

AMERICAN BAR ASSOCIATION
COMMISSION ON DISABILITY RIGHTS
CRIMINAL JUSTICE SECTION
GENERAL PRACTICE, SOLO AND SMALL FIRM DIVISION
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
SECTION OF REAL PROPERTY, TRUST AND ESTATE LAW
SENIOR LAWYERS DIVISION
COMMISSION ON LAWYER ASSISTANCE PROGRAMS
COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY
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COUNCIL FOR RACIAL AND ETHNIC DIVERSITY IN THE EDUCATIONAL
PIPELINE
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BAR ASSOCIATION OF BALTIMORE CITY
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OREGON STATE BAR
PHILADELPHIA BAR ASSOCIATION
STATE BAR OF WISCONSIN
UTAH STATE BAR
NATIONAL CONFERENCE OF WOMEN'S BAR ASSOCIATIONS
NATIONAL NATIVE AMERICAN BAR ASSOCIATION

REPORT TO HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association urges all entities that administer a law school
2 admission test to provide appropriate accommodations for a test taker with a disability to best
3 ensure that the exam results reflect what the exam is designed to measure, and not the test taker's
4 disability.
5
- 6 FURTHER RESOLVED, That the American Bar Association urges all entities that administer,
7 score, or report the results of a law school admission test to establish procedures to ensure that
8 the application process, the scoring of the test, and the reporting of test scores is consistent for all
9 applicants and does not differentiate on the basis that an applicant received an accommodation
10 for a disability.
11
- 12 FURTHER RESOLVED, That the American Bar Association urges all entities that administer a
13 law school admission test to:
14

- 15 1. Make readily accessible to applicants the policies, guidelines, and administrative
16 procedures used for granting accommodations requested by those with disabilities;
- 17 2. Give notice to applicants, within a reasonable period of time, whether or not requested
18 accommodations have been granted; and
- 19 3. Provide a fair process for timely reconsideration of the denial of requested
20 accommodations.

REPORT

Introduction

The ABA's Goal III calls on the legal profession to eliminate bias and to enhance diversity, including for persons with disabilities. In spite of these assurances, the testing process for law school admission remains an obstacle to the full and equal participation of individuals with disabilities in the legal profession. Students with disabilities are substantially underrepresented in law schools across the country.¹ In part, this is due to the fact that the testing process relied upon by most law schools in the United States does not afford the same benefits to applicants with disabilities that it affords to other applicants.

The proposed resolution urges any entity that administers a law school admission test to ensure that law school applicants with disabilities are given no less than the accommodations that federal law requires, including, where appropriate, removal of architectural and communication barriers, modification of rules, practices and procedures, and provision of auxiliary aids and services.

The Americans with Disabilities Act (ADA), enacted in 1990, introduced a new way of looking at what it means to discriminate. For people with disabilities, affording identical treatment to all does not confer equal access to proceedings, programs, and activities. The person with deafness, the person with blindness, the person who uses a wheelchair, or the person with dyslexia might be excluded unless accommodations are made for his or her unique needs.

The proposed resolution also urges any entity that administers, scores, or reports a law school admission test to take steps to ensure that the application process, the scoring of the test, and the reporting of test scores do not discriminate based on disability, in particular that scores not be differentiated on the basis of whether an individual received any type of accommodation for a disability. It further urges any entity that administers a law school admission test to make public the policies, guidelines, and administrative procedures used for granting accommodations requested by those with disabilities; to give notice to applicants within a reasonable period of time whether requested accommodations have been granted; and to provide a fair process for timely reconsideration of the denial of requested accommodations.

For many years, the ABA has been committed to going beyond what the law requires in providing accommodations to lawyers, judges and law students with disabilities. In 1989, the ABA adopted policy supporting in principle proposed legislation that became the ADA. In 1997, the ABA approved a policy calling upon all courts to provide qualified language interpreters, including sign language interpreters, for persons who are deaf or hard of hearing. Policy adopted in 1998 urges that any nominating or evaluating entity, when making character and fitness determinations of state judicial candidates, narrowly tailor its questions concerning

¹ While persons with disabilities represent nearly 20% of the population, a much smaller percentage are found in our law schools. While there is no accurate count, because tracking based on disability lags well behind such statistics for race, ethnicity and gender, we do know that only 3.4% of law students requested accommodations for the 2009-2010 school year. E-mail from Kenneth R. Williams, Data Specialist, ABA Section of Legal Education and Admissions to the Bar (Jan. 18, 2011, 17:29 EST) (on file with author).

physical and mental disabilities or physical and mental health treatment in order to focus its inquiries on information relevant to a candidate's current fitness to serve as a judge, with such reasonable modifications as might be required. In 2002, the ABA adopted policy urging all federal, state and municipal courts to make courthouses and court proceedings accessible to individuals with disabilities, including lawyers, judges, jurors, litigants, witnesses, and observers, in order to ensure equal access to justice and compliance with the ADA. The policy also recommended that each courthouse appoint a disability accommodations coordinator to develop procedures for receiving requests for accommodations from individuals with disabilities and for responding creatively with reasonable accommodations that meet the needs of the individual, including removal of architectural barriers, modification of rules and practices, and provision of auxiliary aids and services.

The proposed resolution builds upon these existing policies by urging entities that administer law school admission tests to take specific steps to ensure that applicants with disabilities have equal access to legal education. The resolution is necessary because existing resolutions are incomplete in their application to the law school admission process and because developments in the 20 years since passage of the ADA have resulted in a wealth of experience that entities can draw upon to implement more effective programs.

Background

An individual who wishes to attend an ABA-accredited law school must take an admission test before entry. In order for a law school to become one of the over 195 ABA-approved law schools, an academic institution must adhere to standards promulgated by the Council of the ABA's Section of Legal Education & Admissions to the Bar (Council). The Council is identified by the U.S. Department of Education as the national accrediting agency for professional law schools. Although there is a process for consultation with the ABA House of Delegates on accreditation matters, decisions of the Council are final.² According to the Council's ABA Standards and Rules of Procedure for Approval of Law Schools (Standards), a law school must have an admission test which is "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."³

Standard 503 of the Standards requires that, "In making admission 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."⁴

Presently, the only nationally-administered test available for such a purpose is the Law School Admission Test (LSAT). In its current state, the LSAT is a timed test with four scored and one unscored multiple choice sections. Each section is thirty-five minutes long. There is one reading comprehension section, one analytical reasoning section, and two logical reasoning/games sections. The LSAT is administered by the Law School Admissions Council (LSAC), a non-profit organization. Although the Section Council does not endorse a particular admission test

² 2007-2008 ABA Standards for Approval of Law Schools, Preface, at vi-vii.

³ 2007-2008 ABA Standards for Approval of Law Schools, Standard 503.

⁴ *Id.*

nor does it have official ties with the LSAC, it does acknowledge the LSAT in the Standard's Interpretation 503-1 which states:

A law school that uses an admission test other than the Law School Admission Test sponsored by the Law School Admission Council shall establish that such other test is a valid and reliable test to assist the school in assessing an applicant's capability to satisfactorily complete the school's educational program.

The proposed resolution is not intended to apply only to the LSAC, but is meant to cover any and all entities that administer a law school admission test.

Flagging

The Standards append the guidelines developed by the LSAC regarding proper use of the test results as "Appendix 2: LSAC Cautionary Policies Concerning LSAT Scores." The cautionary policies single out LSAT scores earned under accommodated or nonstandard conditions. The policy states:

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.

According to the LSAC's website, an applicant registered to take the LSAT must complete a packet. The packet contains forms to be filled out by the applicant and an evaluator describing and documenting the applicant's disability as well as the accommodation(s) requested by the applicant.⁵ The LSAC has reported that, on average, 1,960 applicants requested an accommodation per testing year between 2002 and 2007.⁶ Furthermore, during that timeframe, the majority of accommodations given, 67%, were for extra testing time, extra rest time, or a separate testing room.⁷ An applicant who is granted extra time as an accommodation typically received up to time-and-a-half for the test.⁸ When extra time is given as an accommodation, the score is reported individually and the person does not receive a percentile rating. The LSAC sends a letter to the law school notifying the institution of this practice and that the score attained with the extra time is "nonstandard." This procedure is commonly called "flagging" a score.

A consensus within the testing and academic communities recognizes that extra time for those with learning disabilities and some other disabilities is an acceptable accommodation for an entrance examination, although there continues to be disagreement about the amount of extra

⁵ See LSAC – The LSAT - Accommodated Testing, <http://lsac.org/JD/LSAT/accommodated-testing.asp>.

⁶ Thornton, Andrea, Marcus, Laura & Reese, Lynda, *LSAC Report Research Series: Accommodated Test-Taker Trends and Performance for the June 2002 through February 2007 LSAT Administrations* (2008), at 4, available at: <http://lsac.org/LsacResources/Research/TR/TR-08-02.pdf>.

⁷ *Id.* at 6.

⁸ *Id.* at 7.

time that should be granted. For example, the LSAC typically grants at most time-and-a-half, while the College Board (which administers the SAT, PSAT, and Advanced Placement tests) gives up to double the amount of time. Yet when an accommodated score is labeled as “nonstandard” or when a testing agency tells the academic program that the score does not conform to the scores of students who were not given accommodations, the student with the accommodated score is placed at a serious disadvantage. There are serious policy, ethical, and social problems involved with flagged scores, including disregard for an applicant’s desire not to have his or her disability revealed and the potential attachment of a stigma during the admission process. If scores are to be flagged, it should be done with the consent of the applicant.

Pursuant to a federal court case dealing with flagged SAT scores,⁹ a Blue Ribbon Panel of experts was convened to study whether flagged/accommodated SAT scores were comparable, and as valid as, non-accommodated SAT scores. The Panel’s majority concluded that the SAT scores of accommodated tests had results equivalent to tests with no accommodations.¹⁰ Educational Testing Service (ETS), the entity which oversees administration of the SAT, has found there is a positive correlation between tests with extra time given and achievement in college; in other words, SAT scores of those with extra time as an accommodation “were fairly accurate predictors of [first year grade point averages] for students with learning disabilities.”¹¹ Therefore, in 2003, the College Board abandoned the flagging of test scores that had extra time as an accommodation. Following the College Board’s lead, American College Testing, Inc., halted flagging of the ACT test shortly thereafter.

There is a growing body of case law dealing with the granting of accommodations for and the flagging of law school admission tests. Additionally, there are numerous lawsuits involving the LSAC and other graduate school-related testing agencies that have been settled out of court. Most agreements are with individual plaintiffs and involve making accommodations for one applicant which expire after the applicant takes the test. In recent years, two larger settlement agreements were reached between the LSAC and both the U.S. Department of Justice (DOJ) and the National Federation of the Blind (NFB). The agreement with DOJ dealt primarily with the review process of accommodation requests. The agreement with the NFB is tailored towards accommodations for those with visual impairments.

Accommodations

Judge David S. Tatel, who is blind, described how accommodations made it possible for him to serve as Judge on the U. S. Court of Appeals for the D.C. Circuit in an address to the National Conference on the Employment of Lawyers with Disabilities, co-sponsored by the ABA Commission on Mental & Physical Disability Law, the ABA Office of the President and the U.S. Equal Employment Opportunity Commission in 2006. Judge Tatel described how the use of a

⁹ *Breimhorst v. ETS*, 2000 WL 34510621 (N.D. Cal, Mar. 27 2000).

¹⁰ NOEL GREGG, ET AL., THE FLAGGING TEST SCORES OF INDIVIDUALS WITH DISABILITIES WHO ARE GRANTED THE ACCOMMODATION OF EXTRA TIME: A REPORT OF THE MAJORITY OPINION ON THE BLUE RIBBON PANEL ON FLAGGING (2002).

¹¹ THE COLLEGE BOARD, PREDICTIVE VALIDITY OF SAT I: REASONING TEST FOR TEST-TAKERS WITH LEARNING DISABILITIES AND EXTENDED TIME ACCOMMODATIONS, RESEARCH REPORT NO. 2002-5, at 9 (2002).

reader, Braille Speak for note-taking, and other accommodations eliminated the impact of his disability on his work. He added:

One of the most interesting things I noticed in my law firm, and I now notice on my court, is the extent to which the institution subconsciously accommodates to the needs of people with disabilities. When I first started people had never worked with a blind lawyer, and there were awkward moments. There were periods of time I would go to a meeting and people were talking about a document that I might not have seen ahead of time. People would be silently reading it, and I would clear my throat until finally one person would get the point and start reading aloud. Well, after a couple of years, people began to read things out loud just on their own. It became second nature. The same thing happened on the D.C. Circuit.¹²

In the landmark case of *Tennessee v. Lane*, the Supreme Court highlighted the importance of providing accommodations so as to prevent exclusion:

The unequal treatment of disabled persons in the administration of judicial services has a long history, and has persisted despite several legislative efforts to remedy the problem of disability discrimination. Faced with considerable evidence of the shortcomings of previous legislative responses, Congress was justified in concluding that this “difficult and intractable proble[m]” warranted “added prophylactic measures in response.” . . . Recognizing that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility.

Accommodations, when needed, are essential to prevent discrimination against individuals with disabilities. Congress recognized this in the context of high stakes testing when it enacted the ADA. Title III of the ADA codifies the concept that it is discriminatory not to “offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.”¹³ Moreover, DOJ regulations implementing ADA Title III state that a test-administering entity shall make sure that:

[t]he examination is selected and administered so as to best ensure that, when the examination is administered to an individual with a disability that impairs sensory, manual, or speaking skills, the examination results accurately reflect the individual’s aptitude or achievement level or whatever other factor the examination purports to measure, rather than reflecting the individual’s [disability.]¹⁴

Furthermore, private entities that offer admission testing are required to:

¹² THE NATIONAL CONFERENCE ON THE EMPLOYMENT OF LAWYERS WITH DISABILITIES: A REPORT FROM THE AMERICAN BAR ASSOCIATION FOR THE LEGAL PROFESSION, at 30-31 (2006)

¹³ See 42 USC §12189.

¹⁴ 28 C.F.R. § 36.309(b)(1)(1).

provide appropriate auxiliary aids for persons with impaired sensory, manual, or speaking skills, unless that entity can demonstrate that offering a particular auxiliary aid would fundamentally alter the measurement of the skills or knowledge the examination is intended to test or would result in an undue burden.¹⁵

Because ending discrimination requires accommodation of individual needs, determining what accommodations "best ensure" equality in a given instance requires a fact-specific, individualized analysis of the test taker's circumstances.¹⁶ Regulations regarding testing and accommodations under the ADA, recently released by the DOJ, underscore the importance of this process and stress the importance of having the testing agency: request documentation of an impairment in a reasonable manner; give considerable weight to documentation of previously used accommodations; and work with the applicant in a timely manner.¹⁷

Law school entrance examinations are high stakes tests. The Attorney General, in issuing the regulations on testing accommodations, recognized this fact noting "the importance of ensuring that the key gateways to education and employment are open to individuals with disabilities."¹⁸ An "accessible" exam must provide a qualified individual with a disability an opportunity to demonstrate his or her knowledge and ability equal to that which it extends to other test takers.¹⁹

Moreover, law school entrance examinations will continue to be relied on by most law schools even if the ABA decides no longer to make them a mandatory requirement in order to receive ABA-accreditation. They not only help to determine whether an applicant is admitted to law school, but whether an applicant will receive financial support and has access to the nation's leading law schools. Admission to a prestigious law school is more than an economic benefit for a student. Attending a prestigious law school opens up opportunities in government and public life, prestigious private law firms, judicial clerkships in higher courts, and access to judicial appointments at the highest levels later in life. The U.S. Supreme Court recognized the significance of gaining admission to the leading law schools in *Grutter v. Bollinger*:

Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives. The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges.

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have

¹⁵ 28 C.F.R. § 36.309(b)(3).

¹⁶ See 28 C.F.R. app. §35.160; 28 C.F.R. §35.160(b)(2); See also *Enyart v. NCBE*, 630 F.3d 1153, 1164-65 (9th Cir. 2011), *cert. denied*, 80 U.S.L.W. 3191 (U.S. Oct. 3, 2011); *Wong v. Regents of Univ. of Cal.*, 192 F.3d 807, 818 (9th Cir. 1999); *D'Amico v. N.Y.S. Bd. of Law Examiners*, 813 F. Supp. 217, 221 (W.D.N.Y. 1993).

¹⁷ See 75 Fed. Reg. 56,236 (Sept. 15, 2010) (codified at 28 C.F.R. §36.309(b)(iv-vi))

¹⁸ 56 Fed. Reg. 35,544, 35,572 (July 26, 1991).

¹⁹ *Id.*

confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools “cannot be effective in isolation from the individuals and institutions with which the law interacts.” Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.²⁰

Although the *Grutter* case concerned a program to promote diversity by race and ethnicity at the University of Michigan Law School, the Court’s observation that all members of our heterogeneous society should have an equal opportunity to participate in the educational institutions that train our leaders also applies to individuals with disabilities.

Conclusion

Making law schools accessible to individuals with disabilities can help ensure that the legal profession is more open to persons with disabilities than it is now. The Association should encourage entities that administer law school admission testing and the law schools that rely on such testing to implement the ADA and to look for creative ways to make legal education and the legal profession more accessible to students with disabilities.

Respectfully submitted,
Katherine H. O’Neil, Chair
Commission on Disability Rights
February 2012

²⁰ *Grutter v. Bollinger*, 539 U.S. 306, 332-33 (2003) (citations omitted).