the American Recovery and Reinvestment Act of 2009.

Tort and Insurance Law

Insurance Information Office. Supports enactment of federal legislation to establish a non-regulatory insurance information office within the Treasury Department.

Youth at Risk

The delegates approved three resolutions supporting the right to education.

- Encourages the federal government, states and school districts to pass laws and implement policies that will secure the right of every child to a high-quality education, and encourages attorneys and bar associations to help secure that right through improvements in state and federal law, representation of students, parents and organizations, and community legal education.
- Urges federal and state legislatures to pass laws and national, state and local education, child welfare and juvenile justice agencies to implement and enforce policies that will help advance the right to remain in school, promote a safe and supportive school environment for all children, and enable them to complete school.
- Urges the enactment and implementation of statutes and policies that support the right of youth who have left school to return to school to complete their education in high-quality age-appropriate programs. ■

The monthly *Washington Letter* reports news of national public interest to the legal profession, including congressional, executive branch and ABA activities concerning the association’s legislative priorities. The newsletter is published by the Governmental Affairs Office as a service to ABA members and national, state and local bar associations. Full text is available on the Internet at <http://www.abanet.org/poladv/publications.shtml>. © 2009 American Bar Association. All rights reserved. Please address correspondence to:

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