Memorandum

Date: April 19, 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 it was 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, on behalf of the CMPDL, 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 quoted section.

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. Struck "qualified" because that language is typically reserved for the Americans with Disabilities Act (ADA) Title I, 42 U.S.C. §§12111-117, and Title II, 42 U.S.C. §§12131-165, matters. For those who visit and interact with a law school—except for staff and professors—Title III, 42 U.S.C. §§12181-189, would be the applicable section of the ADA, which does not consider the term "qualified."

b. Added "prospective students, guests, and visitors" to make sure relevant and impacted 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, especially offered to the public, 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. The ADA is more than just the 1990 law. Since that time—and just as recently as last year—federal agencies have issued regulations under the ADA that should be followed.

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 admission 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; provide effective communication for the individual;]** 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.

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 1993 ABA resolution regarding providing benefits to ABA members with disabilities.

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 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 to determine success in law school has been questioned.[1] 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 required, we propose the following interpretation: "**Interpretation 503-5. An admission test that is administered with an accommodation shall be considered valid and reliable in order to comply with this Standard. 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 a testing agency flags a score, the score is typically identified as neither valid nor reliable. Additionally, some studies have shown that accommodated scores reliably correspond to performance in law school.[2]

[1] *See* Ruth Colker, "Extra Time as an Accommodation," 69 U. PITT. L. REV. 413 (2008).
[2] *See id*.

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 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 address a current impairment with respect to: the assessment of a request for reasonable accommodation; and objective evidence that an individual is unable to meet professional and academic standards due to a mental or physical disability."**

    i. The Commission—taking terminology and concepts from the ADA and the ABA's 1994 resolution regarding mental health inquiries and bar admissions[3]—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 and to avoid unnecessary assumptions based on disability information. Barring the exceptions outlined above, 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.

V. "Standard 511. STUDENT SUPPORT SERVICES. A law school shall provide all its students, regardless of enrollment or scheduling option, with basic student services,

[3] This resolution was co-sponsored by LEAP.

including maintenance of accurate student records, academic advising and counseling, financial aid counseling, **[disability support services, mental health/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/substance abuse issues.

VI. 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. 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 Law School Admission Council, accommodated scores that *do not* involve extra time are averaged with scores from tests taken under standard conditions.

ii. There are studies published[4] that do show that tests taken with extra time as an accommodation have the same meaning as non-accommodated scores. At the very least, these studies should be considered before the language in this paragraph is used.

VII. Creation of Appendix 4. ACCOMMODATING STANDARDIZED TEST-TAKERS.

a. We suggest the creation of an appendix that will assist testing agencies in providing reasonable accommodations to applicants with disabilities.

b. Over the past few years, the Commission has received many stories from test applicants 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:

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. *See* 28 C.F.R. 36.309(b)(1)(i).

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 not be intrusive or over-inclusive in scope.

iii. Denied applicants 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 applicants 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 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.

[4] *See* Colker, *supra* note 1.